TINO RANGATIRATANGA

ME TE

KĀWANATANGA

TINO RANGATIRATANGA ME TE KĀWANATANGA

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

PRE-PUBLICATION VERSION

PART 1

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Tēnā te ngaru whati
Tēnā te ngaru puku
Tēnā te kupu heke i te wai tuku kiri
Tēnā te tohu i te tai timu i te tai pari
Kua ngū tō reo
Kua rongo tonu i te wai
Are mai ra e te karu kia rongo
Wete mai ra e te taringa kia kite
Tē tae ā tinana atu
Te rere atu te oranga

Oti anō, waipuketia mai ra e
te ngaru mahara
E te puna mātauranga
E te kura wānanga
Tauranga Moana
Te Whakatōhea
Koutou katoa kua eke ki te
iwi nui o te po
E kore e wareware
E kore e mutu
Maranga mai ra e te kupu
Tau mai ra e te aroha
Ma te tuhinga te waha i te
moemoeā o mauri ora
Tau ana
E tau

There is a wave that breaks
There is a wave that swells
There is a lesson in the ebbs of the water
There is a message in the surge of
the tides
The voices of loved ones are now still
They remain heard in the waters
Open your eyes that you might hear
Free your ears that you might see
For whilst you are not with us in body
Your legacy lives on

And so the waves swell in memory
The font of wisdom
The sacred knowledge
Dr Kihi Ngatai
Emeritus Professor Ranginui Walker
All who have ascended to
the celestial heavens
You are not forgotten
You are always remembered
Your words remain
Your love abounds
Let this report be a mouthpiece for
the dreams of the people
Let it be done
Let it be so

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Attorney-General

Parliament Buildings
WELLINGTON

22 December 2022

E ngā Minita e noho mai nā i ērā taumata i te Whare Pāremata, ngā mihi maioha ki a koutou.

Tātai whetū ki te rangi, mau tonu, mau tonu, Tātai tangata ki te whenua, ngaro noa, ngaro noa.

E koutou kua ngaro ki te pū o mahara. Tēnei ka haku, tēnei ka mapu. Tēnei ka aue, tēnei ka auhi. Koutou katoa i te hinganga o te tini, i te moenga o te mano. He aha ma tātou? He tangi, he mihi, he poroporoaki. E moe, i te moenga roa, ki reira okioki ai.

While the starry hosts above remain unchanged and unchanging. The earthly world changes inevitably with the losses of precious, loved ones. To those of you who have been lost to the void of memories. For you we lament. For you we cry of distress. All of you who departed to the assembly of the hundreds and the congregation of the thousands. What are we left to do? Grieve, acknowledge, farewell. Rest now in peace.

It is my honour to present our long-awaited report *Tino Rangatiratanga me te Kāwanatanga: The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry*. This report is for part 1 of stage 2 of the Te Paparahi o Te Raki Inquiry.

He Whakaputanga me te Tiriti / The Declaration and the Treaty

Our stage 1 report, *He Whakaputanga me te Tiriti – The Declaration and the Treaty* (2014), concluded that Te Raki Māori and the Crown reached a momentous agreement at Waitangi, Waimate, and Māngungu in February

1840. We concluded that in February 1840 the rangatira who signed te Tiriti did not cede their sovereignty. That is, they did not cede their authority to make and enforce law over their people or their territories. Rather, they agreed to share power and authority with the Governor. They agreed to a relationship: one in which they and the Governor were to be equal – equal while having different roles and different spheres of influence. In essence, rangatira retained their authority over their hapū and territories, while Hobson was given authority to control Pākehā. The rangatira also agreed to enter land transactions with the Crown. The Crown promised to investigate pre-treaty land transactions and to return any land that had been wrongly acquired. In our view that promise, too, was part of the agreement made in February 1840. Further, as part of the treaty agreement, the rangatira may well have consented to the Crown protecting them from foreign threats and representing them in international affairs where necessary. If so, however, the intention of signatory rangatira was that Britain would protect their independence, not that they would relinquish their sovereignty.

Tino Rangatiratanga me te Kāwanatanga: The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry

In stage 2 of our inquiry, we shift focus to the 415 Te Paparahi o Te Raki claims submitted under the Treaty of Waitangi Act 1975. This part of the report addresses the key issues raised within these claims relating to the nineteenth century. Matters of great significance identified by claimants and considered in this volume include the investigation and determination of claims on pre-treaty land transactions; the events and aftermath of the Northern War; the alienation of Māori land through the Crown's exercise of pre-emptive purchasing; the establishment of a judicial system for determining and individualising title to customary Māori land; and continued land purchasing and loss during the late nineteenth century. Underlying these principal issues of claim was a focus on political engagement between Māori and the Crown. As the treaty relationship unfolded in the period our report covers, it was characterised by the Crown overstepping the bounds of the kāwanatanga, in conjunction with continual erosion of Māori tino rangatiratanga. While Te Raki Māori seek the return of lands, compensation, and specific cultural redress, central to their claims is the restoration of their ability to exercise the tino rangatiratanga as promised in te Tiriti.

In this report, we have not identified precisely when the sovereignty the Crown holds and exercises today was acquired, nor have we considered its legitimacy in a contemporary context – those questions may feature in

the Waitangi Tribunal's forthcoming kaupapa inquiry into constitutional issues.

Summary of chapters

Our report is extensive and covers a significant time period and significant issues. I provide a brief summary.

Chapter 1: Hei Tīmatanga Kōrero / Introduction

Our report begins with an introduction to the inquiry and the inquiry district. Over 26 hearing weeks, we heard wide-ranging evidence across seven taiwhenua: Hokianga, Whangaroa, Waimate–Taiāmai ki Kaikohe, Takutai Moana, Whāngārei, Mangakāhia, and Mahurangi and the Gulf Islands. This district covers approximately half of the land north of Tāmaki Makaurau and remains one of the most economically deprived parts of New Zealand. This introduction also establishes the major issues of claim to be addressed in the forthcoming second part of this stage 2 inquiry and introduces the taiwhenua in which many claimants elected to group themselves.

Chapter 2: Ngā Mātāpono o te Tiriti / The Principles of the Treaty

In chapter 2, we set out the principles of the treaty that apply to the circumstances arising from Te Raki claims. Because of our stage 1 conclusion, it was necessary to revisit how certain treaty principles have been previously expressed, and the rights and duties that arise from the treaty guarantees. It was important, in our view, that our articulation of the principles be based in the actual agreement entered into by Te Raki rangatira and the Crown in 1840. We therefore attach great weight to te mātāpono o te tino rangatiratanga/the principle of tino rangatiratanga, and the expectation of Te Raki rangatira in 1840 that they would continue to exercise their rights and responsibilities to their hapū in accordance with tikanga. Te mātāpono o te houruatanga/the principle of partnership and te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect are also important principles in our inquiry that reflect the actual agreement entered into by Te Raki rangatira and the Crown in 1840.

Chapter 3: Tāngata Whenua / People of the Land

After having established the treaty context for the claims before us, we then describe Te Raki communities prior to 1840, who they were, where and how they lived, and what they valued and believed. While we do not address treaty claims in this section of the report, we draw your attention to the foundational and ongoing importance of hapū rangatiratanga

within Ngāpuhi. The organising principle of te kawa o Rāhiri protects the independence of autonomous hapū, but also binds them together with mutual obligations in times of threat or strife.

Chapter 4: Tino Rangatiratanga me te Kāwanatanga, 1840–44: Ngā Tūtakitanga Tuatahi o Te Raki Māori ki te Kāwanatanga / Tino Rangatiratanga and Kāwanatanga, 1840–44: First Te Raki Māori Encounters with Kāwanatanga

As a central issue in our inquiry, Crown–Māori political engagement is addressed in three chronologically organised chapters of our report. A key concern for the claimants was the steps taken by the Crown to declare sovereignty over the North Island and then all of New Zealand in two proclamations issued by the Queen's representative Captain Hobson in May 1840. We find that it was clear from the wording of the May proclamations, reflecting the wording of the English text of the treaty, that the British considered a 'cession' of sovereignty to have taken place. However, the Crown made no effort to explain to rangatira the process by which it would assert sovereignty over the whole country, nor did it make clear that it intended to establish a government and a legal system entirely under its control. Given our stage 1 conclusions, it is evident to us that by proclaiming sovereignty over the northern island of New Zealand in May 1840 by virtue of 'cession' by the chiefs, the Crown acted inconsistently with the guarantees of te Tiriti as expressed in the te reo text which Te Raki rangatira signed.

Chapter 5: Te Pakanga o te Te Raki, 1844–46 / The Northern War, 1844–46

In chapter 5, we consider the origins of the Northern War, the Crown's conduct during the war, and its impacts on Ngāpuhi. We find that in the year before the outbreak of war, Crown officials failed to consider Ngāpuhi leaders' concerns that te Tiriti was being ignored and that the Crown intended to impose its laws on and subordinate Māori. The frustration of some northern Māori with the trajectory of the treaty relationship lay behind Heke's flagstaff fellings of late 1844 and early 1845. We have described these fellings as a challenge to the Crown's encroachment on Ngāpuhi tino rangatiratanga and a signal that the Crown should meet with them and resolve issues of relative authority. Governor FitzRoy attempted to bolster support for the Crown at an important hui held at Waimate in September 1844, making a number of promises including the return of surplus lands, that is, land in excess of what was determined by Crown processes to have been legitimately acquired by settlers in pre-treaty transactions, which the Crown could then claim for itself. However, he also ignored opportunities for dialogue with Hōne Heke on more than

one occasion. Instead, he threatened military action against Heke and his allies, and chastised rangatira for not intervening in muru conducted in accordance with tikanga against settlers.

Throughout the ensuing conflict, the Crown was the aggressor, using military force to impose the sovereignty it believed had been acquired in 1840. In April 1845, FitzRoy instructed his forces to spare no 'rebels' and capture the principal chiefs as hostages. The Crown initiated attacks on the pā and kāinga of Ngāti Manu, Ngāti Hine, Ngāti Rāhiri, Ngāti Kawa, Ngāti Tautahi, Te Uri o Hua, Te Kapotai, and other hapū, destroying homes, property, waka, and food stores. The Crown was also responsible for renewing hostilities when it attacked Ruapekapeka in December 1845 after a five-month hiatus where it had initially ignored Heke's first appeals for peace negotiations, and then made the surrender of land a condition for peace. By contrast, Heke, Te Ruki Kawiti, Hikitene, and their allies fought only when attacked, and sought to protect both Māori and settler communities as much as possible from the effects of conflict. We find that the Crown took advantage of and encouraged divisions within Ngāpuhi during the war and failed to adequately consider the welfare of non-combatants affected by its military campaigns. All these aspects of the Crown's conduct during the Northern War represent serious breaches of the treaty that had both severe immediate and long-term impacts on Ngāpuhi.

Chapter 6: Ngā Kerēme Whenua i Mua i te Tiriti, ngā Hokonga Whenua ki te Karauna Anake, me ngā Whenua Tuwhene / Old Land Claims, Pre-Emption Waivers, and Surplus Lands

In chapter 6, we consider the Crown's policies for the investigation of pre-1840 land transactions. Before signing te Tiriti, Te Raki Māori had transacted land with settlers within the context of their own laws, and the tikanga of tuku whenua. However, through the work of the first land claims commission and the subsequent bodies established to investigate old land claims, the Crown seized the power to determine the process for identifying land rights, and Te Raki Māori tikanga was supplanted without their consent or involvement in decision-making. We find that the Crown's imposition of English legal concepts, grant of absolute freehold title to the settlers concerned, and its own subsequent taking of the surplus were effectively a raupatu of Māori tino rangatiratanga over thousands of acres of land in Te Raki.

Chapter 7: Tino Rangatiratanga me te Kāwanatanga, 1846–65: Te Tikanga o te Hepeta o Kuīni Wikitōria / Tino Rangatiratanga and Kāwanatanga,1846–65: The Meaning of the Queen's Sceptre

In chapter 7, we discuss the major constitutional change that occurred during the 1850s and 1860s, fundamentally affecting the treaty relationship in Te Raki. The New Zealand Constitution Act 1852 established a bicameral national Legislature comprising a lower house of representatives to be elected by settlers and an appointed upper house. Most Māori men were excluded from the franchise because they could not meet the property test (Māori women, like Pākehā women, were excluded altogether). No specific provision was made for Māori representation in Parliament until four Māori seats were introduced in 1867 – far fewer representatives than Māori were entitled to on a population basis. In 1856 the settler Government – at its insistence – was granted self-government ('responsible' government) by the imperial government. The executive now comprised representatives of the settler parliament, whose advice the Governor had to accept. But the Governor initially retained the right to make decisions on Māori affairs himself, arguing that this would give Māori better protection. The settler Government was determined to end this arrangement, and gradually assumed responsibility for Māori affairs. Governor George Grey accepted the principal of ministerial responsibility for Māori affairs in 1861, and the imperial government confirmed that principle in 1864.

During this period, Governors Gore Browne and Grey sought different solutions to provide for Māori involvement in the governance of their communities, such as the Kohimarama Rūnanga (a national rūnanga of Māori leaders) in 1860, and Grey's district rūnanga (intended to provide limited powers of local self-government) in 1861. However, despite Te Raki Māori support for these initiatives, both were short-lived and they gave way to directly assimilationist institutions such as the Native Land Court. Neither governor used the powers available in section 71 of the Constitution Act 1852 to establish native districts in which Māori could continue to govern themselves according to their own 'laws, customs and usages'.

We find that the transfer of authority by the imperial to the colonial Government and its ultimate decision that colonial ministries might assume responsibility for Māori affairs fundamentally undermined the treaty relationship. The Crown had promised to protect Māori in possession of their lands, in the exercise of their chiefly authority, and in their independence. Yet the Crown failed to build any of these safeguards into the new constitution. Instead, the Crown progressively transferred

authority to the very settler population from which it was to protect Māori.

Chapter 8: Ngā Hokonga Whenua a te Karauna 1840–65 / Early Crown Purchasing, 1840–65; Chapter 9: Te Kooti Whenua Māori i Te Raki, 1862–1900 / The Native Land Court in Te Raki, 1862–1900; Chapter 10: Ngā Hokonga o ngā Whenua Māori, 1865–1900 / Crown and Private Purchasing of Māori land, 1865–1900

In chapters 8–10, we consider in detail other issues of claim related to the Crown's actions and omissions in respect of Te Raki Māori land. Key issues addressed in this group of chapters include the alienation of Māori land through the Crown's exercise of pre-emptive purchasing between 1840 and 1865 (chapter 8); the establishment of the Native Land Court as a judicial system for determining and individualising title to customary Māori land (chapter 9); and continued land purchasing and loss during the late nineteenth century (chapter 10). The Crown's imposition of a new system of land tenure from 1862, initially through its Native Land legislation was particularly devastating – not just to Te Raki Māori land ownership, but to the structures and practices underpinning the cultural, political, and economic organisation of hapū. The overall effect of the Crown's nineteenth-century land policies, often conducted on the ground by Crown purchase agents in ways that breached the treaty, was that only one-third of the district remained in Māori ownership by 1900. By the end of the nineteenth century, many Te Raki Māori lacked sufficient land for sustenance, let alone the future development and participation in the colonial economy that they had expected in 1840. Certain hapū were virtually landless.

Chapter 11: Tino Rangatiratanga me te Kāwanatanga, 1865–1900: Ngā Whakamātautanga o Te Raki Māori te Whakapuaki te Tino Rangatiratanga / Tino Rangatiratanga and Kāwanatanga, 1865–1900: Te Raki Māori Attempts to Assert Tino Rangatiratanga

The final substantive chapter of this report concerns the efforts of Te Raki Māori to assert their tino rangatiratanga in the late nineteenth century. They established committees to mediate internal disputes and manage relationships with settlers and the colonial Government; they engaged with other northern tribes to establish regular regional parliaments at Waitangi, Ōrākei, and elsewhere; they sought accommodation with the Kīngitanga; and during the 1890s, they took lead roles in the attempts of the Kotahitanga movement to establish a national Māori parliament and self-government recognised by the Crown. They sought no more than the Crown's legal recognition for local komiti and national paremata that

were already operating. However, the Crown rejected or ignored their proposals, and in particular was unwilling to recognise any significant transfer of authority from colonial institutions. This was a historically unique opportunity to make provision in New Zealand's constitutional arrangements for Māori tino rangatiratanga at a national level. The Crown's failure to recognise and respect Te Raki rangatiratanga over this period was a breach of the treaty and its principles.

Recommendations

We anticipate that our findings and the recommendations will provide Te Raki Māori and the Crown further support and understanding as they move forward with negotiations to settle the claims of Te Raki tangata whenua. In order to assist the parties with this work, we recommend that:

- The Crown acknowledge the treaty agreement which it entered with Te Raki rangatira in 1840, as explained in our stage 1 report.
- The Crown make a formal apology to Te Raki hapū and iwi for its breaches of te Tiriti/the Treaty and its mātāpono/principles for:
  - Its overarching failure to recognise and respect the tino rangatiratanga of Te Raki hapū and iwi.
  - The imposition of an introduced legal system that overrode the tikanga of Te Raki Māori.
  - The Crown's failure to address the legitimate concerns of Ngāpuhi leaders following the signing of te Tiriti, instead asserting its authority without adequate regard for their tino rangatiratanga which resulted in the outbreak of the Northern War.
  - The Crown's egregious conduct during the Northern War.
  - The Crown's imposition of policies and institutions that were designed to wrest control and ownership of land and resources from Te Raki Māori hapū and iwi, and which effected a rapid transfer of land into Crown and settler hands.
  - The Crown's refusal to give effect to the Tiriti/Treaty rights of Te Raki Māori within the political institutions and constitution of New Zealand, or to recognise and support their paremata and komiti despite their sustained efforts in the second half of the nineteenth century to achieve recognition of and respect for those institutions in accordance with their tino rangatiratanga.
- All land owned by the Crown within the inquiry district be returned to Te Raki Māori ownership as redress for the Crown's breaches of te Tiriti/the Treaty and ngā mātāpono o te Tiriti/the principles of the Treaty.

- The Crown provide substantial further compensation to Te Raki Māori to restore the economic base of the hapū, and as redress for the substantial economic losses they suffered as a result of the Crown's breaches of te Tiriti/the Treaty and ngā mātāpono o te Tiriti/the principles of the Treaty.
- The Crown enter discussions with Te Raki Māori to determine appropriate constitutional processes and institutions at national, iwi, and hapū levels to recognise, respect, and give effect to their Tiriti/Treaty rights. Legislation, including settlement legislation, may be required if the claimants so wish.

Our last recommendation above will require consideration of how to enable the meaningful exercise of tino rangatiratanga at national, iwi, and hapū levels. Those discussions and negotiations will occur in part at a constitutional level and will require a sharing of power as envisaged in te Tiriti. We have no doubt that this process will be challenging for the Crown, but undertaking it in good faith is essential if the treaty partnership and the Crown's own honour is to be restored. It is important that any proposed resolution to the claims involve the legislative and policy reform necessary to reset the relationship between tino rangatiratanga and kāwanatanga so that the promises of te Tiriti are realised.

Heoi anō, e ngā amokura, e ngā amokapua, kua tukuna atu e mātou, a mātou whakaaro. Hei aha? Hei whakaaroaro mā koutou o te Whare Pāremata, mā ngā Māori o Te Raki, mā te motu whānui hoki.

Nāku noa,

Judge Craig T Coxhead
Presiding Officer

ABBREVIATIONS

AJHR	*Appendix to the Journal of the House of Representatives*
AJLC	*Appendices to the Journals of the Legislative Council*
app	appendix
BPP	*British Parliamentary Papers: Colonies New Zealand*, 17 vols (Shannon: Irish University Press, 1968–69)
CA	Court of Appeal
ch	chapter
cl	clause
CMS	Church Missiony Society
DNZB	*Dictionary of New Zealand Biography*
doc	document
ed	edition, editor, edited by
GBPD	*Great Britain Parliamentary Debates*
HMS	Her/His Majesty's Ship
JPS	*Journal of the Polynesian Society*
LINZ	Land Information New Zealand
ltd	limited
MB	minute book
memo	memorandum
MHR	member of the House of Representatives
NADC	North Auckland Development Company
NZJH	*New Zealand Journal of History*
NZLR	*New Zealand Law Reports*
NZPD	*New Zealand Parliamentary Debates*
NZSC	*New Zealand Supreme Court*
OLC	old land claim
p, pp	page, pages
para	paragraph
PC	Privy Council
ROI	record of inquiry
s, ss	section, sections (of an Act of Parliament)
sess	session
SOE	State-owned enterprise
v	and (in a legal case name)
vol	volume
Wai	Waitangi Tribunal claim

Unless otherwise stated, footnote references to briefs, claims, documents, memoranda, papers, submissions, and transcripts are to the Wai 1040 record of inquiry. A copy of the index is available on request from the Waitangi Tribunal.

CHAPTER 1

HEI TĪMATANGA KŌRERO / INTRODUCTION

E ngā rangatira o Ngāpuhi, whakarongo mai. Kaua e uhia te Tiriti o Waitangi ki te kara o Ingarangi, engari me uhi anō ki tōu kara Māori, ki te kahu o tēnei motu.

Ngāpuhi chiefs, listen to me. Don't cover the Treaty of Waitangi with the English flag, but cover it with your own flag, with the cloak of this island.

—Āperahama Taonui (Ngāpuhi).[1]

1.1 The Te Paparahi o Te Raki Inquiry: Stage 2

This pre-publication report addresses the Treaty of Waitangi claims of iwi, hapū, whānau, other groups, and individuals of Te Paparahi o Te Raki, the great land of the North. It was in this district where rangatira and the Crown first signed the treaty at Waitangi on 6 February 1840, at Waimate a few days later, and then on 12 February at Māngungu. The first claim from this district was received by the Tribunal on 13 September 1985 and concerned rates on Māori land.[2] Sir James Henare filed a further claim on 13 October 1988 concerning Crown actions affecting the Taumārere River and its confluence with Te Moana o Pikopiko i Whiti.[3] Since then, Te Raki Māori have lodged a total of 415 claims that have been registered by the Tribunal. While the the vast majority of the claims were brought by Māori affiliating to Ngāpuhi, New Zealand's most populous iwi, claims were also brought by those affiliating to Ngāti Whātua, Ngātiwai, Patuharakeke, Ngāti Rehua, and Ngāti Manuhiri, among others.

In addressing these claims and the issues they give rise to, our inquiry has a broad geographical sweep, resulting in part from an early decision to combine five (later seven) taiwhenua (subregions) into an overarching district.[4] For our purposes, the Te Paparahi o Te Raki inquiry district includes Hokianga and most of Northland's east coast, broadly covering Whangaroa, Bay of Islands, Mangakāhia, Whāngārei, Mahurangi, and the Gulf Islands. It is inclusive of all territories

1. Merata Kawharu, *Tāhuhu Kōrero: The Sayings of Taitokerau* (Auckland: Auckland University Press, 2008), p 34. Āperahama Taonui was a signatory of te Tiriti and, later, a founder of the Kotahitanga movement.

2. Tiata Witehira, K Witehira, and T Tohu, statement of claim, 13 September 1985 (Wai 24, claim 1.1.1, SOC 1).

3. Sir James Hēnare, statement of claim, 13 October 1988 (Wai 49, claim 1.1.2, SOC 2).

4. Throughout this report, the term 'taiwhenua' will be used to refer to subregions of the Te Raki inquiry district.

north of Tāmaki Makaurau (Auckland) that have not been the subject of previous Waitangi Tribunal historical reports. We discuss the inquiry district and each taiwhenua in detail later in this chapter.

The process of hearing a large number of claims, spanning an extensive rohe, was neither a short nor a simple one. Many tangata whenua witnesses, Crown witnesses, lawyers, and technical experts presented evidence and legal submissions over 26 hearing weeks, spanning five years, from 2013 to 2017. These hearings occurred alongside, and continued after, the release of our stage 1 report in November 2014, *He Whakaputanga me te Tiriti/The Declaration and the Treaty*. We received final submissions in reply in November 2018.

This report assessed the meaning and effect of the 1835 He Whakaputanga o te Rangatiratanga o Nu Tireni/Declaration of the Independence of New Zealand, and te Tiriti/the Treaty at the time these documents were signed, in order to provide essential context for our inquiry into post-1840 claims. We concluded that rangatira who signed te Tiriti at Waitangi, Waimate, and Māngungu did not cede their sovereignty in February 1840.[5] This conclusion provided a foundational basis for stage 2 of the inquiry, in which we have heard and assessed claims from throughout the inquiry district that Crown acts and omissions breached the treaty and its principles from 6 February 1840 onwards.

This volume is the first part of our report for stage 2 of the Te Raki inquiry. The next two chapters discuss the treaty principles relevant to this inquiry, and the tribal landscape of the district. The following chapters address issues arising from claims related to Crown conduct in Te Raki, from the signing of the treaty to the end of the nineteenth century. Twentieth century issues, broadly considered, will be addressed in subsequent volumes as part 2 of our stage 2 report.

This introductory chapter begins with an explanation of important terms relevant to this inquiry and provides a short account of the procedural background from the pre-hearing phase through to its completion. We discuss the inquiry as a whole, its particular features, and the types of claims we heard. We then set out the significant issues arising from the claims, before introducing each taiwhenua. Lastly, we outline the structure of this report and its chapters.

1.2 Whakatakotoranga Kupu / Terminology

In our stage 1 report, we adopted specific terminology for the purposes of our discussion and analysis.[6] As this terminology remains important in this stage 2 report, we repeat here our earlier explanations of key terms.

5. Waitangi Tribunal, *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry*, Wai 1040 (Wellington: Legislation Direct, 2014), pp 526–527.
6. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 11.

1.2.1 Te Tiriti and the Treaty

As in our stage 1 report, in this report we have chosen to use 'te Tiriti' to refer to the Māori text, 'the Treaty' to refer to the English text, and 'the treaty' to refer to both texts together, or to the event as a whole without specifying either text.

1.2.2 He Whakaputanga and the Declaration

Likewise, where we refer to 'he Whakaputanga o te Rangatiratanga o Nu Tireni' or 'he Whakaputanga', we are referring to the Māori text of the 1835 declaration. Where we refer to 'the Declaration of Independence' or 'the Declaration', we mean the English text; and we use 'the declaration' to refer to both texts together, or to the event as a whole without specifying either text.

1.2.3 Te Paparahi o Te Raki: the name of this inquiry

During early discussions with claimants, they suggested that our inquiry district be named 'Te Paparahi o Ngāpuhi' (the great land of Ngāpuhi). They also said they wanted an inquiry process that enhanced Ngāpuhi whanaungatanga, while allowing each hapū and community their own distinct voice.[7] However, while many parties to this inquiry identified themselves as Ngāpuhi, not all did. In keeping with the principle of whanaungatanga, we therefore chose the name 'Te Paparahi o Te Raki'.[8]

As noted earlier, we use Te Paparahi o Te Raki to refer to all territories north of Auckland that have not been the subject of previous Waitangi Tribunal historical inquiries.

1.2.4 Ngāpuhi

While 'Ngāpuhi' today refers to people from throughout the Bay of Islands, Hokianga, Whangaroa, and Whāngārei areas, and is sometimes used to refer to people from throughout the north, that was not always the case. As we discuss further in chapter 3 of this report, prior to the signing of the treaty, 'Ngāpuhi' comprised three separate but related groups: the inter-related hapū of Hokianga, as well as a northern and a southern alliance of hapū surrounding the Bay of Islands.[9] As at 1840, 'Ngāpuhi' remained a grouping of autonomous hapū, each with their own zones of influence and resource rights, sharing common descent, who cooperated or competed as circumstances and tikanga required.[10] Throughout this report, we use 'Ngāpuhi' in a way that reflects its use in historical sources. When describing past events, we have used hapū names or lines of descent to more accurately reflect relationships at particular periods.

7. Memorandum of the Ngāpuhi Design Group (#3.1.19), p 8.
8. Memorandum 2.5.11, pp 1–4.
9. Manuka Henare, Hazel Petrie, and Adrienne Puckey, '"He Whenua Rangatira": Northern Tribal Landscape Overview (Hokianga, Whangaroa, Bay of Islands, Whāngārei, Mahurangi and Gulf Islands' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2009) (doc A37), p 363.
10. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 2; Nuki Aldridge, transcript 4.1.1, Te Tii Marae, pp 106–107, 112–113.

Where we use 'Te Raki' or 'Te Raki Māori', we are referring to the entire inquiry district and all those claimants who live within it. Most often, we use more specific terms, such as area or hapū names, to identify the places or people to whom we are referring.

1.2.5 The sound written as 'wh'

In te reo Māori, the phoneme (distinct sound) now written as 'wh' was typically written by Europeans in the early nineteenth century as 'w'. 'Kaiwhakarite', for example, was typically written 'kaiwakarite', and 'Whakaputanga' written as 'Wakaputanga'. In this report, we use the original 'w' spelling only in direct quotations; otherwise, we use the modern digraph 'wh'.

1.3 Ko te Hātepe Ture o ngā Tono Nei / Procedural Background

1.3.1 Appointment of the stage 2 panel

Stage 1 of the Te Raki inquiry ran over six years, from 2008 to 2014. Judge Craig Coxhead (Ngāti Makino, Ngāti Pikiao, Ngāti Maru, Ngāti Awa) was the presiding officer. The late Professor Ranginui Walker (Whakatōhea), Joanne Morris, the late Kihi Ngatai (Ngāiterangi and Ngāti Ranginui), Professor Richard Hill, and the late Keita Walker (Ngāti Porou) completed the panel.

In November 2012, the Tribunal's deputy chairperson appointed Dr Robyn Anderson to the panel for stage 2 of the inquiry. In order to manage potential conflicts arising from her previous research, Dr Anderson did not attend hearings relating to the Whāngārei and Mangakāhia areas and has not been involved in the determination of relevant specific claims.[11] Following the release of the stage 1 report in November 2014, Professor Hill, Joanne Morris, and Keita Walker stepped down from the Te Raki inquiry. In February 2015, the Tribunal's chairperson appointed Dr Ann Parsonson as a panel member for stage 2 of the inquiry.[12]

1.3.2 Planning and hearings

At a judicial conference in December 2005, the then chairperson of the Waitangi Tribunal, Chief Judge (now Justice) Joe Williams, recommended that Ngāpuhi assemble a 'Design Group' to propose how the hearing of Northland claims should proceed.[13] Over two years, the Ngāpuhi Design Group (the Design Group) developed a comprehensive proposal and carried out extensive consultation with the claimant community.[14] The Design Group filed its proposal with the Tribunal in March 2007.[15]

The Design Group sought a comprehensive and substantial inquiry process that would enhance the claimants' whanaungatanga. They emphasised that the

11. Memorandum 2.5.137.
12. Memorandum 2.6.111.
13. Memorandum 2.5.2, p 1.
14. Memorandum 2.5.11, pp 1–2.
15. Submission of the Ngāpuhi Design Group (#3.1.19).

independence of hapū coexists with a Ngāpuhi-wide unity – a characteristic of Ngāpuhi social organisation expressed in the pepeha, 'Ngāpuhi kōwhao rau' (Ngāpuhi of a hundred holes).[16] The Design Group proposed that the five inquiry districts – Whangaroa, Hokianga, Bay of Islands, Whāngārei, and Mahurangi-Gulf Islands – be incorporated into a single district to cover all remaining treaty claims between Mahurangi and Muriwhenua.[17]

After receiving submissions from parties, the Tribunal chairperson supported the proposed single district inquiry, observing that the inquiry process should 'emphasise the relatedness and the kinship which binds all of the communities involved in this inquiry from south to north'. However, the chairperson stipulated that within the one large district, it would remain necessary to approach the inquiry 'section by section'.[18] The subregions within the district, which became known as taiwhenua, were intended to enable the claimants to organise themselves and prepare for hearings.[19]

During the interlocutory stage of our inquiry, claimants emphasised that the issue of Crown sovereignty was central to their claims, and in 2007 they proposed that it be the subject of separate hearings.[20] In 2008, the Tribunal decided to hold early hearings on Te Raki Māori understandings of he Whakaputanga and te Tiriti as this was a matter central to all post-1840 Te Raki claims.[21] The stage 1 hearings began in 2010. The key questions to be answered concerned whether rangatira of the Bay of Islands and Hokianga ceded sovereignty to the British by signing

16. We set out the claimants' explanation for this pepeha in our stage 1 report. One explanation was provided by Dr (now Tā) Patu Hohepa: 'Ko te kōwhao-rau he kupenga, ko te kōwhao-rau he whakapapa, ko te kōwhao-rau he kāinga-rua, he kāinga-toru, ko te kōwhao-rau he whanaungamaha, na reira, mātou i ora ai, nā te kōwhao-rautanga' ('The kowhao-rau we speak of can be likened to a net with many holes. Kowhao-rau refers to genealogy and relationships. Kowhao-rau can be likened to a second and third house. Kowhao-rau refers to our many kin relationships. And that is why we have survived, because of all of these separate but related connections'): Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 36; Patu Hohepa, transcript 4.1.1, Te Tii Marae, pp 106, 112; Manuka Henare, Hazel Petrie, and Adrienne Puckey, 'He Whenua Rangatira' (doc A37), p 14; Memorandum 2.5.11, pp 2–4; the Ngāpuhi Design Group comprised Raniera (Sonny) Tau and Titewhai Harawira (Ngāpuhi Kaumātua/Kuia Council); Dr Patu Hohepa (Te Rōpū Whakapiripiri o Te Tai Tokerau); Hone Sadler and Paeata Clark (Te Aho Alliance – formerly the Ngāti Hine Claims Alliance); Te Rā Nehua and Hori Tuhiwai (Puhipuhi Te Maruata Collective); Pat Tauroa and Erimana Taniora (Whangaroa Papa Hapū); Rudy Taylor and Bob Ashby (Hokianga Claims Alliance); John Alexander and Kaye Baker (Te Waimate/Taiāmai Claims Alliance); Jane Hōtere and Aileen Austin (Mahurangi and Gulf Islands Collective); and Hirini Heta and Richard Nathan (Tai Tokerau Tiriti o Waitangi Forum – formerly the Tai Tokerau District Council Claims Committee): submission of the Ngāpuhi Design Group (#3.1.19), p 13.

17. Whāngārei claimants did not support this proposal: memo 2.5.11, pp 2, 4.

18. Memorandum 2.5.11, p 4.

19. Taiwhenua translates to permanent home, land, or district; memorandum 2.5.102, p 1; memorandum 2.5.144, p 5.

20. Memorandum of counsel for Wai 375, Wai 510, Wai 513, Wai 515, Wai 517, Wai 520, Wai 523, Wai 861, and Wai 919 (#3.1.22), p 4.

21. Memorandum 2.5.15, p 2.

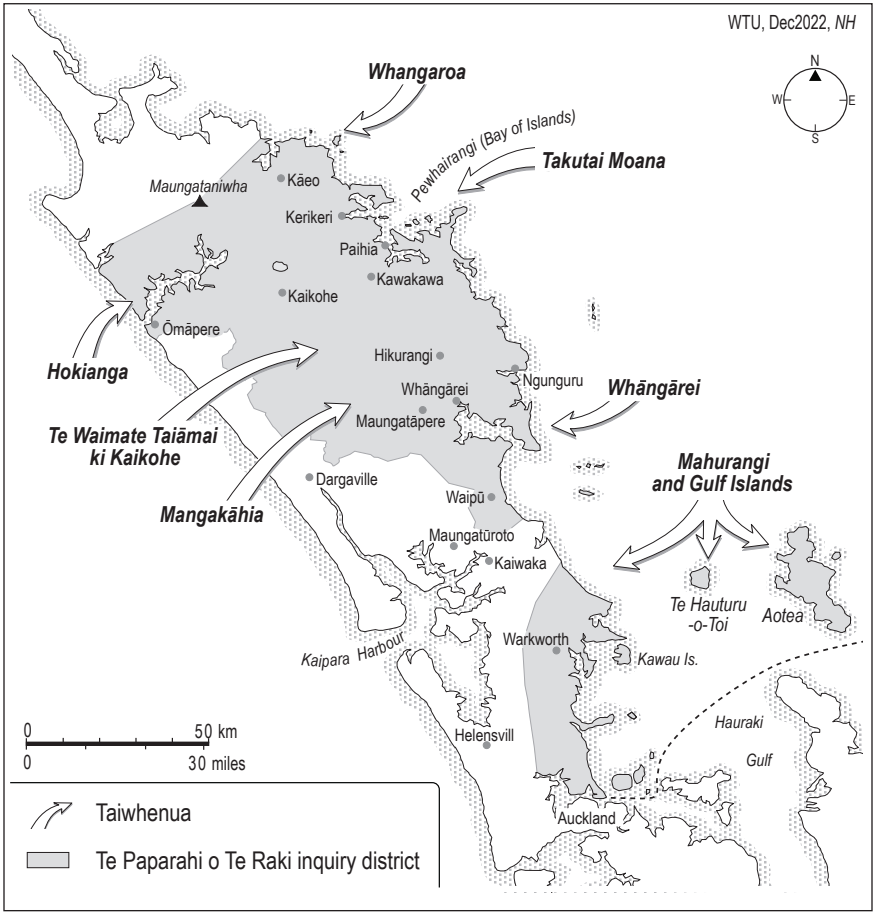
te Tiriti o Waitangi in 1840, and how they understood the relationship they were entering into with the Crown under te Tiriti.[22]

Because the stage 1 inquiry only dealt with events up to February 1840, we did not make any findings of treaty breach or recommendations to the Crown under the Treaty of Waitangi Act 1975. We did, however, reach the conclusion that Te Raki rangatira who signed te Tiriti did not cede their sovereignty in February 1840. We stated that the meaning and effect of the treaty agreement 'came from the Māori text, on the one hand, and the verbal explanations and assurances given by Hobson and the missionaries, on the other'.[23] Rangatira agreed to share power with the Governor, though they 'had different roles and different spheres of influence'. They were to retain their independence and chiefly authority over their people and within their territories.[24]

Hearings for stage 2 of the inquiry proceeded with a regional approach, consistent with the claimants' principles of unity and autonomy. Earlier, in 2009, the Tribunal addressed numerous submissions from claimants and counsel regarding a proposal to sever Mahurangi and the Gulf Islands from the Te Paparahi o Te Raki inquiry. The Tribunal decided that Mahurangi and Gulf Islands would stay within the inquiry district, a decision it reaffirmed in February 2012 and again in February 2013.[25] In late 2012, the number of taiwhenua increased from five to seven. Mangakāhia and Whāngārei would now each hold their own hearings, while Takutai Moana, the coastal Bay of Islands collective, would organise themselves separately from their inland whanaunga in Waimate–Taiāmai ki Kaikohe.[26] In September 2014, the Tribunal refined the Te Raki inquiry boundary so that the western boundary aligned with the boundary of the Te Roroa district, and the northern and southern boundaries aligned with the surrounding Muriwhenua and Kaipara district boundaries.[27] In November 2015, we granted five additional hearing weeks, increasing the original programme from 21 to 26 hearing weeks in total.[28] During the hearing phase, claimants from each taiwhenua came together to present evidence; each hapū had the opportunity to be heard on marae in their own rohe. Technical evidence relating to historical and contemporary issues common to all groups was also presented thematically throughout these hearings.[29]

We note here the level of cooperation and goodwill among claimant parties. We have no illusions that this collaboration was always easy, and we know that claimants were organising themselves in often trying circumstances. Difficulties stemmed from the sheer number of claims and the need to balance representation

22. Our stage 1 report only considered three signings: at Waitangi on 6 February 1840, at Waimate on 9 and 10 February, and at Māngungu in Hokianga on 12 February: Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 1.
23. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 526.
24. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 527.
25. Memorandum 2.5.24; memorandum 2.5.112, p [3]; memorandum 2.5.147, p 2.
26. Memorandum 3.1.798(a), pp 45–47; memorandum 2.5.132, p 5; memorandum 2.6.80, p 2.
27. Memorandum 2.6.89, pp 2–4; memorandum 2.6.101, pp 3–6.
28. Memorandum 2.6.165, p 20.
29. Memorandum 2.5.85, pp [1]–[2]; memorandum 2.5.127, pp 1–2.



Map 1.1: Inquiry district and taiwhenua

from different groups, given the large numbers of claimants wishing to offer their kōrero in the limited time available.

For many involved in the inquiry, the formal delineation of administrative boundaries belied the reality that claimant groups stood astride taiwhenua. This was especially so for larger hapū. Te Whiu, for example, has close connections with groups within Takutai Moana and Waimate–Taiāmai ki Kaikohe; Ngāti Hine, based in the north-east, interlinks with Takutai Moana, Whāngārei, and Mangakāhia; while Ngāti Rēhia also affiliates to groups within Takutai Moana, Waimate–Taiāmai, and Mahurangi. Te Parawhau closely relate to groups within Whāngārei and Mangakāhia; Ngāti Rangi to both Takutai Moana and Waimate–Taiāmai; Ngāti Kura to Whangaroa and Takutai Moana; Ngāti Manu to Waimate–Taiāmai, Whangaroa, Whāngārei, and Mangakāhia.

Week	Hearing	Place	Duration
1	Opening statements	Te Tii Marae, Waitangi	18–22 March 2013
2	Takutai Moana	Waitaha Room, Copthorne, Waitangi	14–17 May 2013
3	Whangaroa	Turner Centre, Kerikeri	8–12 July 2013
4	Waimate–Taiāmai ki Kaikohe	Turner Centre, Kerikeri	2–6 September 2013
5	Whāngārei	Forum North, Whāngārei	14–18 October 2013
6	Mangakāhia	Korokota Marae, Mangakāhia	16–20 December 2013
7	Mahurangi	North Harbour Stadium, Auckland	10–13 February 2014
8	Hokianga	Mōria Marae, Whirinaki	7–11 April 2014
9	Takutai Moana	Tau Henare Marae, Pīpīwai	4–8 August 2014
10	Whangaroa	Ōtangaroa Marae, Whangaroa	22–26 September 2014
11	Waimate–Taiāmai	Turner Centre, Kerikeri	24–28 November 2014
12	Whāngārei	Akerama Marae, Tōwai	16–20 February 2015
13	Hokianga	Tuhirangi Marae, Waimā	13–17 April 2015
14	Takutai Moana	Whitiora Marae, Te Tii Mangonui, and Kerikeri Returned and Services' Association	8–12 June 2015
15	Whangaroa	Te Tāpui Marae, Matauri Bay	1–4 September 2015
16	Waimate–Taiāmai	Turner Centre, Kerikeri	2–6 November 2015
17	Whāngārei	Terenga Parāoa Marae, Whāngārei	15–19 February 2016
18	Hokianga	Mātaitaua Marae, Utakura	18–22 April 2016
19	Takutai Moana	Oromāhoe Marae, Oromāhoe	18–22 July 2016
20	Hokianga	Tauteihiihi Marae, Kohukohu	22–26 August 2016
21	Local Issues Research Programme	Turner Centre, Kerikeri	17–21 October 2016
22	Porotī Springs claimants; Crown evidence	Waitaha Room, Copthorne, Waitangi	5–9 December 2016
23	Generic closing submissions	Te Whakamaharatanga Marae, Waimamaku	18–22 April 2017
24	Claims specific closing submissions	Terenga Parāoa Marae, Whāngārei	19–23 June 2017
25	Claims specific closing submissions	Ōtangaroa Marae, Whangaroa	31 July–4 August 2017
26	Crown closing submissions	Waitaha Room, Copthorne, Waitangi	16–20 October 2017

Table 1.1: The hearings.

Alongside the cooperation between claimant groups, the Crown played an important role in fostering a productive inquiry process, including their active engagement throughout the process and in filling a funding gap in the early stages of the inquiry.[30] Without this support, it is unlikely the hearings could have proceeded as they did.

1.4 Ngā Kerēme / The Claims

The 415 claims in this inquiry can be broadly divided into subregional or district-wide claims; iwi or hapū claims; whānau or individual claims; and claims made on behalf of boards, trusts, or other groups such as Te Tai Tokerau District Māori Council. Often, the claims from these different groups overlap. The large number of claims brought before us, and the way that claimants chose to arrange and present their evidence, reflects the fundamental importance of hapū groupings in the north.

In this first part of our stage 2 report, we address the claims and evidence relating to the nineteenth century. During the interlocutory (pre-hearing) process, claimant counsel coordinated to produce generic submissions – collective pleadings on key issues of claim that could be adopted, in whole or in part, by the claimants. Broadly, the claims addressed in this volume raise the following major issues reflected in the generic submissions:

- The relationship of rangatiratanga and kāwanatanga: the political engagement between Te Raki hapū and iwi and the Crown in the nineteenth century. In part 1 of our report, we assess this issue over four periods between 1840 and 1900:
  - *1840–44:* the years immediately following the signing of the treaty and the Crown's proclamations of sovereignty, characterised by the establishment of Crown colony government and the Crown's attempts to assert its authority in Te Raki.
  - *1844–46:* a period in which some Bay of Islands rangatira signalled their dissatisfaction with how the treaty relationship had developed by felling the flagstaff on Maiki Hill, which led to violent clashes between Ngāpuhi and British forces, and internal divisions among Ngāpuhi in conflicts that would come to be known collectively as the Northern War.
  - *1846–65:* the aftermath of the Northern War, which saw Ngāpuhi attempts to re-establish their relationship with the Crown and encourage settlement in the north; and the Crown's grant of settler self-government in New Zealand, and its attempts to provide for Māori self-government and the titling of Māori land in Te Raki.
  - *1865–1900:* a period of far-reaching tenurial change under the Native Land Court and of two phases of extensive Crown land purchasing

30. Memorandum 2.6.28; memorandum 2.6.47.

that resulted in sustained Te Raki Māori opposition to the Crown's assimilationist policies, and strong assertions of their autonomy.

- The Crown's policies towards Māori lands: how the Crown sought to govern land transactions and extinguish customary title in order to implement its plans for the settlement of the colony. To assess this issue, we discuss the following areas of Crown policy:
  - The Crown's investigation and confirmation of pre-treaty land transactions (old land claims); in particular, its retention of so-called 'surplus' land (rather than returning to Māori owners land that exceeded the maximum amount granted to pre-treaty purchasers); pre-emption waivers to enable direct settler purchase of Māori land (1844 to 1845); the award of scrip to settlers so they could move out of northern districts and take up land elsewhere; and the commissions of inquiry established during the mid-nineteenth and twentieth centuries to finalise grants and address grievances arising from these matters.
  - The establishment, operation, and impact of the Native Land Court in the inquiry district from 1862 to 1900.
  - The Crown's purchasing of Te Raki Māori land in the nineteenth century and its effect on the land base of Te Raki Māori. Here, we assess the Crown's policies and its purchasing operations on the ground over two periods during the nineteenth century: from 1840 to 1865 and from 1865 to 1900.

These issues arise from the rapid development of the Crown's colony – broadly, the Crown's efforts to engage with hapū, to challenge and limit the exercise of tino rangatiratanga, to institute sweeping land tenure change through the individualisation of titles, and to facilitate land purchasing and British settlement on a large scale.

Part 2 of our stage 2 report will address claim issues predominantly relating to the twentieth century, including the exercise of tino rangatiratanga and the nature of political engagement between Te Raki hapū and the Crown in the decades after 1900; continued land alienation in the twentieth century, along with Crown policies for the retention, titling, and administration of remaining Māori land in Te Raki; public works taking of Māori land in the inquiry district; socio-economic issues; environmental issues; and local government and rating issues. The report will also address claims concerning Crown acts and omissions in respect of te reo Māori, including te reo o Ngāpuhi; and the Crown's policies for recognising wāhi tapu, taonga, and tikanga in the district, and the effect these policies have had on Te Raki Māori.

A forthcoming volume of this report will address any remaining claims considered specific to the taiwhenua in which claimants have chosen to organise themselves.

1.5 Te Rohe o te Paparahi / The Paparahi District

The northern boundary of the Te Raki inquiry district runs from Whāngāpē Harbour on the west coast, across the Maungataniwha Range, to Whangaroa Habour on the east coast. The western boundary includes a short section of the coast south of Hokianga Harbour, before running inland along the boundary set by the Te Roroa and Kaipara inquiry districts. The southern boundary runs along the north shore of the Waitematā Harbour. The eastern boundary runs down the east coast and includes some of the outlying islands, such as Hauturu (Little Barrier), Taranga and Marotere (Hen and Chickens), and Aotea (Great Barrier), amongst many others.

The Te Raki inquiry district covers roughly half the land north of Tāmaki Makaurau, the other half having been the subject of five Tribunal inquiries between 1987 and 2006.[31] The Tribunal has also previously reported on a discrete issue in the Te Raki inquiry district: the *Ngawha Geothermal Resource Report* (1993) was an urgent response to a joint-venture application by the Bay of Islands Electric Power Board and the Taitokerau Maori Trust Board to use the Ngāwhā geothermal resource to generate electricity.[32] This inquiry addressed claims that the Crown's acquisition of land at Ngāwhā and the claimants' rights to the geothermal resource guaranteed under the treaty were not adequately protected by the Geothermal Energy Act 1953 and the Resource Management Act 1991.[33]

During our hearings, we were fortunate to be guided by tangata whenua on visits to some of their most important sites across Te Raki. These visits allowed us to see for ourselves the lands and waterways whose histories pervaded so much of the kōrero we had heard. We experienced the depth of traditional knowledge our guides held and their intimate connection to their whenua, their moana, their awa, their repo, and their puna, as well as their deep sense of grievance at their degradation and loss. Kaikōrero related the traditions associated with maunga that dominate the landscape, among them Te Ramaroa, Maungataniwha, Rākaumangamanga, and Tūtāmoe, some of the poupou (pillars) that support Te Whare Tapu o Ngāpuhi.[34] They took us to valleys such as Paraoanui, whose soil had in earlier times earned the north a reputation as an abundant area. We were shown sites such as Kahoe, where forests have been felled for logging, and their gum dug in the swamps for export, providing fluctuating employment and also causing ecological damage. We saw farmland, little of it now in Māori hands, that

31. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Mangonui Sewerage Claim*, Wai 17 (Wellington: GP Publications, 1988); Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, Wai 22 (Wellington: Waitangi Tribunal, 1988); Waitangi Tribunal, *The Te Roroa Report 1992*, Wai 38 (Wellington: Booker and Friend Ltd, 1992); Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45 (Wellington: GP Publications, 1997); Waitangi Tribunal, *The Kaipara Report*, Wai 674 (Wellington: Legislation Direct, 2006).

32. Waitangi Tribunal, *The Ngawha Geothermal Resource Report 1993*, Wai 304 (Wellington: Brooker and Friend Ltd, 1993).

33. It was agreed that the Wai 1040 Tribunal could inquire into further Ngāwhā claims providing these had not previously been determined in the *Ngawha Geothermal Resource Report* (1993): memorandum 2.6.176, p 2.

34. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 46–47.

was once the site of collectively held wetlands, such as Hikurangi, with tuna that sustained local kāinga.

We traversed both coasts of this district, and their many culturally and environmentally significant inlets, harbours, and islands, including Whangaruru Harbour, Waikare Inlet, Motukokako Island (Hole in the Rock), Whangaroa, Te Ngāere, and Matauri. We heard of the environmental damage past and present affecting the waters in this district and of a resulting loss of kaimoana. We were also told of taonga such as Porotī and Waiwera, where access is limited due to private ownership.

Claimants took us to valued awa that facilitated trade and transport throughout the rohe, such as the Taumārere River, the Whirinaki River, and the meeting place of the Wairua and Mangakāhia Rivers, which together form the Wairoa River, critical to the peoples who depend on them. Everywhere, we were told of wāhi tapu and, too often, of the threats these face, now and in the future.

A historical account of the hapū of Te Raki, and their whakapapa connections to one another, and to iwi whose lands border the inquiry district or who have claims within it, is given in chapter 3. For now, though, we briefly note statistics that reflect aspects of their contemporary circumstances.

The most recent census results available (from 2018) show that over 165,201 Ngāpuhi – approximately 19 per cent of the country's total population of Māori descent – then resided in New Zealand, a number that had grown steadily over the last 15 years. Ngāpuhi are a young population, with over 33 per cent aged under 15 and only 5.5 per cent aged 65 or older.[35] However, only 21 per cent, or 35,000 people, lived in Northland, in contrast to 38.5 per cent in Tāmaki Makaurau.[36] Ngāpuhi are also among the many Māori who have made their lives overseas.

The data also reveal Northland is one of New Zealand's most economically deprived areas and includes some of its most isolated places. According to the 2018 statistics, Ngāpuhi were over-represented in a range of socio-economic measures of deprivation, including unemployment and low attainment rates in formal education.[37] Census figures cannot, of course, tell the whole story. The kōrero we heard recorded the often-difficult lives of whānau and hapū. Te Raki Māori trace many of the circumstances their communities face today to colonisation and the history of broken Crown promises since 1840.

1.5.1 The taiwhenua

In the following sections, we offer an overview of the various taiwhenua that comprise the larger Te Raki district, in the order that claimant groups organised their hearings. This is not a comprehensive list of claimants or claims in each taiwhenua,

35. 'Demographics', Te Whata, https://tewhata.io/ngapuhi/social/people/demographics/, accessed 7 November 2022.
36. 'Demographics', Te Whata, https://tewhata.io/ngapuhi/social/people/demographics/, accessed 7 November 2022.
37. 'Demographics', Te Whata, https://tewhata.io/ngapuhi/social/people/demographics/, accessed 7 November 2022.

but a general guide to key locations and groups based on the information provided to the Tribunal in claimant evidence and submissions.

1.5.1.1 *Hokianga*

The Hokianga taiwhenua is situated at the north-west corner of our inquiry district, adjacent to Whangaroa to its north-east and Waimate–Taiāmai ki Kaikohe to its east. It is the only taiwhenua on the west coast. Hokianga hapū are located either side of the Hokianga Harbour, within a rohe rich in natural resources and history. The region is known for a wooded interior that supplied the logging and gum extraction industries, and helped forge early relationships between local Māori and Pākehā settlers.

The claimants provided evidence on the following list of Hokianga hapū and some of their centres:

- Ngāti Manawa and Te Waiariki at Whakarapa and Pānguru;
- Te Kai Tutae at Pānguru;
- Te Ihutai at Mangamuka, Raukapara, Ōrira, and Kohukohu;
- Te Uri Māhoe at Mangamuka;
- Te Uri Kōpura at Rangiora, Mangamuka, and Ōmanaia;
- Te Patupō, Te Reinga, and Kohatutaka at Waihou;
- Ngāti Hao at Waihou, Hōreke, and Utakura;
- Ngāti Kairewa at Waihou and Hōreke;
- Te Ngahengahe at Waihou, Motukiore, and Ōrira;
- Ngāti Toro at Motukiore;
- Te Patu Toka at Whakarapa;
- Te Pōpoto at Rangiahua and Utakura;
- Ngāi Tūpoto at Te Huahua, Motukaraka, Tapuwae, and Kohukohu;
- Ngāti Here at Motukaraka and Ōue;
- Ngāti Pou at Waimamaku, Waimā, Waihou, and Mangamuka;
- Te Roroa at Ōmāpere, Pākanae, and Waimamaku;
- Te Poukā at Pākanae, Waimamaku, and Opononi;
- Ngāti Korokoro at Pākanae and Waimamaku;
- Ngāti Wharārā at Kokohuia, Ōmāpere, Opononi, and Pākanae;
- Te Hikutū at Whirinaki;
- Ngāti Hau and Ngāti Kaharau at Ōmanaia;
- Te Māhurehure at Waimā, Moehau, Motukiore, and Rāwene;
- Te Urikaiwhare at Waimā, Tāheke, and Rāwene;
- Ngāti Hurihanga at Waimā and Tākehe;
- Ngāti Pākau at Tākehe and Punakitere;
- Te Rouwawe at Moehau, Waimā, and Tākehe;
- Ngāi Tū at Ōtāua, Punakitere, and Tākehe;
- Ngāti Whātua at Waimā, Moehau, and Motukiore; and

- Te Whānaupani at Hōreke and Utakura.[38]

1.5.1.2 *Whangaroa*

Whangaroa sits north of both Waimate–Taiāmai ki Kaikohe and Takutai Moana and to the north-east of Hokianga, extending to the northernmost point of our inquiry district. Claimants described the traditional rohe of Whangaroa hapū and whānau as the area bounded by 'the Takou River in the South and the Orua-iti River in the North, together with the traditional fishing grounds and islands off the coast of the mainland'.[39] Yet, they also stressed the difficulty of fitting hapū neatly within stable geographic boundaries. They have therefore 'developed a historico-political identity that is distinct from both Ngapuhi and Ngati Kahu'.[40]

The claimants provided evidence on the following Whangaroa hapū and some of their marae and areas of significance:

- Ngāti Rua at Taupō Marae;
- Ngāti Rangimatamomoe and Ngāti Rangimatakakaa at Ōtangaroa Marae;
- Ngāti Hoia and Mangawhero at Waihapa Marae;
- Ngāti Rēhia at Tākou Bay;
- Ngāti Kura, Ngāti Miru, Ngāti Rēhia among others at Tapui;
- Ngāi Tupango at Te Ngāere;
- Ngāti Ruamahue at Wainui;
- Ngāti Kawau at Karangahape Marae;
- Ngāti Pakahi at Mangaiti Marae; and
- Ngāti Uru, Ngāti Pakahi, and Te Whānaupani at Te Patunga Marae.[41]

1.5.1.3 *Waimate–Taiāmai ki Kaikohe*

The richness of Waimate–Taiāmai ki Kaikohe land provided the opportunity for Waimate–Taiāmai hapū to enter into early economic relations with Pākehā traders and whalers. The volcanic soil of the Taiāmai plains was ideal for food production and, guarded by pā on surrounding hilltops, the plains became known as 'the gardens of Ngapuhi'.[42] Waimate–Taiāmai ki Kaikohe is situated between Takutai Moana on the east coast and Hokianga on the west. Whangaroa is to its immediate north, and Mangakāhia is to its south.[43]

38. We note Dr Hohepa's important qualificiation; he added that though we can list the hapū of Hokianga and their various centres today, in the past each hapū 'not only had their "kōwhao" or main haukāinga, but also merged into other "kōwhao" because of genealogy links, whanaungatanga, and the like': Patu Hohepa, 'Hokianga: From Te Korekore to 1840' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2011) (doc E36), pp 180, 181–183.

39. Opening statement for Whangaroa taiwhenua (doc E45), p 10.

40. Opening statement for Whangaroa taiwhenua (doc E45), p 14.

41. Opening statement for Whangaroa taiwhenua (doc E45), pp 25–31.

42. Opening statement for Te Waimate–Taiāmai and Kaikohe taiwhenua (doc E58(d)), p 5; Vincent O'Malley and John Hutton, 'The Nature and Extent of Contact and Adaptation in Northland, c1769–1840' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2007) (doc A11), p 145.

43. Opening statement for Te Waimate–Taiāmai and Kaikohe taiwhenua (doc E58(d)), pp 2–3.

The claimants provided evidence on the following Waimate–Taiāmai ki Kaikohe hapū and some of their areas of significance and marae:

- Ngāi Tawake ki te Tuawhenua, Ngāti Tautahi, Ngāti Rēhia, Te Uri Taniwha, Ngāti Kiripaka, Te Whānau Tara, Ngāti Hineira, Te Mounga, Ngāti Korohue, and Te Whiu at Te Waimate;
- Te Uri Taniwha, Te Whānau Tara, Ngāti Hineira, Ngāti Whakahotu, and Ngāti Korohue at Te Ahuahu;
- Ngāti Mau, Ngāti Rangi, Te Uri Taniwha, Te Whānau Wai, and Ngāti Kiriahi at Ōhaeawai/Ngāwhā;
- Ngāti Ueoneone, Ngāti Kura, Te Uri o Hua, Ngāti Whakaeke, Ngāti Tautahi, and Te Takoto Ke at Kaikohe;
- Ngāi Tawake ki te Waoku at Matarāua; and
- Ngāre Hauata and Te Urikapana at Oromāhoe/Pākaraka.[44]

1.5.1.4 *Takutai Moana*

The hapū coalition Ngā Hapū o Te Takutai Moana (Takutai Moana), which was formed in July 2009, covers a coastal area spanning the north and south of the Bay of Islands, and is bordered by Whangaroa to the north, Waimate–Taiāmai ki Kaikohe to the west, and Whāngārei to the south. Takutai Moana interests consequently often overlap with those of Waimate–Taiāmai ki Kaikohe, and also with hapū from Whangaroa, Whāngārei, and Mangakāhia. There are more claims relating to Takutai Moana than for any other taiwhenua in this inquiry.[45]

The claimants provided evidence on the following Takutai Moana groups and some of their marae and areas of significance:

- Ngāti Rēhia at Tākou, Whitiora, and Hiruharama Hou Marae;[46]
- Ngāti Rāhiri, Ngāti Kawa, and Te Matarahurahu at Oromāhoe;[47]
- Ngāti Kuta and Patukeha at Te Rāwhiti;[48]
- Ngāti Hine at Ōtiria, Te Rito, Kawiti, Kaikou, Miria, Mohinui, Matawaia, Waimahae, and Mōtatau Marae,[49]
- Ngāti Manu at Te Karetu Marae;[50] and
- Te Kapotai at Waikare.[51]

44. Opening statement for Waimate–Taiāmai and Kaikohe taiwhenua (doc E58(d)), p 3.
45. Opening statement for Ngā Hapū o Te Takutai Moana Collective (doc E49), p 5.
46. Te Huranga Hohaia (doc D8), p 12; Tony Walzl, 'Ngati Rehia Overview Report' (commissioned research report, Kerikeri: Ngāti Rehia Claims Group, 2015) (doc R2), p 12.
47. Opening statement for Ngā Hapū o Te Takutai Moana Collective (doc E49), p 63.
48. Opening statement for Ngā Hapū o Te Takutai Moana Collective (doc E49), p 58.
49. Ngāti Hine identified a number of marae in their evidence which are located in the Takutai Moana, Whāngārei, and Mangakāhia taiwhenua. We note that these taiwhenua do not have defined borders, but were chosen by the claimants as general areas for the purposes of hearings: Ngāti Hine evidence: rangatiratanga (doc M24), p 31; opening statement for Ngā Hapū o Te Takutai Moana Collective (doc E49), p 5.
50. Opening statement for Ngā Hapū o Te Takutai Moana Collective (doc E49), p 60.
51. Opening statement for Ngā Hapū o Te Takutai Moana Collective (doc E49), p 14.

1.5.1.5 *Whāngārei*

The Whāngārei taiwhenua sits south of Takutai Moana, east of Mangakāhia, and north of Mahurangi, though Whāngārei and Mahurangi are separated by a stretch of Kaipara land. Prominent geographic features of Whāngārei include a long coastline renowned for its kaimoana, rolling volcanic hills, wetlands drained of water and kai to create farmland, and the spring waters at Porotī sourced from the Whatitiri maunga. The taiwhenua is home to the small city of Whāngārei, which differentiates it to some degree from the remainder of the largely rural inquiry district. The maunga Parihaka dominates the urban centre. The harbour is fringed with mangroves and overlooked by the maunga Manaia, one of the poupou supporting Te Whare Tapu o Ngāpuhi.

Whāngārei hapū are located in something of a border zone between major southern and northern iwi, so that groups such as Patuharakeke affiliate strongly to Ngāpuhi, Ngāti Wai, and Ngāti Whātua.[52] Whāngārei claimants have participated in Tribunal inquiries for the Te Roroa and Kaipara districts. It is a region of complex intertribal relations.[53]

The claimants provided evidence on the following Whangārei hapū and some of their marae and areas of significance:

- Te Parawhau at Terenga Parāoa Marae;[54]
- Te Waiariki at Ngunguru Bay;[55]
- Te Orewai, a hapū of Ngāti Hine, at Tau Henare Marae;[56]
- Ngāti Hau at Pehiaweri Marae;[57]
- Patuharakeke at Takahiwai Marae;[58] and
- Ngātiwai at Tuparehuia, Matapōuri, Punaruku, Pātaua, Otetao, Mōkau, Oākura, and Whananaki.[59]

1.5.1.6 *Mangakāhia*

The Mangakāhia taiwhenua is where the rohe of Ngāti Hine, Te Parawhau, and Ngāti Whātua intersect. The area, claimant Te Ringakaha Tia-Ward told us, is 'a place of genealogical convergence'.[60] Geographically, it is situated in the interior of the inquiry district, south of Te Waimate–Taiāmai ki Kaikohe and west of Whāngārei. Mangakāhia is to a considerable extent defined by its relationship to the river that runs through its centre. Sourced from within the Tūtāmoe Ranges

52. Opening submissions for Wai 745 and Wai 1308 (#3.3.71), p 3.
53. opening statements for the Whāngārei taiwhenua (doc E46), pp 2–3.
54. opening statements for the Whāngārei taiwhenua (doc E46), p 9.
55. opening statements for the Whāngārei taiwhenua (doc E46), p 17.
56. Ngāti Hine evidence: rangatiratanga (doc M24), p 31; Te Orewai Te Horo Trust, statement of claim, 31 August 2008 (Wai 1753, claim 1.1.280, SOC 280), p 5; opening statements for the Whāngārei taiwhenua (doc E46), p 7.
57. Ngā Hapū ō Whāngārei site visit booklet, pt B (doc I45), p 26.
58. Ngā Hapū ō Whāngārei site visit booklet, pt A (doc I44), p 17.
59. Opening statements for the Whāngārei taiwhenua (doc E46), pp 6–7; 'Ngātiwai Marae', Ngātiwai, http://www.ngatiwai.iwi.nz/marae.html, accessed 20 September 2020.
60. Te Ringakaha Tia-Ward (doc J7), p 3.

and extending to Hokianga, the Mangakāhia River is at the heart of the claimants' identity and their whanaungatanga.[61]

Their geographical situation has meant that Mangakāhia hapū are deeply connected to neighbouring iwi and hapū.

The claimants provided evidence on the following Mangakāhia hapū and some of their marae and areas of significance:

- Te Kumutu, Ngāti Toki, Ngāti Moe, Ngāti Whakahotu, and Ngāti Horahia at Parahaki Marae;
- Ngāti Toki, Ngāti Horahia, and Ngāti Te Rino (a hapū of Ngāti Hine) at Te Tarai o Rāhiri Marae at Pakotai;
- Ngāti Te Rino at Te Aroha Marae at Parakao;
- Te Parawhau at Korokota Marae at Titoki; and
- Te Uriroroi, Te Parawhau, and Te Māhurehure at Maungarongo Marae at Porotī.[62]

1.5.1.7 *Mahurangi and the Gulf Islands*

Mahurangi, including the Gulf Islands, is the southernmost taiwhenua of the inquiry district. It stretches from Pakiri in the north to Waitematā in the south, and east to Aotea (Great Barrier Island) and the other islands off the east coast traditionally known as Ngā Poitu o te Kupenga o Toi Te Huatahi.[63] Mahurangi is the location of an intricate layering of affiliations between resident and neighbouring iwi and hapū. Prominent iwi and hapū in the district include Te Kawerau, Ngāti Whātua, Te Uri o Hau, Ngāti Rehua, Ngātiwai, and the various Hauraki iwi and hapū.[64] It is also geographically separated from the other taiwhenua by the boundaries of the Kaipara inquiry district. The peoples of this rohe have intimate connections with Kaipara, Te Tai Tokerau, Tāmaki Makaurau, Hauraki, Te Moana-nui-o-Toi/Tikapa Moana, and Tainui.

We received evidence on the following Mahurangi and Gulf Islands hapū and iwi and some of their marae and areas of significance:

- Ngāi Tawake and Ngāti Rēhia at Te Whetu Marama Marae;
- Ngāti Whātua and Ngāti Manu at Mahurangi;[65]
- Ngāpuhi ki Tāmaki Makaurau, Ngāti Rongo, and Te Kawerau ā Maki at the Mahurangi Coast;
- Ngāti Rehua at Aotea; and

61. Opening statement for the Mangakāhia taiwhenua (doc E54), pp 1–2.
62. Closing statement for the Mangakāhia taiwhenua (#3.3.293(a)), pp 5–12; Ngāti Hine evidence: rangatiratanga (doc M24), p 31.
63. Michael Beazley (doc K8), p 8.
64. Peter McBurney, summary of 'Traditional History Overview of the Mahurangi and Gulf Islands Districts' (doc A36(b)), p 2.
65. Walzl, 'Ngati Rehia Overview Report' (doc R2), p 299; Barry Rigby, 'The Crown, Maori, and Mahurangi, 1840–1881' (commissioned research report, Wellington: Waitangi Tribunal, 1998) (doc E18), pp 24–25.

- Ngāti Manuhiri at Pakiri.[66]

1.5.2 Settlement legislation affecting the Tribunal's jurisdiction

Since hearings began, some of the 415 claims originally consolidated or aggregated into this inquiry – particularly those on the border of our inquiry district – have been negotiated and settled with the Crown by means of Treaty settlement legislation. The effect of these settlement Acts determines the extent to which the Tribunal can inquire into and report on particular claims.

Historical claims are fully settled in settlement legislation if they relate exclusively to the the group that has settled. Where a claim is brought by any Māori or group of Māori on the basis of an affiliation to a different group from the group that has settled, and the claimant can establish that affiliation, then the claim falls within the Tribunal's jurisdiction. Where only parts of a claim relate to other interests outside of the group that has settled, then the claim is only settled to the extent that it relates to the settling group.

While claims outside the Tribunal's jurisdiction can inform and provide context for some events that may be outlined in this report, no findings or recommendations can be made in relation to them.

1.5.2.1 *Settlement legislation fully or partially removing the Tribunal's jurisdiction*

Schedule 3 to the Treaty of Waitangi Act 1975 lists sections in settlement legislation prohibiting the Tribunal from further investigating settled historical claims. Several pieces of settlement legislation affect this inquiry's scrutiny of issues:

- Section 17(3) of the Te Uri o Hau Claims Settlement Act 2002 removed the Tribunal's jurisdiction to inquire into or to make findings or recommendations on settled Te Uri o Hau claims.
- Section 13(2) of the Te Roroa Claims Settlement Act 2008 removed the Tribunal's jurisdiction to inquire into or to make findings or recommendations on settled Te Roroa claims.
- Section 14(4) of the Ngāti Manuhiri Claims Settlement Act 2012 removed the Tribunal's jurisdiction to inquire into or to make findings or recommendations on settled Ngāti Manuhiri claims.
- Sections 13(4) and 13A(5) of the Ngāti Whātua Ōrākei Claims Settlement Act 2012 removed the Tribunal's jurisdiction to inquire into or to make findings or recommendations on settled Ngāti Whātua Ōrākei claims.[67]

66. Rigby, 'The Crown, Maori and Mahurangi' (doc E18), pp 12–13; Peter McBurney, 'Traditional History Overview of the Mahurangi and Gulf Islands Districts' (commissioned research report, Wellington: Mahurangi and Gulf Islands District Collective and Crown Forestry Rental Trust, 2010) (doc A36), pp 81–86, 595–596.

67. Beyond the standard exclusion clause relating to a claim being brought on virtue of descent from an ancestor other than one of the settling group, Ngāti Whātua Ōrākei historical claims also do not include claims founded on a customary right exercised by one or more hapū predominantly outside the primary area of interest of Ngāti Whātua Ōrākei at any time after 6 February 1840: Ngāti Whātua Ōrākei Claims Settlement Act 2012, s 12(4)(a)(ii).

- Section 14(4) of the Ngāti Whātua o Kaipara Claims Settlement Act 2013 removed the Tribunal's jurisdiction to inquire into or to make findings or recommendations on settled Ngāti Whātua o Kaipara claims.
- Section 15(4) of the Ngāi Takoto Claims Settlement Act 2015 removed the Tribunal's jurisdiction to inquire into or to make findings or recommendations on settled Ngāi Takoto claims.
- Section 15(4) of the Ngāti Kuri Claims Settlement Act 2015 removed the Tribunal's jurisdiction to inquire into or to make findings or recommendations on settled Ngāti Kuri claims.
- Section 15(4) of the Te Aupouri Claims Settlement Act 2015 removed the Tribunal's jurisdiction to inquire into or to make findings or recommendations on settled Te Aupouri claims.
- Section 15(4) of the Te Rarawa Claims Settlement Act 2015 removed the Tribunal's jurisdiction to inquire into or to make findings or recommendations on settled Te Rarawa claims.
- Section 14(4) of the Te Kawerau ā Maki Claims Settlement Act 2015 removed the Tribunal's jurisdiction to inquire into or to make findings or recommendations on settled Te Kawerau ā Maki claims.
- Section 15(4) of the Ngāti Pūkenga Claims Settlement Act 2017 removed the Tribunal's jurisdiction to inquire into or to make findings or recommendations on settled Ngāti Pūkenga claims.
- Section 15(4) of the Ngāi Tai ki Tāmaki Claims Settlement Act 2018 removed the Tribunal's jurisdiction to inquire into or to make findings or recommendations on settled Ngāi Tai ki Tāmaki claims.

1.5.2.2 *The Ngatikahu ki Whangaroa Claims Settlement Act 2017*

Section 15(6) of the Ngatikahu ki Whangaroa Claims Settlement Act 2017 preserved the Tribunal's jurisdiction to complete and release reports on those historical claims of Ngatikahu ki Whangaroa that are heard in the Wai 1040 Te Paparahi o Te Raki inquiry. Those historical claims therefore remain within the Tribunal's jurisdiction for the purposes of this report.

1.5.3 Structure of part 1 of the stage 2 report

This first part of our stage 2 inquiry report primarily addresses issues arising from the claims up to 1900.

In chapter 2, we begin by considering the implications for ngā mātāpono o te Tiriti (the principles of the treaty) of our stage 1 report conclusion that that there had been no cession of sovereignty in Te Raki. We outline how the Tribunal has developed its jurisprudence on treaty principles and state our own views on those that we consider important in this part of the inquiry in light of the conclusions of our stage 1 report.

We discuss the tribal landscape of the district in chapter 3. We introduce the peoples of Te Raki, where and how they lived, consider their relationships with the natural world, and their systems of law, authority, and social organisation.

In chapter 4, we examine how the Crown–Māori relationship was negotiated in the immediate post-treaty years, up to 1844.

We discuss the Northern War in chapter 5: its origins and impacts, the Crown's conduct of the war, and its approach to peace negotiations.

Chapter 6 considers the Crown's validation of pre-treaty and pre-emption waiver transactions (also known as old land claims) in a process that extended from 1840 well into the twentieth century.

In chapter 7, we discuss the extent of political engagement between Te Raki Māori and the Crown in the dynamic period following the Northern War up to 1865, during which the settlers achieved self-government.

The following chapters concern Crown purchasing and Māori land alienation in the nineteenth century (chapters 8 and 10) and the operation of the Native Land Court (chapter 9).

Finally, in chapter 11 we consider the relationship between Te Raki Māori tino rangatiratanga and kāwanatanga in the latter part of the nineteenth century. This chapter considers the determined efforts of Te Raki Māori to resist the Crown's assimilationist policies and to secure Crown recognition of their autonomy between 1865 and 1900.

CHAPTER 2

NGĀ MĀTĀPONO O TE TIRITI / THE PRINCIPLES OF THE TREATY

> Te Tiriti above all else envisages a relationship between two peoples who have agreed that the interests of both are strengthened by partnership.[1]
>
> —Erima Henare

2.1 Hei Tīmatanga Kōrero / Introduction: The Implications of our Stage 1 Report for ngā Mātāpono o te Tiriti / the Principles of the Treaty

The key issue that concerns us here is the implications for the ngā mātāpono o te Tiriti of our stage 1 report conclusion that there was no cession of sovereignty in Te Raki when the rangatira entered into a treaty agreement with the Crown at Waitangi, Waimate, and Mangungu in February 1840.

The Waitangi Tribunal, established by the Treaty of Waitangi Act 1975, is charged with making recommendations on claims 'relating to the practical application of the principles of the Treaty and, for that purpose, to determine its meaning and effect and whether certain matters are inconsistent with those principles'.[2] The Treaty of Waitangi Amendment Act 1985 extended our jurisdiction, amending the 'certain matters' to include legislation, regulations, or proclamations passed or issued on or after 6 February 1840, and policies of the Crown, or acts or omissions on the part of the Crown, on or after the same date.[3] The Tribunal can inquire into and make recommendations on claims made by any Māori that he or she, or any group of Māori to which they belong, could be prejudicially affected by these acts, policies, or omissions.

The principles are not defined in any way in our governing legislation. It is left for the Tribunal itself to define the principles against which Crown actions will be tested. Each Tribunal panel, as it reports on the claims it is hearing in any given inquiry, decides which principles are appropriate for that inquiry. No Tribunal is bound by the decisions of a previous Tribunal inquiry (or the courts). A Tribunal inquiry panel may develop principles outlined in a previous inquiry, or add new principles.

Section 5(2) of the Treaty of Waitangi Act requires that the Tribunal:

1. Erima Henare (doc E49(k)), p 14.
2. Treaty of Waitangi Act 1975, preamble.
3. Treaty of Waitangi Amendment Act 1985, s 3 (1).

shall have regard to the 2 texts of the Treaty set out in Schedule 1 and, for the purposes of this Act, shall have exclusive authority to determine the meaning and effect of the Treaty as embodied in the 2 texts and to decide issues raised by the differences between them.

In our stage 1 report, we set out our conclusions on the meaning and effect of the treaty, and its significance for the claims in our inquiry:

- We are bound by our legislation to regard the treaty as comprising two texts, though once we have considered the English text with an open mind, we are under no obligation to find some sort of middle ground of meaning between the two versions.
- We agree with the approach adopted by the Tribunal in previous reports, which has given special weight to the Māori text in establishing the treaty's meaning and effect; they have done so because the Māori text was the one that was signed and understood by the rangatira – and indeed, signed by Hobson himself. Where any ambiguity arises between the two texts, the Māori text should be accorded 'considerable weight'.[4]

In so exercising its jurisdiction, the Tribunal has from the outset considered, in particular, the relationship between article 1 and article 2 of the treaty, as well as the significance of the wording of those articles in both Te Reo Māori and in English. In various inquiries, the Tribunal has reached different conclusions about the agreement at Waitangi and about whether the treaty was a treaty of cession. But it has been generally, if not always, accepted that Māori did cede sovereignty to the Crown. That has had implications for the treaty principles the Tribunal has articulated and applied over the years (as we will discuss further).

In this report, we face a set of circumstances that have not arisen before in a district inquiry. We held a wide-ranging preliminary inquiry which, at the request of Ngāpuhi, focused not on claims against the Crown arising after the signing of te Tiriti but on the relationship of Ngāpuhi hapū with the Crown in the two decades preceding its signing. Ngāpuhi sought Tribunal hearings on the significance of He Whakaputanga o te Rangatiratanga o Nu Tireni/the Declaration of the Independence of New Zealand (1835) and the signing, in February 1840, of te Tiriti. They did so to reflect what they considered to be the particular circumstances in which those two agreements were entered into, given that their rangatira were the first in Aotearoa to engage in both. They submitted that their post-1840 Tiriti claims must be considered and understood in light of these particular circumstances and these agreements.

In 2014, we released a stage 1 report that emphasised the treaty's unique position in Te Paparahi o te Raki. We concluded, on the basis of the extensive evidence before us – including evidence that had not been available to other Tribunal inquiries – that Ngāpuhi had not ceded sovereignty when they signed te Tiriti.

4. Waitangi Tribunal, *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry*, Wai 1040 (Wellington: Legislation Direct, 2014), pp 521–522.

This means that our approach to treaty principles differs from that of a number of other Tribunal inquiry panels and from that of the courts, which have stated that the Crown proclaimed sovereignty in 1840 over the North Island by virtue of 'the rights and powers ceded . . . by the Treaty of Waitangi', and over the South Island on the grounds of discovery.[5]

Our view, which we explain further in this chapter, is that we must consider if, or how, our understanding of treaty principles may evolve, both in light of our stage 1 report, and through the exploration of various principles in other Tribunal reports as applied to a range of contexts.[6] In Te Raki, it may no longer be appropriate to rely on principles that are based in a cession of sovereignty by rangatira to the Crown. The treaty principles we apply must reflect the expectations and understandings of Te Raki Māori that have arisen from the history of their relationship with the British Crown and from the undertakings given to them at the treaty ceremonies. They must not be preoccupied with the intentions of the British, who in any case, as we have shown in stage 1 of our inquiry, did not reveal their full intentions and expectations to Māori.[7]

The principles must be based in the actual agreement entered into in 1840 between Te Raki rangatira and the Crown, rather than in an assumption that sovereignty was ceded by Māori, who would become the Queen's subjects in return for the protection 'of their chieftainships and possessions'.[8] That was not the exchange that took place in Te Raki. Here, Māori leaders agreed to share power and authority with the Governor, though they would have different roles and different spheres of influence. They understood that they had received assurances from the Crown that they would retain their independence and chiefly authority, and they also understood that through the treaty, the Crown and its agents asked for authority (kāwanatanga) to control the Europeans. This was the arrangement to which they consented. They appear, too, to have agreed that the Crown would protect them from foreign threats and represent them in international affairs, where that was necessary.[9]

In stage 1 of our inquiry, we raised the question of the implications of our conclusions for the principles of the treaty and suggested that counsel might make submissions on it in stage 2. Many counsel took this opportunity, and we summarise their submissions later.

In subsequent sections, we outline the Tribunal's views on treaty principles and on the meaning and effect of the treaty as developed in its various reports over several decades. More importantly, we set out the basis of our own views

5. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 690 (cited in Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 438).

6. Janine Hayward, "Flowing from the Treaty's Words": The Principles of the Treaty of Waitangi', in Janine Hayward and Nicola Wheen (eds), *The Waitangi Tribunal/Te Roopu Whakamana i te Tiriti o Waitangi* (Wellington: Bridget Williams Books, 2004), p 40.

7. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 519–526.

8. *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 at 663 (cited in Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 438).

9. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 527–529.

on ngā mātāpono o te Tiriti/the principles of the treaty. We do not suggest that treaty principles be dispensed with – indeed, this would hardly be compatible with our jurisdiction – or that they be substantially revised. But, as we noted in the stage 1 report, no earlier Tribunal inquiry has received the full range of evidence and arguments that we have about the broader historical context for the crucial events of 6 February 1840; the hui and whaikōrero that culminated in the signing of te Tiriti at Waitangi, Waimate, and Mangungu; and the significance of He Whakaputanga o te Rangatiratanga o Nu Tireni. We are the first to have had that opportunity.[10] Based on that evidence, in the context of the developing relationship between Ngāpuhi and the British Crown, we drew our conclusions about the nature of the agreement reached at Waitangi, and that is also our starting point for reconsidering ngā mātāpono o te Tiriti/the principles of the treaty. We emphasise that, as in every Tribunal inquiry, our focus is on the significance of te Tiriti to the claimant hapū and iwi of this inquiry district.

In this chapter we consider those principles that we regard as most significant to the issues of part 1 of our stage 2 report; that is, matters relating to the engagement of Te Raki Māori with the Crown, Te Raki autonomy, and Crown policies that affected Māori lands between 1840 and approximately 1900. We may add to these principles in subsequent volumes of this report. Throughout, we express the treaty principles in both te reo Māori and in English, as claimants invited us to do.

Nā te māngai mō ngā kerēme o te reo o Ngāpuhi me te reo Māori, Ms Thomas, i whakatakoto mai ana kōrero e pā ana ki te kaupapa o Te Reo Māori i roto tonu i te reo Māori. Ka whakatakotoria te mānuka e ngā kaikerēme kia reo māori ngā mātāpono. Ka hikina e mātou tēnā mānuka. Nā reira, mēnā he mātāpono reo māori tā ngā kaikerēme ka whai mātou i a rātou mātāpono reo Māori. Ā, ka āta tirohia e mātou ngā ripota o Te Rōpū Whakamana i te Tiriti o Waitangi. I ētahi wā, kua āta ruku hoki mātou i ētahi whakamāramatanga o Ms Thomas.[11]

2.2 Claimant and Crown Positions on te Tiriti / the Treaty and its Principles, and the Rights and Duties of Treaty Partners

2.2.1 The claimants' generic submissions on the implications of the stage 1 report for treaty principles

Claimant counsel expressed a range of views. Claimants generally agreed that the principles should now be interpreted in light of the conclusions of the stage 1 report. A number of counsel considered that this meant questioning or re-evaluating some established principles; others did not.

10. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 433.

11. Counsel for the Te Reo o Ngāpuhi and Te Reo Māori claimants in our inquiry, Ms Alana Thomas, provided her submissions, including the principles relevant to the issue of Te Reo Māori, in te reo. Claimants challenged us to provide the principles in te reo, and we have accepted that challenge. We have drawn on principles in te reo provided by claimants, and occasionally have sought clarification from Ms Thomas. We have also considered explanations of principles given in other Tribunal reports.

Janet Mason, counsel who presented generic submissions for the claimants on Issue 1 in our inquiry (Tino Rangatiratanga, Kāwanatanga, and Autonomy), submitted that the principles must be revised. As the Crown wrongly relies upon the treaty being a treaty of cession, she argued that there are consequences for the way the treaty principles are understood and applied. Counsel challenged the basis of several principles, widely considered central to treaty jurisprudence, as set out in the Tribunal's *Te Tau Ihu o te Waka a Maui*: *Report on Northern South Island Claims* (2008) and on its website, notably partnership, reciprocity, autonomy, and active protection. For instance, the principle of reciprocity, which she cited, emphasises that partnership 'between the races' is a reciprocal one, involving fundamental exchanges. It states that 'Māori ceded to the Crown the kāwanatanga (governance) of the country in return for a guarantee that their tino rangatiratanga (full authority) over their land, people, and taonga would be protected.'[12] She argued that it is clear from this statement of the principles that the Tribunal's position in *Te Tau Ihu* – consistent with the position of the courts and the executive – was premised on 'the fundamental, and incorrect, view that te Tiriti/the Treaty was a treaty of cession.'[13] In light of the Tribunal's conclusions in the stage 1 report,

> the Principle that the Crown acquired rights of governance over all Māori and over all of New Zealand must now be called into question. This cannot be a Principle given that it is not actually what the bargain under te Tiriti/the Treaty was.[14]

In other words, counsel stated, the claimants were not disputing that the Crown, under the laws of New Zealand, holds and exercises sovereignty; their argument was that the sovereignty the Crown purports to exercise does not derive from from the treaty.

Ms Mason cited legal expert Professor Jane Kelsey's evidence in our inquiry to the effect that the stage 1 report offered the opportunity to revisit treaty principles and 'restore tino rangatiratanga and tikanga Māori' to their core; as the stage 1 report said, the treaty principles 'must inevitably flow' from the agreement between Māori and the Crown in February 1840.[15] Therefore, counsel argued, the principles must be revised in this report to accommodate the Tribunal's conclusion that there was no cession of sovereignty in the treaty.[16] She considered their application not only to historical claims but also to current circumstances.[17] Her submission focused on the Crown's present 'heightened duty' as it exercised its 'de facto sovereignty' to protect Māori rights and interests until Te Raki Māori and the

12. Claimant closing submissions (#3.3.228), p 114; see also Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, Wai 785, 3 vols (Wellington: Legislation Direct, 2008), vol 1, pp 2–8.
13. Claimant closing submissions (#3.3.228), p 118.
14. Claimant closing submissions (#3.3.228), p 131.
15. Claimant closing submissions (#3.3.228), pp 118–119, 126.
16. Claimant closing submissions (#3.3.228), pp 120–121.
17. Claimant closing submissions (#3.3.228), pp 135–136.

Crown agreed on a constitutional framework and mechanisms to give effect to the partnership consistent with the treaty negotiated in 1840.[18]

Counsel focused in particular on the 'revised principle' of partnership (under which 'it is accepted that te Tiriti/the Treaty was not a treaty of cession'), submitting that the treaty instead envisaged 'three spheres of authority':

- the British Crown governing its subjects over land 'legitimately' acquired by it or them ('British Authority');[19]
- Māori tino rangatiratanga over Māori peoples, lands, and other taonga ('Māori Authority'); and
- a partnership, to be discussed and agreed to where Māori and English populations intermingled ('Shared Authority').[20]

This was, she argued, the nature of the partnership understood in February 1840, and against which Crown conduct must be assessed.[21] Counsel also pointed to the duty of each partner to act reasonably and 'with the utmost good faith' towards the other, as a corollary of the duty of partnership.[22] In her submission, the 'de facto sovereignty currently exercised by the Crown must be re-negotiated without undue delay to give effect to the Partnership that was envisaged under te Tiriti/the Treaty'. In her discussion of the principles, she stated that under the treaty, the British Crown was given the right to exercise kāwanatanga over its settlers and over the land they 'legitimately' acquired. But the Crown had unilaterally enlarged that authority to usurp the sphere of Māori authority, and it had also acted 'unilaterally in the Shared Authority Sphere', to the detriment of Māori.[23] Counsel's submissions on the revised principles of active protection and rangatiratanga pointed to how the Crown might best exercise the authority it had 'usurped' until it agreed with Te Raki Māori on a new, treaty-consistent constitutional structure and on a

18. She stated that the revised principles she had proposed came from an amalgamation of principles from the 1987 *Lands* case decided by the Court of Appeal, those devised by the executive, and those of the Tribunal as set out in its *Te Tau Ihu* report: claimant closing submissions (#3.3.228), pp 135, 137.

19. Counsel suggested that 'no more than 5% of the dry land of Aotearoa New Zealand had been 'legitimately' acquired, and that these were the only areas where the Crown was entitled to exercise kāwanatanga, along with the '3% of the population at 1840 who were non-Maori'. Hence, these lands and peoples were the limit of the Crown's kāwanatanga rights: claimant closing submissions (#3.3.228,), p 141. Some other counsel took issue with the suggestion that five per cent of the land had been 'legitimately' acquired: closing submissions for Wai 602 and Wai 1508 (#3.3.293), pp 5–7'closing submissions for Wai 1507 (#3.3.257), pp 8–14;

20. Counsel stated that she derived her three spheres from the Tribunal's conclusion on the meaning of te Tiriti, and 'characterised' them 'as essentially identifying 3 distinct spheres of "sovereignty" co-existing under te Tiriti/the Treaty as at 1840'. Elsewhere she used the term 'three spheres of authority': claimant closing submissions (#3.3.228), pp 7–8, 136. The Tribunal did not use either term, as more than one other counsel pointed out. It referred to the rangatira agreeing to share power with the Governor, as equals – 'although of course they had different roles and different spheres of influence': Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 526–527.

21. Claimant closing submissions (#3.3.228), p 136.

22. Claimant closing submissions (#3.3.228), p 140.

23. Claimant closing submissions (#3.3.228), p 140.

process for the realisation of the exercise of tino rangatiratanga.[24] The Crown must also observe the principles of informed decisions and equity (so that the interests of settlers are not prioritised to the detriment of Māori), and redress (where there have been Tribunal recommendations regarding breaches of the treaty, these ought to be implemented).

Her final principle was that of fiduciary obligations. Counsel submitted that the Crown owes Māori a fiduciary obligation in relation to:

- all property for which the Crown has a pre-emptive right;
- its de facto exercise of authority of Te Raki Māori peoples, lands, and other taonga; and
- the tino rangatiratanga of Te Raki Māori over their peoples, territories, lands, and other taonga.

She cited the June 1987 case of *New Zealand Maori Council v Attorney-General* (the *Lands* case), which describes the responsibilities of the Crown as a treaty partner as 'analogous to fiduciary duties', requiring not merely 'passive' duties of the Crown but 'active protection' of Māori 'in the use of their lands and waters to the fullest extent practicable'.[25] More recently, she submitted, in the case of *Proprietors of Wakatū v Attorney-General*, the Supreme Court has confirmed the Crown's fiduciary obligations, 'at least in relation to matters of property'. 'Whether [the Crown] owes fiduciary obligations in other matters', counsel summarised, 'is to be assessed on a case-by-case basis.'[26]

Counsel added guidelines for decision-making to implement mechanisms giving effect to the treaty partnership. We return to her submissions about guidelines for the future in a subsequent volume of our report.

2.2.2 Specific claimant submissions on the implications of the stage 1 report for treaty principles

A number of counsel responded to the Tribunal's invitation to make supplementary submissions on treaty principles. Some adopted the generic closings as a whole, while others adopted certain paragraphs but dissented from others.[27] In broad terms, the various positions of claimant counsel may be summarised as follows:

- criticism of those principles that are based on the premise that the treaty was a treaty of cession by which the Crown acquired sovereignty; such principles should be reviewed or revised to reflect the fact that the relationship between Te Raki Māori and the Crown is one of equals;

24. Claimant closing submissions (#3.3.228), pp 137–138.
25. Claimant closing submissions (#3.3.228), p 143; *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641, p 664.
26. *Proprietors of Wakatū v Attorney-General* [2017] 1 NZLR 423 (SC); claimant closing submissions (#3.3.228), p 143.
27. Closing submissions for Wai 774 (#3.3.391), p 7; supplementary submissions for Wai 234, Wai 246, and others (#3.3.231), pp 2–3; supplementary closing submissions for Wai 320, Wai 736, Wai 1307, Wai 1140, Wai 1958, Wai 2062, and Wai 2476 (#3.3.234), p 3.

- affirmation that the stage 1 report findings mean that the Crown is held to a higher standard in this inquiry, in order to give effect to the guarantees in the treaty and protect the mana of rangatira; the Crown's duties should accord with what Māori understood partnership to mean, and the expectations that they held of the Crown, when they signed te Tiriti;
- uneasiness with treaty principles that derive from the Crown's own statement of principles in the 1980s or with those defined by the courts. In particular, it was submitted that the principle of active protection should be revisited in light of the conclusion of the stage 1 report that sovereignty was not ceded by the rangatira of Te Raki. Further, the principle of autonomy/rangatiratanga should replace that of partnership as the overriding principle;
- affirmation of existing principles, though some modification may be necessary; and resistance to the position adopted in generic submissions – namely, that the Tribunal should disregard past Tribunal jurisprudence;[28]
- commitment to the principles being expressed and discussed in te reo Māori; and
- reconsideration of the rights and obligations of the parties to the treaty arising from the principles.[29]

In this section, we outline some of counsels' key submissions in further detail.

Tu'inukutavake Afeaki, counsel for claimant Kingi Taurua (whose claim was made on behalf of Ngāti Kawa, Ngāti Rāhiri, and Ngāti Rēhia), submitted that the treaty principles argued were first laid out through the *Lands* case and have subsequently been defined by Parliament. Thus he argued that the 'principles' were 'conceived and developed from within a Pākehā sphere of legal discourse and Westminster-style judicial and political process, and the fact that it was done under the presumption that ultimate authority over Māori rested with the Crown'.[30]

The principles as expressed through the *Lands* case and defined by Parliament, Mr Afeaki asserted, were brought together unilaterally, without the claimants' input; and they 'confuse the true meaning of te Tiriti, irrespective of the fact that it is te Tiriti that Rangatira signed and made sacred and not the principles'.[31] He added, though, that while he applied the principles of the treaty in his submissions, this by no means indicated an acquiescence in or acceptance of the Crown's sovereignty over Mr Taurua or his tīpuna; this was simply the only path to securing a remedy.[32]

28. Closing submissions for Wai 774 (#3.3.391), p 13; supplementary submissions for Wai 49, Wai 682, Wai 1464, Wai 1546, Wai 68, Wai 149, Wai 455, Wai 565, Wai 1440, Wai 1445, Wai 1518, Wai 1520, Wai 1527, Wai 1551, Wai 1677, Wai 1710, and Wai 2182 (#3.3.241), p 27; synopsis of supplementary submissions for Wai 620 and Wai 1508 (#3.3.239), p 4.

29. The specific submissions of claimant counsel were summarised by counsel Janet Mason in her reply submissions on political engagement: submissions in response regarding political engagement (#3.3.450), pp 199–244.

30. Closing submissions for Wai 774 (#3.3.391), pp 12–13.

31. Closing submissions for Wai 774 (#3.3.391), p 13.

32. Closing submissions for Wai 774 (#3.3.391), p 16.

Yet te Tiriti itself, he submitted, laid the basis for a relationship:

> [it] brought together Māori and Pākehā as equal 'Treaty Partners'. So at a fundamental level there exists a duty on the Crown to treat the Claimants' tīpuna with the utmost respect for their Tikanga, Tino Rangatiratanga, and Mana. Each partner would act reasonably and in the utmost good faith toward each other.[33]

Season-Mary Downs, counsel for Te Rūnanga o Ngāti Hine and many named claimants, suggested that a number of core principles may need to be revised in light of the stage 1 report, given that they have hitherto been based on the Crown's assumption of sovereignty. Among them is the principle of partnership, which must now reflect the 'fundamental agreement in Te Tiriti that Maori and the Crown agreed to share power and authority with the Governor'. The principle of reciprocity no longer applies, she argued, in that it has also been based on the understanding that Māori ceded sovereignty of the country. Furthermore, the principle of active protection is now 'flawed where it maintains that the Crown's duty to actively protect flows from the Crown's sovereign right to govern'. If the Crown had observed the treaty agreement at 1840, then the duty of active protection 'would not need to exist today, because Maori would simply have exercised rangatiratanga'. Ms Downs submitted that other protective principles, such as that of equal treatment, also appear to assume that the Crown is sovereign, that it exercises 'an overarching superior authority, and as part of that authority, it must treat Māori equally'. But if the 1840 agreement were complied with, and Māori and the Crown both exercised authority in their respective spheres, 'there would be no need for these protectorate, fiduciary-type Treaty principles'.[34]

Dr Bryan Gilling, representing numerous claimant groups, stated that he had not identified any new principles, or any existing principles that had become superseded or incorrect.[35] Rather, some 'careful modification and rebalancing of order and weight' was required as a result of the Tribunal's conclusions of the stage 1 report for it to give effect to the spirit of the treaty.[36] In respect of partnership, he considered the overarching statements from the *Lands* case were still applicable; the Court of Appeal stated that the partners are required to act reasonably,

33. Closing submissions for Wai 774 (#3.3.391), p 14.

34. Supplementary closing submissions for Wai 49, Wai 682, Wai 1464, Wai 1546, Wai 68, Wai 149, Wai 455, Wai 565, Wai 1440, Wai 1445, Wai 1518, Wai 1520, Wai 1527, Wai 1551, Wai 1677, Wai 1710, and Wai 2182 (#3.3.241), pp 12–18.

35. Dr Gilling's supplementary submissions were made on behalf of the following claimants: Te Raa Nehua (Wai 246 and Wai 1148), Hemi-Rua Rapata (Wai 234), Karanga Pourewa (Wai 1312), Erimana Taniora (Wai 1333), Waitangi Wood (Wai 1661), Louie Katene (Wai 1684), Terry Tauroa (Wai 1843), Audrey Leslie (Wai 1943), Lisette Rawson (Wai 2254), Drew Hikuwai (Wai 1613), William Hikuwai (Wai 1838), Sailor Morgan (Wai 1846), Tahua Murray (Wai 2389), Te Huranga Hohaia (Wai 492 and Wai 1341), Robin Paratene (Wai 1726), John Davis (Wai 1753), Harry Mahanga (Wai 2027), Maiki Marks (Wai 2424), Dr Terence Lomax (Wai 605), Tarawau Kapa (Wai 1515), James Eruera (Wai 249 and Wai 2124), Ricky Houghton (Wai 1670), and Ken McAnergney (Wai 1940): supplementary submissions regarding Tiriti principles and the *Wakatu* decision (#3.3.231), pp 1–3.

36. Supplementary submissions regarding Tiriti principles and the *Wakatu* decision (#3.3.231), p 7.

honourably, and in good faith.[37] The principle comes from the nature or the 'spirit' of the agreement, in his view, rather than from any particular clause within it. And to the extent that the courts or the Tribunal have seen the principle of partnership as springing from a 'solemn exchange' of sovereignty for protection of tino rangatiratanga, this had been 'overturned' by the Tribunal's stage 1 conclusions.[38] Dr Gilling supported the emphasis of the generic submissions that the treaty was not one of cession but a treaty of partnership. Given that each party (as the Tribunal concluded in our stage 1 report) was to have their own sphere of authority and an equal say in the 'shared authority' sphere, Māori could not (as has been suggested by the Court of Appeal) be subordinated to the wishes and demands of the Crown in their own sphere or in the shared sphere. Rather, the relationship should be redefined as a true partnership, which reflects the equality of status of the partners.[39]

Dr Gilling suggested therefore that the principle of autonomy should be revised so that it encompasses 'the full extent of Te Raki Maori authority assured to them under Te Tiriti'.[40] Similarly, the Crown's duty remains of active protection of tino rangatiratanga (consistently reaffirmed by the Tribunal and the courts, and extended to a wide range of Māori interests).[41] Counsel considered the idea, which has previously informed Tribunal jurisprudence, that article 2 involved a fundamental exchange of the cession of sovereignty in return for the guarantee of tino rangatiratanga. He questioned whether this meant that the exchange was fundamental to the Crown's duty of active protection. In his submission it was not. The duty did not derive solely from article 2 but also from the preamble and article 3; the duty is thus explicitly set out when the treaty is read in its entirety.[42]

Counsel argued that despite our conclusion in the stage 1 report that there was no cession of sovereignty, the Crown's duty to actively protect tino rangatiratanga not only remained but was also heightened. He gave three reasons for this: first, that rangatira and the British representative signed a document that explicitly guaranteed their tino rangatiratanga; this had also been explained to the rangatira by Williams. Secondly, he submitted that it was the understanding of both parties that tino rangatiratanga should be protected; the British stressed their wish to acquire sufficient authority to control British subjects and to protect their authority, while rangatira did not 'regard kawanatanga as undermining their own status or authority'.[43] It was, and remains, the duty of the Crown to understand

37. Supplementary submissions regarding Tiriti principles and the *Wakatu* decision (#3.3.231), p 8.
38. Supplementary submissions regarding Tiriti principles and the *Wakatu* decision (#3.3.231), p 9.
39. Supplementary submissions regarding Tiriti principles and the *Wakatu* decision (#3.3.231), p 12.
40. Supplementary submissions regarding Tiriti principles and the *Wakatu* decision (#3.3.231), pp 15–16.
41. Supplementary submissions regarding Tiriti principles and the *Wakatu* decision (#3.3.231), pp 17–19.
42. Supplementary submissions regarding Tiriti principles and the *Wakatu* decision (#3.3.231), p 19.
43. Supplementary submissions regarding Tiriti principles and the *Wakatu* decision (#3.3.231), p 20.

what tino rangatiratanga means for Māori so that it can give meaningful and practical effect to their authority – a duty derived from the duty of active protection, said counsel.[44] Thirdly, counsel suggested that it is clear from the stage 1 report that an exchange between the Crown and Māori did occur – even if it did not involve a cession of sovereignty in exchange for protection of tino rangatiratanga. In the Tribunal's view, he said, the guarantee of tino rangatiratanga was in return for '*allowing the Governor a limited authority*' (emphasis in original). This reading of te Tiriti should be adopted.

Dr Gilling added that in light of the Crown's duty, it was important that it understood what tino rangatiratanga means for Māori, 'but there is no evidence that the Crown even attempted to find this out, let alone take meaningful steps to ensure its protection'.[45] Instead, he submitted, Te Raki Māori were treated 'as the constituent group in Te Tiriti and the subservient group within New Zealand', which meant that their guaranteed tino rangatiratanga 'has often been overridden by their imposed sovereign entity, the Crown'. That, he stated, is not the case with partners, each of whom should have its own sphere of authority, and each should work with the other 'reasonably, fairly, and in good faith . . . to make the sphere of shared authority work'.[46]

Other counsel saw no need to revise treaty principles – though this did not mean they discounted the significance of the conclusions reached at stage 1 of our inquiry.[47] Rather, they submitted that the responsibilities of the Crown to interpret existing principles consistently with the obligations recognised in the conclusions of the stage 1 report were heightened.

Te Kani Williams, submitting on behalf of claimants representing Kenana Te Ranginui Marae Trust, Pikaahu hapū, Ngāti Kuta ki Te Rawhiti, Patukeha hapū, the Te Reo o Ngāpuhi, and the Tohunga Suppression Act claims, questioned the legitimacy of the Crown's sovereignty.[48] He did not advocate disregarding past treaty jurisprudence, 'including findings that have been extremely favourable for Māori'.[49] He submitted that the stage 1 report confirmed long-held Te Raki Māori understandings of te Tiriti, and that this extended also to the principles.

44. Supplementary submissions regarding Tiriti principles and the *Wakatu* decision (#3.3.231), pp 21–22.

45. Supplementary submissions regarding Te Tiriti principles and the *Wakatu* decision (#3.3.231), pp 21–22 (Emphasis in counsel's submission).

46. Supplementary submissions regarding Tiriti principles and the *Wakatu* decision (#3.3.231), pp 21–22.

47. Supplementary closing submissions for Wai 320, Wai 736, Wai 1307, Wai 1140, Wai 1958, Wai 2062, and Wai 2476 (#3.3.234), pp 7–10; supplementary submissions regarding issues raised at hearing week 23 (#3.3.232), pp 3–4; synopsis of supplementary submissions for Wai 620 and Wai 1508 (#3.3.239), p 10; supplementary submission for Wai 49, Wai 682, Wai 1464, Wai 1546, Wai 68, Wai 149, Wai 455, Wai 565, Wai 1440, Wai 1445, Wai 1518, Wai 1520, Wai 1527, Wai 1551, Wai 1677, Wai 1710, and Wai 2182 (#3.3.241), pp 12–20.

48. Supplementary closing submissions for Wai 320, Wai 736, Wai 1307, Wai 1140, Wai 1958, Wai 2062, and Wai 2476 (#3.3.234), pp 2, 5–6; see also memo 2.6.141.

49. Counsel who presented the generic closing submissions for Issue 1 later challenged Mr Williams's characterisation of her submissions as inviting the Tribunal to 'disregard the myriad of past Tribunal jurisprudence': supplementary submissions (#3.3.444), pp 13–14.

The starting point for understanding the principles, he submitted, 'is the text of Te Tiriti itself . . . [the principles have] always come from the basis of what was guaranteed to Te Raki Māori'. Thus, he argued, the stage 1 report conclusions do not 'materially impact on, or change, the principles themselves'. What the conclusions do is 'place the onus back on the Crown to show how [it has] acted consistently with Te Tiriti and its principles', given the better awareness that Māori did not cede sovereignty in te Tiriti.[50]

Similarly, in supplementary submissions for a number of claimants, Peter Johnston noted that the Crown had acted in accordance with its incorrectly held view that rangatira had ceded sovereignty. It therefore had a heightened duty to actively ensure and protect the mana of rangatira ('including Te Raki Māori') not only to make and enforce law over their people or their whenua but also to ensure they could share their power and authority with Britain. In the socio-economic context, the Crown had a heightened duty to include Māori (including Te Raki Māori) in a way that 'gave mana to the partnership relationship'. It had – and still has – heightened duties to recognise Māori authority and tino rangatiratanga over, and responsibility for, the economic development and socio-economic well-being of its peoples. Likewise, it had – and has – heightened duties to actively protect Māori (including Te Raki Māori) from the adverse effects of settlement, particularly those arising from matters over which the Crown exercised control (including land and resource loss, fragmentation of land ownership, and restricted access to development capital).[51]

We note the position of John Pera Kahukiwa (counsel for Te Waiariki, Ngāti Korora, and Ngāti Takapari, as well as Ngāti Torehina ki Matakā claimants), who argued that the principles have not changed since te Tiriti was entered into. Instead, the Tribunal's focus should be on the principles that arise out of the actual agreement entered into in 1840, as determined in our stage 1 report. He said that Ngāpuhi considered there are two kinds of principles: those that arise from the fundamental motives of the parties, and those that may be considered desirable standards of behaviour. Among these standards, he then identified principles of bilateralism (where intermingling between the rangatira me ngā hapū and the Crown and its people occurs, and there is anticipation of a joint venture); and comity (which he explained as mutual respect between parties, including regarding the other's mana, authority, and jurisdiction).[52] Comity, he added, entails 'courtesy . . . friendly recognition as far as practicable of each other's laws and usages'; it has also been described as 'a principle of restraint, to be applied and

50. Supplementary closing submissions for Wai 320, Wai 736, Wai 1307, Wai 1140, Wai 1958, Wai 2062, and Wai 2476 (#3.3.234), pp 5, 7, 8–10.

51. Supplementary submissions regarding issues raised at hearing week 23 (#3.3.232), pp 3–4.

52. Synopsis of supplementary submissions for Wai 620 and Wai 1508 (#3.3.239), pp 9–10; John Kahukiwa, transcript 4.1.30, Terenga Parāoa Marae, p [227]; memorandum of counsel for Wai 620, Wai 1411–1416 and Wai 2230 (#3.2.2570), pp 3–4.

exercised where authorities or jurisdictions overlap'.[53] Mr Kahukiwa emphasised that central to both bilateralism and comity was respect for each other's separate spheres of influence and authority over their respective peoples, and maintenance of the independence of those authorities.[54]

We received submissions in te reo from Alana Thomas, counsel for the Te Reo o Ngāpuhi and Te Reo Māori claimants, giving the principles relevant to the issue of te reo Māori:

> a. te Mātāpono o te Tauutuutu;
> b. te Mātāpono o te Houruatanga; and
> c. te Mātāpono o te Matapopore Ngangahau.[55]
>
> Hei tāpiri ake ki aua mātāpono, ka noho te otinga o tēnei Taraipunara i te ripoata tuatahi mo Te Paparahi o te Raki hei kaupapa whakapū mo te take o Te Reo Māori.

Counsel provided the following English translation:

> a. the Principle of Reciprocity;
> b. the Principle of Partnership; and
> c. the Principle of Active Protection.
>
> Additional to those principles, in Counsel's submission, this Tribunal must first consider the findings contained in the Te Paparahi o te Raki Stage One report as it is those findings that create the basis and the foundation for the principles.[56]

Counsel specified a number of protective duties arising from these principles that the Crown must discharge. She submitted:

> Hei whakakapi ake i tēnei wāhanga o te tuhinga nei, i raro i te tāwharautanga o aua mātāpono, ēnei takohanga kua hora nei:
>
> He here tō te Karauna ki te aro pū atu i te mana me te rangatiratanga o Te Hunga Māori o te Raki, me ōna momo katoa;
>
> He here tō te Karauna ki te tiaki me te whakahaumaru i te rangatiratanga, ngā whenua, ngā kainga me nga taonga katoa o Te Hunga Māori o Te Raki;
>
> He here ano tō te Karauna ki te whakawhanake, ki te whakarauora, ki te whakahaumaru noki i Te Reo Māori me Te Reo o Ngāpuhi hei taonga. Ka noho haepapa tonu te Karauna ki te whakatairanga i Te Reo Māori hei taonga, hei reo mana o Aotearoa;
>
> He here tō te Karauna ki te whakatū he kawana e ngākau nui ana ki ngā takohanga i raro i te Tiriti; he kawana e matatau ana i Te Reo; ka mutu

53. Memorandum of counsel for Wai 620, Wai 1411–1416 and Wai 2239 (#3.2.2570), p 4.
54. Memorandum of counsel for Wai 620, Wai 1411–1416, and Wai 2239 (#3.2.2570), pp 4–5.
55. Ko te tapaetanga whakakopani mo te take o te reo Māori, tikanga, wāhi tapu, taonga (#3.3.221), p 15.
56. Summary of claimant closing submissions (#3.3.221(c)), pp 7–8.

He here tō te Karauna ki te noho tahi ki Te Hunga Māori o te Raki kia hanga ētahi kaupapa here e mau tonu ana i te pūmaharatanga, me ngā whāinga o Te Hunga Māori o te Raki.[57]

The English translation provided by counsel reads:

In Counsel's submission, the following duties emerge from the three principles outlined in the previous section:

The Crown has a duty to recognise the mana and rangatiratanga of Te Hunga Māori o te Raki and all that is encompassed within the exercise of that rangatiratanga;

The Crown has a duty to protect and safeguard Te Hunga Māori o te Raki rangatiratanga, their lands, homes, and ō rātou taonga katoa;

The Crown has a duty to strengthen, revitalise and protect Te Reo Māori and Te Reo o Ngāpuhi as taonga. The Crown remains responsible for promoting Te Reo Māori as a taonga, and as an official language of Aotearoa;

The Crown has a duty to establish and provide Te Hunga Māori o te Raki with a government that is genuine about upholding its obligations and duties under Te Tiriti, a government that is proficient in Te Reo Māori;

The Crown has a duty to work alongside Te Hunga Māori o te Raki to establish policies that align with the aspirations and objectives of Te Hunga Māori o te Raki.[58]

Paranihia Walker, counsel for Pārahirahi C1 Trust and ngā hapū o Ngāwhā, submitted that:

the dominant language of the principles identified to date has been the English language, both in terms of designation and discussion. This approach can never be consistent with Te Tiriti, because it favours the language, philosophy and law of only one party to it.[59]

Ms Walker suggested the Tribunal rectify the imbalance by giving due weight to te reo Māori in its discussion of any principles flowing from te Tiriti. Such an approach, in her view, was long overdue. She submitted that some appropriate starting points for identifying treaty principles included:

a) respect for rangatiratanga, including tino rangatiratanga, mana, kawa, tikanga and te reo Māori;
b) respect for kāwanatanga, in its appropriate domains;

57. We reproduce these submissions in full, and will address the issues of Te Reo Māori me Te Reo o Ngāpuhi in the next part of our stage 2 report: ko te tapaetanga whakarapopoto mo te take o te reo Māori (#3.3.221(b)), pp 11–12. These duties were also submitted by counsel for Issue 14 (Te Reo Māori, Wāhi Tapu, Taonga, and Tikanga).

58. Ko te tapaetanga whakakopani mo te take o te reo Māori, tikanga, wāhi tapu, taonga (#3.3.221), pp 12–13; ko te tapaetanga whakakōpani mo te kereme Wai 2062 (#3.3.388), pp 19–20; closing submissions for Wai 2062 (#3.3.388(a)), p 21.

59. Amended closing submissions for Wai 53 (#3.3.370(b)), pp 9–10.

c) discussion and mutual consent in relation to matters of common interest; and
d) respect for kawa, tikanga and te reo Māori when considering the application, scope or otherwise of rangatiratanga. It is only through this law, philosophy and language that the essence of rangatiratanga can be captured.[60]

Ms Walker added, 'To approach the exercise in any other manner is to fall into the trap carefully designed and set by successive colonial governments.'[61]

Counsel for Ngāti Manu and counsel for Hokianga claimant groups both said their claimants 'observe the text of Te Tiriti o Waitangi' and that they expected that the Crown's guarantees to them would in turn be honoured. They referred to principles of 'Respect, Fairness and Natural Justice', which they said underlined the claimants' understanding of the 'covenant', and asserted the importance of the Crown's dealing with Māori 'in an honourable and good faith way, and [that it] should ensure the protection and prosperity of Māori as a people including their economic, physical, spiritual and cultural wellbeing'.[62]

Ngāti Manu counsel Annette Sykes argued that the Crown's fiduciary obligations extend to active protection of Ngāti Manu, Te Uri Karaka, and Ngā Uri o Pōmare,

> to the fullest extent practicable in possession and control of their property and taonga and their rights to develop and expand such property and taonga using modern technologies . . . [their] ongoing distinctive existence as a people . . . [their] economic position and their ability to sustain their existence and their ways of life.[63]

In addition, counsel argued, the Crown was obliged to ensure Māori benefited from its governing structures, and its legislation and policy. As a result, the duties of the Crown included ensuring the following:

> the retention of rangatiratanga over tūrangawaewae . . . [the active protection of] recourse to spiritual and physical resources as they were traditionally managed . . . [and ensuring] the retention of rangatiratanga over taonga, social structures, property and resources in accordance with their own laws, cultural preferences and customs.[64]

Ms Sykes also introduced supplementary submissions on tikanga on behalf of Ngāti Manu and other groups that stated: 'Ko te ngako o ngā kōrero ka rangona e te marea . . . he whakamāhuki mō te mana Māori motuhake. ('The essence of the submissions you will hear . . . allude to matters of self-autonomy and

60. Amended closing submissions for Wai 53 (#3.3.370(b)), p 10.
61. Amended closing submissions for Wai 53 (#3.3.370(b)), p 10.
62. Closing submissions for Wai 354, Wai 1514, Wai 1535, and Wai 1664 (#3.3.399(b)), p 81; amended closing submissions for Wai 549, Wai 1526, Wai 1728, and Wai 1513 (#3.3.297(a)), p 28.
63. Closing submissions for Wai 354, Wai 1514, Wai 1535, and Wai 1664 (#3.3.399(b)), p 81.
64. Closing submissions for Wai 354, Wai 1514, Wai 1535, and Wai 1664 (#3.3.399(b)), pp 82–83.

self-determination of the rights and obligations of the Māori Peoples'.)[65] Ms Sykes also noted that a legal system consistent with the principle of partnership would have taken into account tikanga Māori: '[s]pecifically, it would have accounted for how Tikanga Māori could co-exist with Crown law on a basis that would reflect the Tino Rangatiratanga of Te Raki Māori'.[66] Ms Sykes remarked that much of the evidence in this inquiry consistently refers to tikanga as 'the first law of this land' and submitted that tikanga was a taonga, which the Crown must protect.[67] She also submitted that the Crown has a duty of active protection in respect of tikanga Māori to ensure its preservation, and in particular, its transmission from generation to generation. The Crown has a further duty to ensure that Māori can choose to adapt their tikanga and rights to their way of life largely in accordance with the te Tiriti guarantee of tino rangatiratanga. Like counsel for Ngāti Kawa, Ngāti Rāhiri, and Ngāti Rēhia, Ms Sykes cited principles, but rooted them firmly in the treaty itself – in article 2, the preamble, and what is commonly referred to as the fourth article or article 4.[68]

Jason Pou, on behalf of Hokianga claimants, detailed the Crown's duties to protect the whānau and hapū of Hokianga through the exercise of good government. It had a duty to ensure, among other things, the protection and promotion of Hokianga entitlements to peace and law and order; the absence of discrimination in the eyes of the law and law makers; and the determination of matters affecting Māori land by Māori, in accordance with their own methods of reaching agreements. The Crown also had a duty to remedy past breaches, without '[taking] advantage of levels of poverty and subordination that the whanau and hapu of Hokianga have been burdened with following Crown injustice'.[69]

65. Supplementary submissions for tikanga, in te reo Māori (#3.3.221(i)), p 3; supplementary submissions for tikanga, in English (#3.3.221(j)), p 3.

66. Ko te tapaetanga whakakopani mo te take o te reo Māori, tikanga, wāhi tapu, taonga (#3.3.221), p 69.

67. Ko te tapaetanga whakakopani mo te take o te reo Māori, tikanga, wāhi tapu, taonga (#3.3.221), p 61.

68. Ko te tapaetanga whakakopani mo te take o te reo Māori, tikanga, wāhi tapu, taonga (#3.3.221), pp 59, 61. We discussed what is commonly referred to as the fourth article of the treaty, which broadly guaranteed that Māori custom and religion would be protected. This was first raised orally at Waitangi on 6 February 1840 by Bishop Jean Baptiste Pompallier, head of the French Catholic mission at Kororāreka: Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 372. Hobson later promised to preserve Māori custom in a 'fourth article': Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 435. The late claimant Rima Edwards presented to us oral traditions confirming the existence of this fourth article handed down from Heke Pokai, Ngamanu, and Te Hinaki within Te Whare Wānanga o Te Ngakahi o Ngāpuhi: Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 451. We concluded that the 'so-called "fourth article"' was 'an oral addition to the Crown's treaty undertakings to the rangatira': Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 518.

69. Amended closing submissions for Wai 549, Wai 1526, Wai 1728, and Wai 1513 (#3.3.297(a)), pp 28–29.

Mindful of te kawa o Rāhiri (the law of Rāhiri),[70] counsel also spoke of a framework of 'inseparable rights' essential to 'the concept of nationhood which forms part of the Hokianga assertion of identity'.[71] These included 'the right to be distinct peoples albeit adapting with time'; the right to the 'territorial integrity of their land base'; the right to 'freely determine their destinies . . . [to] be the architects of their own future'; the right to self-government; and the right to have previous injustice remedied.[72]

2.2.3 The Crown's position on the treaty and its principles

Crown counsel's main submission was that the conclusions reached in our stage 1 report do not, and should not, affect treaty principles.[73]

Counsel submitted that the Tribunal itself has decided 'not to alter treaty principles' in light of the stage 1 report. It cited *He Whiritaunoka: The Whanganui Land Report* (2015), which stated that the Waitangi Tribunal 'has rejected the suggestion that the Treaty should apply differently in different places, depending on how the Treaty was received there, or even whether the Treaty was received there'. Treaty duties applied, it said, even where Māori were not offered the treaty and did not sign it.[74] In *He Whiritaunoka*, the Tribunal found that Whanganui Māori did not agree to the Crown's assumption of sovereignty but the Crown assumed it anyway; consequently, the effect of the treaty is to bind the Crown to use that appropriated power well in relation to Māori. Crown counsel cited the Tribunal's view in *He Whiritaunoka* that 'What that means in practice has come to be conceived of in terms of "principles" of the treaty.'[75] The Crown noted that the report further decided against recrafting the principles of the treaty, sticking rather to the principles that were 'core to the Tribunal's jurisprudence' – that is, partnership, good faith, reciprocity, active protection, and autonomy.[76]

The Crown suggested that if Ngāpuhi did not cede their sovereignty (as the stage 1 report says), Ngāpuhi are in a similar position to other tribes who signed the treaty but did not intend to cede sovereignty either (such as Whanganui Māori); or who did not sign and therefore could never have intended to cede sovereignty (such as Moriori and ngā iwi o Te Urewera).[77] As the Tribunal has already reported

70. As explained by Patu Hohepa in our hearings: transcript 4.1.25, Tauteihiihi Marae, pp 796–800. We discuss te kawa o Rāhiri in section 2.4.1.

71. Amended closing submissions for Wai 549, Wai 1526, Wai 1728, and Wai 1513 (#3.3.297(a)), pp 24–25.

72. Amended closing submissions for Wai 549, Wai 1526, Wai 1728, and Wai 1513 (#3.3.297(a)), pp 24–27.

73. Crown closing submissions (#3.3.402), p 34; see also pp 34–40.

74. The Whanganui Land report, counsel said, pointed to the examples of Rekohu and Te Urewera: Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report*, Wai 903, 3 vols (Wellington: Legislation Direct, 2015), vol 1, p 143.

75. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 151 (Crown closing submissions (#3.3.402), p 35).

76. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, pp 155–156 (Crown closing submissions (#3.3.402), p 35).

77. Crown closing submissions (#3.3.402), pp 35–36.

on the claims of these groups, the Crown argued it would be inconsistent if it now applied amended or heightened treaty principles to Ngāpuhi.[78]

Crown counsel further submitted that:

- In the seminal *Lands* case, the Court of Appeal developed a conception of treaty principles that has already accounted for the Tribunal's essential conclusions in its Te Raki stage 1 report; that is, about the understanding (or lack of understanding) Māori signatories may have had regarding the reference to sovereignty in the English text. The judges' view was that there was a real question as to whether Māori signatories understood they were asked to cede the sovereignty referred to. They variously noted the marked differences between the English and Māori texts of the treaty, the different meanings attributed to 'kāwanatanga', and that the concept of sovereignty as understood in English law was unknown to Māori. Bisson J also noted the opinion of Professor Hugh Kawharu that the chiefs would have believed they were retaining their rangatiratanga intact and all customary rights and duties as trustees for their tribal groupings.[79]
- The stage 1 report itself stated that its essential conclusion that Ngāpuhi did not cede their sovereignty was not radical and represented continuity rather than change. It cited previous Tribunal and court decisions and the views of leading scholars over the previous generation. Therefore, counsel argued, it would be out of step with this approach if the stage 1 report conclusions led to a change to treaty principles, 'including principles as articulated by the Tribunal.'[80]
- Treaty principles are timeless. Counsel cited the view of Bisson J in the *Lands* case that the principles must have the same meaning today as they did in 1840; what changed were the circumstances in which those principles apply: 'At its making, all lay in the future. Now much claimed to be in breach of the principles and of the Treaty itself, lies in the past. It did not provide for what was to happen if, as has occurred, its terms were broken.'[81] Crown counsel suggested that despite the Tribunal's application of the principles in different contexts, the principles themselves needed to remain in a fundamental, broad sense; this gave 'strength and consistency' to the values that underpin them.
- The application of treaty principles is of the utmost importance. In counsel's view, the most important thing for the Tribunal to do is apply the principles to the 'facts'. The Tribunal, counsel submitted, should pay special attention to two principles in this inquiry: the duty on the Crown and Māori to act in good faith, fairly, reasonably, and honourably towards one another, 'often said to be the paramount principle'; and the duty of the Crown actively to protect the matters referred to in article 2. Therefore, the threshold for treaty

78. Crown closing submissions (#3.3.402), p 36.
79. Crown closing submissions (#3.3.402), p 37.
80. Crown closing submissions (#3.3.402), p 38.
81. Andrew Irwin, transcript 4.1.32, Waitahi Events Centre, p 49.

breach requires conduct that is dishonourable, unfair, or unreasonable. Counsel maintained this was a not a low threshold.[82]

Moreover, counsel noted that the courts have found that

> [t]he duties owed by the Crown under treaty principles are not unqualified and will be tempered by reasonableness and practicality. The Crown, in carrying out its obligations, is not required to go beyond taking such action as is reasonable in the prevailing circumstances.[83]

Nor, Crown counsel argued, does the 'paramount principle' mean that 'every asset or resource in which Māori have a justifiable claim to share must be divided equally'.[84]

2.2.4 The claimants' reply submissions

In reply submissions, some counsel were critical of the Crown's approach. Dr Gilling, for example, in his submissions for Dr Terence Lomax on behalf of Te Uri o Hawato, rejected the Crown's submission that the Tribunal's conclusions from stage 1 'do not, and should not, affect treaty principles'. The list of principles might not have changed, counsel stated, but he rejected the view that their interpretation had not changed either. Dr Gilling suggested that as the Crown did not enter into 'any discussion as to how the starting point of any of the principles may change' as a result of stage 1, it was open to the Tribunal to reach conclusions in its stage 2 report on the extent to which the previous report 'evolves our understanding and interpretation of the principles of Te Tiriti'.[85]

Ms Mason, counsel who made the generic submissions on political engagement, clarified her argument and challenged the Crown's position that claimant counsel had in fact offered no revision of what treaty principles should now be.[86] The claimants, she said, submit that some of the principles 'as currently enumerated' are not consistent with the meaning of te Tiriti and therefore rest on a false foundation. 'Most obviously', she stated, 'the current Principles overstate the authority conferred to the Crown under te Tiriti/the Treaty.'[87] Citing Professor Jane Kelsey's evidence, she submitted that the current principles are 'neither neutral

82. Crown closing submissions (#3.3.402), p 39.

83. Crown closing submissions (#3.3.402), pp 39–40, citing *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC), p 517.

84. Crown closing submissions (#3.3.402), p 40, citing *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA), p 152.

85. Submissions in response for Wai 605 (#3.3.435), pp 3–5.

86. Counsel also suggested that the Crown, while summarising the 'differing approaches' of several counsel to the revised principles she had proposed in the generic submissions, had not referred to the submissions made on behalf of 'a number of Claimant Counsel, many of which in fact support the Revised Principles'. She appended a table summarising the submissions of claimant counsel on the revised principles: claimant submissions in reply (#3.3.450), pp 139–140; see also annex B, pp 198–244.

87. Submissions in response regarding political engagement (#3.3.450), p 143 (emphasis added in counsel's submissions).

nor immutable and should not be treated as such'. She added that '[t]he Waitangi Tribunal has the exclusive mandate in its own jurisdiction to generate new Principles that truly reflect the constitutional relationship established in te Tiriti/the Treaty.'[88] In particular, she suggested that in light of stage 1 of our inquiry, which concluded that sovereignty was not ceded, the principle of partnership 'changes fundamentally'. She reiterated that three spheres were envisaged – British authority, Māori authority, and shared authority – and 'that this was the nature of the partnership that was to follow the signing'. She submitted that all Crown conduct must be assessed against that partnership, and not against the idea that the Crown is entitled to govern as long as it does so reasonably.[89] The principle that 'provided that the Crown has Kāwanatanga over all of Aotearoa New Zealand', counsel argued,

> ought to be revised to say that the sovereignty that the Crown currently exercises is in breach of te Tiriti/the Treaty, and is held and exercised partially on behalf of Māori, by the Crown, in trust, in a protectorate capacity, until such time as the Partnership arrangement envisaged . . . [in 1840] has been negotiated and given effect to.[90]

Mr Kahukiwa, on behalf of Te Waiariki, Ngāti Korora, and Ngāti Taka Pari similarly challenged the Crown's assertion that he had argued that 'no revision of treaty principles is needed'.[91] Counsel clarified that the Tribunal's conclusions in the stage 1 report – based on te Tiriti's true meaning and effect – should lead to a reassertion and exposure of the principles as they existed in 1840, as opposed to a 'revision or amendment' of treaty principles.[92] Counsel also rejected the Crown's argument that the Court of Appeal's conclusions on the treaty principles in the *Lands* case already accounted for the context traversed in the stage 1 report. Counsel pointed out that, in the court's majority decision, Justice Robin Cooke emphasised that the case was confined to the practical application of the State-Owned Enterprises Act 1986, and that 'the story of the signing of Te Tiriti was not within the scope of their judgment'.[93] Mr Kahukiwa submitted that as the stage 1 report specifically interrogated evidence on the treaty signings, the Crown's '[attempt] to undermine [the stage 1 report] with a case that by its own admission did not delve into those matters does not stack up'.[94]

In her submissions in reply on behalf of Ngāti Manu, Ms Sykes was deeply critical of the Crown's submissions on the treaty and its principles, particularly its alleged interpretation of 'tino rangatiratanga as something less than the full

88. Submissions in response regarding political engagement (#3.3.450), p 145.
89. Janet Mason, transcript 4.1.29, Te Whakamaharatanga Marae, pp 61–62; submissions in response regarding political engagement (#3.3.450), p 147.
90. Submissions in response regarding political engagement (#3.3.450), p 144.
91. Reply submissions for Wai 620, Wai 1411–1416, and Wai 2239 (#3.3.455), p 11 (Crown closing submissions (#3.3.402), p 33).
92. Reply submissions for Wai 620, Wai 1411–1416, and Wai 2239 (#3.3.455), p 11.
93. Reply submissions for Wai 620, Wai 1411–1416, and Wai 2239 (#3.3.455), pp 18–19.
94. Reply submissions for Wai 620, Wai 1411–1416, and Wai 2239 (#3.3.455), p 20.

sovereign authority that the Māori signatories to the Treaty understood it to mean'.[95] Citing the evidence of Professor Kelsey, Ms Sykes highlighted that deriving treaty principles largely from that interpretation would be inconsistent with the conclusions in the stage 1 report, and would 'deny the authority intrinsic to tino rangatiratanga and the legitimacy of tikanga as the rules and processes to govern relationships and behaviour and resolving disputes'.[96] Instead, she argued, '[i]f the Treaty is to be honoured as the Crown submissions promote then Te Raki Māori must have the right to make laws within their own territories – unfettered, but cognisant of Pākehā Law'.[97]

2.3 What the Tribunal Has Said Previously about ngā Mātāpono o te Tiriti / the Principles of the Treaty, and the Rights and Duties that Arise from the Treaty Guarantees

In this section we consider what previous Tribunal reports have said about ngā mātāpono o te Tiriti/the principles of the treaty, and the rights and duties arising from the treaty guarantees. We begin with the Tribunal's reminder in *He Whiritaunoka* of the derivation and purpose of treaty principles. In that report, the Tribunal considered why it is statutorily required to identify treaty principles and suggested that this was

> perhaps the most effective way of defining a standard for assessing Crown conduct that responds to the power imbalance that developed and continued after 1840. Those who assumed power did not consider that there needed to be an ongoing application of the Treaty's provisions, because – from their perspective – the purpose of the Treaty was fulfilled once the Crown assumed sovereignty and land transactions progressed. In requiring the Tribunal to identify Treaty principles, the Act recognises that it was the Treaty that the newcomers relied on to gain the upper hand and set the agenda.[98]

Thus, the Tribunal concluded, it has long been accepted that treaty principles are to be derived 'not only from its texts but also from the context and spirit in which the Treaty was entered into'; in other words, the principles are derived from the *meaning and effect* of the texts. Given that the *contra proferentem* rule and legal precedents concerning treaties with indigenous peoples direct the Tribunal to ascertain 'the natural meaning of the Treaty' to those Māori who entered into it, the Tribunal considered that the treaty principles most relevant to its inquiry 'are those that speak to the kind of relationship that Māori properly expected to be able to enter into'.[99] They should, therefore, reflect understandings about what

95. Reply submissions for Wai 354, Wai 1514, Wai 1535, and Wai 1664 (#3.3.475), p 22.
96. Elizabeth Jane Kelsey (doc AA1), p 6 (cited in reply submissions for Wai 354, Wai 1514, Wai 1535, and Wai 1664 (#3.3.475), pp 22–23).
97. Reply submissions for Wai 354, Wai 1514, Wai 1535, and Wai 1664 (#3.3.475), p 23.
98. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 155.
99. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 155.

the treaty signified 'that would have been recognisable, realistic, and relevant to people' at the time the treaty was signed.[100]

These statements appear entirely applicable to the Te Paparahi o Te Raki inquiry, and we return to them later in section 2.4. They draw on broad principles of treaty interpretation we adopted at the outset of this inquiry, which both privilege the Māori understanding of a treaty where there was ambiguity arising from its two texts in different languages, and attach particular importance to the context and spirit in which the treaty was entered into in the Bay of Islands and Hokianga by Ngāpuhi leaders and the Crown.

2.3.1 Tribunal development of ngā mātāpono/the principles

In any discussion of ngā mātāpono o te Tiriti/the principles of the treaty, it seems to us, we must start with the words of te Tiriti, and with the particular circumstances in which te Tiriti was explained to Māori leaders, and agreed to, or rejected by them.

In our discussion of earlier Tribunal reports in *He Whakaputanga me te Tiriti*, we focused on those arising from Tribunal inquiries into claims in the northern part of New Zealand, where the treaty was of 'unique importance' to claimants; and also on reports of the early- to mid-1980s that made a point of examining what was promised and agreed at Waitangi in February 1840. The Tribunal had a particular interest in understanding the two texts of the treaty and the differences between them, and whether Māori had agreed to a cession of sovereignty.[101]

We concluded that the Tribunal reports we looked at have reached different views about the agreement at Waitangi.[102] Some implied 'that Māori in 1840 did not cede to the Crown what the English text describes as "all the rights and powers of Sovereignty", while others have regarded a cession of sovereignty as being very clear to both parties'.[103] We noted legal scholar Ani Mikaere's view that the Court of Appeal's judgments in the *Lands* case led to a shift in Tribunal reports towards a greater emphasis on the English text and the Crown's acquisition of sovereignty.[104]

We considered the landmark *Lands* case in the Court of Appeal, which focused on the principles of the treaty (as section 9 of the State-Owned Enterprises Act 1986 required), noting that the proceedings at Waitangi in 1840 were not traversed in any particular detail as part of those proceedings. The Court felt it unnecessary for the purposes of the case before them to consider the differences between the treaty texts and the 'possible different understandings of the Crown and the Maori in 1840 as to the meaning of the Treaty',[105] although it did acknowledge that

100. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 150.
101. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 433–434.
102. These reports included *Motunui–Waitara* (1983), *Manukau* (1985), *Orakei* (1987), *Muriwhenua Fishing* (1988), *Mangonui Sewerage* (1988), and *Muriwhenua Land* (1997); see also Waitangi Tribunal, *He Whakaputanga me te Tiriti*, pp 433–437.
103. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 433.
104. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 434.
105. *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 at 691 (cited in Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 438).

there were 'grounds for thinking there were important differences between the understanding of the signatories as to true intent and meaning of article 1 of the Treaty'.[106] The judges were unanimous in concluding that the Crown had acquired sovereignty in 1840.[107]

We agreed that the Tribunal has clearly been influenced by the Court of Appeal's findings. We suggested, however, that the Tribunal has made its own important observations since the *Lands* case – evidence of a clear development in thinking beyond these findings.[108] We particularly note that it has from the outset derived principles from both British and Māori worldviews, law, experiences of their mutual relationship, and intentions in entering into the treaty.

We turn now to examine the evolution of the Tribunal's consideration of key treaty principles.

2.3.2 Te mātāpono o te tino rangatiratanga

The Tribunal has long emphasised that the treaty guaranteed the rights of Māori to exercise their tino rangatiratanga (full authority) over their lands, their villages, and all their taonga, and in each inquiry has assessed Crown actions and omissions in light of this principle of tino rangatiratanga.

We begin with the *Report of the Waitangi Tribunal on the Orakei Claim* (1987), issued six months after judgment was delivered in the *Lands* case. It was the first Tribunal report to articulate principles relating to the Crown's duties when purchasing Māori land; these were based on a detailed analysis of the instructions of Secretary of State Lord Normanby to Captain Hobson and other documents relating to the Crown's right of pre-emption (we discuss these matters section 2.3.5).

But we note first the report's important discussion on the meaning of tino rangatiratanga in article 2, which seems to us to illuminate that principle, even if – in those very early days of Tribunal jurisprudence – it was not specifically identified as a principle as such. The Tribunal's discussion reflected kōrero among kaumātua on the two texts of the treaty that, in our view, drew out a principle based in the te reo text. The meaning of the phrase 'tino rangatiratanga', the Tribunal said, had caused it 'much trouble'.[109] It was concerned that 'the continued use of "rangatiratanga" to describe the authority of the Maori in respect of their lands and other interests may perpetuate a Victorian view that Maori society was hierarchical'. But clearly, it said, Ōrākei Māori did not see things that way. The Tribunal cited the view of John Rangihau of Tūhoe, expressed in discussion with two Tribunal members shortly before his passing, that 'there was no such thing as a chief in Maori terms, insofar as the concept of "chief" was an English concept, suggesting the rangatira above and the people below'.[110] Rangihau stated that '[r]ecognition by

106. *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 at 690 (cited in Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 438).
107. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 438.
108. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 434.
109. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, Wai 9 (Wellington: Brooker and Friend Ltd, 1987), p 185.
110. Waitangi Tribunal, *Report on the Orakei Claim*, Wai 9, pp 186–187.

the people was . . . a very important element in the identification of a rangatira'; indeed, 'that which distinguished the true rangatira was the quality of commonality', and it was this which 'binds the leader as one with his people'.[111] The Tribunal concluded that they would render 'rangatiratanga' as 'authority', 'tino rangatiratanga' as 'full authority', and 'to give it a Maori form [they added] we use "mana"'.[112]

What were the implications of this discussion for the guarantee in article 2 of the 'tino rangatiratanga' of Māori over their lands? The Tribunal concluded that this acknowledgment in the Māori text

> necessarily carries with it, given the nature of their ownership and possession of their land, all the incidents of tribal communalism and paramountcy. These . . . include the holding of land as a community resource and the subordination of individual rights to maintaining tribal unity and cohesion. A consequence of this was that only the group with the consent of its chiefs could alienate land.[113]

In other words, the principle illuminates the nature of authority in Māori communities and of Māori rights in land, and thus the making of decisions about the alienation of land.

The *Report on the Manukau Claim* (1985) also concluded that 'The guarantee of undisturbed possession or of rangatiratanga means that there must be a regard for the cultural values of the possessor' – specifically, in that case, of fisheries. It added that: 'The guarantee of possession entails a guarantee of the authority to control that is to say, of rangatiratanga and mana.'[114] The *Muriwhenua Land Report* (1997) considered rangatiratanga in the context of pre-treaty land transactions; it stated that the

> aspects of rangatiratanga important to this case include the right to have acknowledged and respected the hapu's system of land tenure and of contracting, and also the hapu's customary preferences in the administration of their affairs or the management of their natural resources.[115]

The Tribunal made that statement in the context of a discussion of Māori custom, values, and law, stressing the importance of the social mores that 'were likely to have influenced Maori in their transactions with Europeans'. The 'fundamental purpose of Maori law was to maintain appropriate relationships of people to their environment, their history and each other'. The essential Māori value of the land was that 'lands were associated with particular communities' and could not pass outside the descent group. The main right lay with the community, and there

111. Waitangi Tribunal, *Report on the Orakei Claim*, Wai 9, pp 187–188.
112. Waitangi Tribunal, *Report on the Orakei Claim*, Wai 9, p 188.
113. Waitangi Tribunal, *Report on the Orakei Claim*, Wai 9, pp 188, 190.
114. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, Wai 8, 2nd ed (Wellington: Waitangi Tribunal, 1989), p 70.
115. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45 (Wellington: GP Publications, 1997), pp 21–28, 390–391.

was no right of land disposal independent of the community. Outsiders might be incorporated within the community, as happened across the Pacific, by (for instance) land allocation, and in doing so they were obligated to contribute to the community, with the expectation that the relationship would strengthen it.[116]

Tribunal inquiries have also underlined tino rangatiratanga as an indigenous right. In *The Taranaki Report: Kaupapa Tuatahi* (1996), tino rangatiratanga was explained as autonomy, or 'the inherent right of peoples in their native territories. Further, it is the fundamental issue in the Taranaki claims and appears to be the issue most central to the affairs of colonised indigenes throughout the world'.[117] In introducing the United Nations Draft Declaration on the Rights of Indigenous Peoples, the *Taranaki* report defined 'aboriginal autonomy' or 'aboriginal self-government' as 'the right of indigenes to constitutional status as first peoples, and their rights to manage their own policies, resources, and affairs (within rules necessary for the operation of the State) and to enjoy cooperation and dialogue with the Government'.[118]

Subsequent Tribunal reports have consistently affirmed that tino rangatiratanga is an equivalent term to autonomy or self-government.[119] The Tribunal has further asserted its equivalence to the term 'mana motuhake', which similarly means separate authority or self-government.[120]

In *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims* (2004), the Tribunal considered the scope of Māori autonomy, defining it as 'the ability of tribal communities to govern themselves as they had for centuries, to determine their own internal political, economic, and social rights and objectives, and to act collectively in accordance with those determinants'.[121] Moreover, the report asserted, Crown recognition of Māori autonomy was essential to the treaty relationship. According to the terms of the treaty, 'tribal autonomy was the only basis for a quality Treaty relationship'; a relationship between the Crown and Māori 'which did not properly limit the sovereignty of the Crown so as properly to protect the autonomy of Maori could not have been consistent with the Treaty'.[122]

116. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, pp 21–28, 390–391.

117. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi*, Wai 143 (Wellington: Legislation Direct, 1996), p 5.

118. The Declaration was sought from the United Nations by the world's indigenous minorities to 'define their rights in relation to national states'. A United Nations working group took 12 years to complete the draft Declaration in 1994. The United Nations General Assembly adopted the Declaration in 2007. The New Zealand Government endorsed the Declaration in 2010; Waitangi Tribunal, *The Taranaki Report*, Wai 143, p 20.

119. Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, Wai 215, 2 vols (Wellington: Legislation Direct, 2010), vol 1, pp 22–23; Waitangi Tribunal, *The Ngāpuhi Mandate Inquiry Report*, Wai 2490 (Wellington: Legislation Direct, 2015), p 23; Waitangi Tribunal, *Te Whanau o Waipareira Report*, Wai 414 (Wellington: GP Publications, 1998), p 215.

120. Waitangi Tribunal, *Tauranga Moana*, Wai 215, vol 1, p 18; Waitangi Tribunal, *He Maunga Rongo: Report on the Central North Island Claims, Stage One*, Wai 1200, 4 vols (Wellington: Legislation Direct, 2008), vol 1, p 172; Waitangi Tribunal, *The Taranaki Report*, Wai 143, pp 5–6, 19–20.

121. Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, Wai 814, 2 vols (Wellington: Legislation Direct, 2004), vol 1, p 113.

122. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 1, p 113.

In *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims* (2008), the Tribunal added that inherent in Māori autonomy and tino rangatiratanga 'is the right to retain their own customary law and institutions and the right to determine their own decision makers and land entitlements.'[123]

In recent years, the Tribunal has introduced specific references to the Crown's obligations in respect of tikanga. The Tribunal found in the *Report on the Crown's Foreshore and Seabed Policy* (2004) that the article 2 guarantee of tino rangatiratanga was inherently a guarantee of the right to exercise tikanga: 'The exercise of mana by rangatira was underpinned and sustained by adherence to tikanga. The chief whose thoughts and actions lacked that essential and recognisable quality of being "tika" would not be sustained in his leadership'. Moreover, the Crown's guarantee of tino rangatiratanga was meaningless unless also accompanied by the tikanga 'that sustain and regulate the rangatira and his relationship to the people, and the land'.[124] In the Te Rohe Pōtae inquiry, the Tribunal has also spoken of the importance of tikanga in relation to tino rangatiratanga. In *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims*, it noted that,

> [T]ikanga underpinned how 'tino rangatiratanga' was exercised as it was relevant to their land tenure, the environment, social and political relationships, and generally to the Māori way of life in Te Rohe Pōtae. Tikanga mediated relationships between people and taonga, and was therefore an integral aspect of tino rangatiratanga. In respect of any interests or taonga, a community's authority (mana or tino rangatiratanga) depended on its exercise of the relevant tikanga. Because the guarantee of rangatiratanga was a promise of protection for Māori autonomy, the Crown was therefore obliged to respect Māori tikanga as a system of law, policy, and practice.[125]

2.3.3 Te mātāpono o te kāwanatanga

The Tribunal has often considered the differences between article 1 in te reo Māori and in English, and accordingly the relationship between 'kāwanatanga' in the Māori text, and 'sovereignty' in the English. It has found that the power to govern as defined in the Māori text was not unrestrained. Nor was it equivalent to 'sovereignty', the term used in article 1 of the English text. In the *Manukau* report, the Tribunal wrote that the kāwanatanga ceded to the Crown was a lesser authority than sovereignty, whereas rangatiratanga is 'not conditioned' and 'tino rangatiratanga' meant 'full authority status and prestige with regard to their possessions and interests'.[126] It added that '[a]s used in the Treaty [kāwanatanga] means the authority to make laws for the good order and security of the country but subject to an undertaking to protect particular Maori interests.'[127]

123. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, Wai 785, vol 1, p 4.
124. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, Wai 1071 (Wellington: Legislation Direct, 2004), p 3.
125. Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims – Pre-publication Version*, Wai 898 (Wellington: Legislation Direct, 2018), pts 1–2, p 157.
126. Waitangi Tribunal, *Report on the Manukau Claim*, Wai 8, pp 66–67.
127. Waitangi Tribunal, *Report on the Manukau Claim*, Wai 8, p 66.

Some Tribunal inquiries that stated Māori 'ceded' authority to the Crown have characterised it in different terms. In the *Orakei* report, as we noted in stage 1 of our inquiry, the Tribunal stated that kāwanatanga

> likely meant to the Maori, the right to make laws for peace and good order and to protect the mana Maori. That, on its face, is less than the supreme sovereignty of the English text and does not carry the English cultural assumptions that go with it, the unfettered authority of Parliament or the principles of common law administered by the Queen's Judges in the Queen's name.[128]

The Ōrākei Tribunal considered that contemporary statements show that 'Maori accepted the Crown's higher authority and saw themselves as subjects[,] be it with the substantial rights reserved to them under the Treaty'. But as we have noted earlier, it also wrote that the Māori text conveyed the 'full authority' that Māori would retain – that is, 'that they would retain their mana Maori'. We added that the Ōrākei inquiry 'did not grapple with the apparent contradiction between "full authority" for Maori and sovereignty for the Crown'.[129]

The view of the *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (1988), however, was that the supremacy of the Queen's authority was clear, because the Crown was to have an overriding control; the chiefs' speeches at Waitangi, it said, demonstrated that they understood this, and 'tino rangatiratanga' equated more to 'tribal self-management'.[130]

Tribunal reports have often said that the scope of kāwanatanga is limited by those interests protected by the guarantee of tino rangatiratanga in article 2. For example, *Ahu Moana: The Aquaculture and Marine Farming Report* (2002) – citing the *Muriwhenua Fishing* report, the *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (1993), the *Te Whanganui-a-Orotu Report* (1995), and *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (2001) – said that

> the kawanatanga of the Crown must not be exercised in such a way as to diminish the guarantees in article 2 of rangatiratanga of the tribes to exercise control over their resources. This involves more than acknowledging ownership or tenure. It means providing for Māori control because of the guarantee of rangatiratanga. The Tribunal has variously described rangatiratanga as the exercise by Māori of autonomy, authority, self-government, or self-regulation over their tribal domain, which includes lands,

128. Waitangi Tribunal, *Report on the Orakei Claim*, Wai 9, p 189 (cited in Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 434).
129. Waitangi Tribunal, *Report on the Orakei Claim*, Wai 9, p 189; see also Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 434.
130. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, Wai 22 (Wellington: GP Publications, 1988), pp 186–187.

waters, and oceans, and, as an extension of that, it encapsulates their right to the development of their resources.[131]

While the kāwanatanga of the Crown is limited by te Tiriti's guarantee of tino rangatiratanga, the principles of partnership and equity give rise to a Crown duty to ensure that its laws and policies adequately give effect to treaty rights and guarantees in both their letter and their implementation. This duty has sometimes been referred to as a principle of good government.[132] As the Tribunal observed in *The Mokai School Report* (2000), this principle is inherently linked to, and defines, the extent of its kāwanatanga rights:

> In shorthand form, the effect of the other Treaty principles on the Crown's right of governance may be said to require the Crown to exercise 'quality kawanatanga' or, more familiarly, 'good governance', where the meaning of 'quality' and 'good' is determined by the consistency of the Crown's governance with the entirety of the Treaty's principles.[133]

The Tribunal has also emphasised the fiduciary nature of the treaty relationship as partly underpinning the Crown's good governance obligations, especially since it has been in a position of power over its treaty partner for much of the period since the treaty was signed.[134] In *The Petroleum Report* (2003), the Tribunal stated that 'The Crown exercises its governmental power – its kawanatanga – as a partner and as a fiduciary. It follows that this power must be used to make good on article 2 and article 3 promises except in exceptional and clearly justifiable circumstances.'[135]

We note also that in the *Muriwhenua Land Report* the Tribunal suggested a principle of 'fair process'. Noting that the Treaty promised 'necessary laws and institutions', it pointed to Lord Normanby's stipulation that a protector of aborigines be appointed to maintain an oversight of State action in the interests of Māori people. He promised also that pre-treaty transactions would be inquired into and lands held unjustly would be returned. The principle, the Tribunal decided, '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'.[136]

131. Waitangi Tribunal, *Ahu Moana: The Aquaculture and Marine Farming Report*, Wai 953 (Wellington: Legislation Direct, 2002), p 64.
132. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, pp 428–429.
133. Waitangi Tribunal, *The Mokai School Report*, Wai 789 (Wellington: Legislation Direct, 2000), p 10.
134. Waitangi Tribunal, *Te Maunga Railways Land Report*, Wai 315 (Wellington: Legislation Direct, 1994), pp 67–68, 70.
135. Waitangi Tribunal, *The Petroleum Report*, Wai 796 (Wellington: Legislation Direct, 2003), p 58.
136. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 390.

In its Tūranga district inquiry report *Turanga Tangata Turanga Whenua*, the Tribunal considered the Crown's obligations under its own constitutional rules and under the treaty. It pointed to the importance in the treaty of three key ideals: the rule of law, just and good government, and the protection of Māori autonomy. Despite the Queen's promises in the treaty to end the lawlessness that characterised relations between Māori and Pākehā, and to introduce a settled form of civil government for that purpose, the Crown had disregarded its own law when it found it politically expedient to do so. The Tribunal gave examples in *Turanga Tangata Turanga Whenua*: the Crown's military incursions and its attack in 1865 on Waerenga a Hika, a defensive pā in which there were many women and children; its prolonged detention on Wharekauri of Te Kooti and his followers, and (after the subsequent battle of Ngātapa) its execution of a number of Tūranga Māori 'without charge, trial, or conviction'; and its 'unlawful confiscation' of Tūranga Māori property rights. It found these actions, committed in the name of the Crown in New Zealand, to be 'brutal, lawless, and manipulative'. These actions, the Tribunal concluded, were inconsistent with the constitutional rules that the Crown brought with it from Great Britain and were introduced through article 1 of the treaty.[137] Foremost among those rules was that the Crown, 'as the embodiment of executive government, is subject to the law and has no power to act outside it'. In its conclusions on the Crown's unlawful conduct, the Tribunal stated that

> the moral authority of the Crown to require its subjects to comply with a standard of conduct prescribed by law depends on the Crown itself adhering to that standard. The Crown had to be above revenge. How else could it claim to govern in the name of all New Zealanders? If we are truly a country respectful of the rule of law, these matters must be acknowledged and put to right.[138]

The Tribunal further affirmed that not only is the Crown obliged to abide by its own laws, but that 'It was implicit in the language and the spirit of the Treaty that government in New Zealand would be just and fair to all. There ought to have been no room for laws or policies calculated to defeat Maori interests in order to favour settler interests.'[139]

The Tribunal also considered the Crown's duties in the balancing of the two treaty spheres of authority in *He Maunga Rongo: Report on Central North Island Claims* (2008). In that inquiry, the Tribunal reiterated that the treaty provided for the right to make national laws, and observed that these duties to balance interests for the purposes of a 'successful partnership' are tested against 'reasonableness, not perfection'.[140] The Tribunal highlighted a series of circumstances where the Crown might need to balance its treaty duties 'against the needs of other sectors of the community':

137. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, p 736.
138. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, pp 736–737.
139. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, p 737.
140. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 4, p 1238.

- in exceptional circumstances such as war or impending chaos;
- for peace and good order;
- in matters involving the national interest;
- in situations where the environment or certain natural resources are so endangered or depleted that they should be conserved or protected; and
- where Māori interests in natural resources have been fully ascertained by the Crown and freely alienated, and/or are not subject to contest between Māori.[141]

The Tribunal was clear, however, that the Crown 'ought not to undertake the balancing exercise without restraint'.[142] It referred to *The Whanganui River Report* (1999) which stated that Māori rangatiratanga is not to be qualified by a balancing of interests. It is not conditional, but was asserted to be protected, absolutely; rather, it is governance that is qualified by the promise to protect and guarantee rangatiratanga for as long as Māori wish to retain it.[143] Thus, surmised the Tribunal in *He Maunga Rongo*, 'Maori rangatiratanga over their property rights or interests was to be respected and provided for in governance.'[144]

Previous Tribunal inquiries have accordingly identified the Crown's Native Land legislation, its introduction of a new land tenure system, its creation of the Native Land Court, and its land purchasing policies and practices in the nineteenth century as prejudicial to Māori, and therefore inconsistent with the Crown's duty to govern fairly and justly.[145] In *He Whiritaunoka*, the Tribunal considered that the 'most basic and incontrovertible' standard of good government in the years following the treaty's signing was to ensure 'fair and proper practices in land transactions'.[146] In its conclusions on Crown purchasing in the Whanganui district from 1870 to 1900, the Tribunal stated: 'In that this was a regime enabled by legislation, we cannot say that the Crown acted outside of the law. Usually, it did not. However, we can say that it was not good government, because it was neither just nor fair.'[147]

In its report, the Tribunal also pointed out that by 1840, Whanganui Māori had experienced little contact with British Governors or Kāwana, and it considered kāwanatanga was 'an open textured word and concept'. It found no evidence that Māori in that district would have understood kāwanatanga as a 'significant check on their exercise of te tino rangatiratanga'.[148] However, the Tribunal observed,

141. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 4, pp 1238–1239.
142. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 4, p 1239.
143. Waitangi Tribunal, *The Whanganui River Report*, Wai 167 (Wellington: GP Publications, 1999), p 329 (Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 4, p 1239).
144. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 4, p 1239.
145. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, pp 737–738; Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, pp 427, 472–473, 531, 534, 535–536.
146. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 157.
147. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 536.
148. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 147.

'[t]he idea of what "kāwanatanga" connoted would develop as land transactions were over entered into and as the new society was established'.[149]

In *Te Mana Whatu Ahuru*, released after our stage 1 report, the Tribunal considered it did not have evidence that the Crown had explained to the Te Rohe Pōtae signatories 'that it sought a supreme, unfettered power over all people and territories'. Instead, the Tribunal said, 'the evidence is that it explained that it wanted a governing power that could be used to control settlers and protect from foreign threat, thereby protecting Māori and bringing mutual benefit'.[150] While the Tribunal has consistently concluded that kāwanatanga was not equivalent to the full power and authority denoted by the term 'sovereignty', *Te Mana Whatu Ahuru* suggested that the balance of kāwanatanga and tino rangatiratanga in the treaty 'did not give rise to a situation in which either Māori or the Crown are able to claim an absolute authority'.[151] As with the treaty's limits on the remit of the Crown's kāwanatanga rights, 'tino rangatiratanga was limited by the Crown's right to govern, and in particular to control settlers and settlement in accordance with the principle of kāwanatanga'.[152]

2.3.4 Te mātāpono o te houruatanga/the principle of partnership

Partnership has long been a key treaty principle derived from the expectations of the partners at the time they entered into the treaty. The principle was characterised by the Court of Appeal in the *Lands* case when it spoke of a partnership requiring each partner 'to act towards each other reasonably and with the utmost good faith'.[153] The court also described these mutual responsibilities as 'analogous to fiduciary duties'.[154] In other words, the principle of partnership states the basis on which post-treaty relationships between Māori and the Crown should be conducted.

The Tribunal has considered the principle of partnership over many years and has talked about it in different ways. It has generally been understood as reciprocal, involving 'fundamental exchanges for mutual advantage and benefits'. Māori 'ceded' sovereignty (in the English text) or kāwanatanga (governance, in the Māori text) of the country in return for the Crown's guarantee that their tino rangatiratanga (full authority or autonomy) over their land, people, and taonga would be protected.[155] Given our conclusions from stage 1, we do not consider it appropriate in our inquiry district to describe a 'fundamental exchange' in these terms. However, partnership remains a crucial principle in this inquiry. Recent Tribunal inquiries have increasingly considered the nature of relationships – between Māori and the Crown; iwi, hapū, and the Crown – and the obligations of the partners to each other, especially the obligations of kāwanatanga. These inquiries have there-

149. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 148.
150. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pts 1–2, p 178.
151. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pts 1–2, p 180.
152. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pts 1–2, pp 182–183.
153. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), p 667.
154. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), p 664.
155. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, Wai 785, vol 1, p 4.

fore been concerned not only with the application of treaty principles to historical claims but also with examining what 'partnership means for the relationship between Māori and the Crown, and for the place of New Zealand's two founding cultures in this land'.[156]

The Wai 262 inquiry report *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuatahi* (2011) was the outcome of the Tribunal's first whole-of-Government inquiry into Māori claims. Its scope was broad; it focused on law and Crown policy in relation to Māori identity and culture, 'both now and in the future', which led to the involvement of core and independent Crown agencies, Crown-owned companies, representatives of the university system, the private sector, and many individuals.[157] But if the inquiry was forward looking, it was also rooted in mātauranga Māori, the key concern of the claimants, which refers not only to Māori knowledge but also to the Māori way of knowing. It incorporates 'language, whakapapa, technology, systems of law and social control, systems of property and value exchange, forms of expression, and much more': traditional technology relating to food cultivation and gathering, knowledge of the various uses of plants and wildlife, systems of controlling relationships between people, the arts and performing arts, and various rituals and ceremonies. In other words, mātauranga Māori concerns the unique Māori way of viewing the world; it incorporates Māori culture, its underlying values or principles, and Māori traditional knowledge.[158] The claim therefore has strong historical roots in traditional knowledge, in the signing of the treaty, and in the long history of policy in which the Crown 'largely supported and promoted one of our two founding cultures at the expense of the other'.[159]

The Tribunal's view in *Ko Aotearoa Tēnei* was that, through the treaty, the Crown 'won the right to enact laws and make policies'. However, the Tribunal stated, that right 'is not absolute'. Like any constitutional promises, those made in the treaty cannot be set aside without agreement, except after careful consideration and as a last resort. In broader terms, the claim concerned the survival of Māori culture and its ongoing place in Aotearoa. In this context the most important of the treaty promises, the Tribunal said, was the guarantee to protect the tino rangatiratanga of iwi and hapū over their 'taonga katoa' – that is, the highest chieftainship over all their treasured things.[160]

The Tribunal considered what exercising tino rangatiratanga means in relation to mātauranga Māori, and how mātauranga might be protected in a modern New Zealand context. The exercising of tino rangatiratanga, it said, must be protected

156. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuarua*, Wai 262, 2 vols (Wellington: Legislation Direct, 2011), vol 1, p 24.

157. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, *Te Taumata Tuatahi*, Wai 262 (Wellington: Legislation Direct, 2011), pp xix, 18.

158. Waitangi Tribunal, *Ko Aotearoa Tēnei, Te Taumata Tuatahi*, Wai 262, pp 22–23.

159. Waitangi Tribunal, *Ko Aotearoa Tēnei, Te Taumata Tuatahi*, Wai 262, p 245.

160. Waitangi Tribunal, *Ko Aotearoa Tēnei, Te Taumata Tuarua*, Wai 262, vol 1, pp 14–18.

to the greatest extent possible – but, like kāwanatanga, it is not absolute. Its sobering view was that

> [a]fter 170 years during which Māori have been socially, culturally, and economically swamped, it will no longer be possible to deliver tino rangatiratanga in the sense of full authority over all taonga Māori. It will, however, be possible to deliver full authority in *some* areas. [Emphasis in original.][161]

What the delivery of full authority might entail depended on the circumstances of the case. But the Tribunal added a powerful caveat: law- and policy-makers should always keep in mind 'that the tino rangatiratanga guarantee is a constitutional guarantee of the highest order, and not lightly to be diluted or put to one side'.[162]

Turning to the principle of partnership, the Tribunal suggested it could be seen as an overarching principle, 'beneath which others, such as kāwanatanga and tino rangatiratanga, lie'.[163] It contrasted the emphasis on partnership in New Zealand with other post-colonial societies, which stress the power of the State and the 'relative powerlessness of their indigenous peoples by placing state fiduciary or trust obligations at the centre of domestic indigenous rights law'.[164] In New Zealand, however, unique arrangements are built on 'an original Treaty consensus between formal equals'. The Tribunal noted that, in New Zealand, '[w]e . . . have our own protective principle that acknowledges the Crown's Treaty duty actively to protect Māori rights and interests. But it is not the framework. Partnership is.'[165] This is a discussion that roots 'partnership' firmly in the treaty itself.

The Tribunal recommended a number of innovations in Crown procedures designed to express what it called 'the new generation of Treaty partnership in which Māori have a meaningful voice in the ongoing fate of their taonga, and the partnership itself is not static but is being constantly rebalanced'.[166] It discussed partnership principles that it suggested differed from 'the principles of good behaviour spelled out by the Court of Appeal in 1987 in the *Lands* case' and were instead principles that could be practically applied 'in the context of modern government policies and programmes'.[167] It examined how the partnership relationship might change in the future and potentially become the partnership that was promised at the time of the signing of the treaty –– 'a relationship of equals'.[168] Further, it suggested that 'on many occasions what we believe is needed more than anything is a change in mindset – a shift from the 'old' approach that valued only one founding culture to one in which the other is equally supported

161. Waitangi Tribunal, *Ko Aotearoa Tēnei, Te Taumata Tuarua*, Wai 262, vol 1, p 16.
162. Waitangi Tribunal, *Ko Aotearoa Tēnei, Te Taumata Tuarua*, Wai 262, vol 1, p 17.
163. Waitangi Tribunal, *Ko Aotearoa Tēnei, Te Taumata Tuarua*, Wai 262, vol 1, p 17.
164. Waitangi Tribunal, *Ko Aotearoa Tēnei, Te Taumata Tuarua*, Wai 262, vol 1, p 19.
165. Waitangi Tribunal, *Ko Aotearoa Tēnei, Te Taumata Tuarua*, Wai 262, vol 1, p 19.
166. Waitangi Tribunal, *Ko Aotearoa Tēnei, Te Taumata Tuatahi*, Wai 262, p 19.
167. Waitangi Tribunal, *Ko Aotearoa Tēnei, Te Taumata Tuarua*, Wai 262, vol 2, p 577.
168. Waitangi Tribunal, *Ko Aotearoa Tēnei, Te Taumata Tuatahi*, Wai 262, p 248.

and promoted'. Partnership required 'cooperation and, on the part of the Crown, a willingness to share responsibility and control with its Māori Treaty partner where it is appropriate to do so'.[169]

Two reports published since our stage 1 report was released, have taken somewhat similar approaches to the principle of partnership. In *He Whiritaunoka*, the Whanganui Land inquiry contrasted the situation of Whanganui Māori when they signed the treaty with that of Ngāpuhi at Waitangi. In Whanganui, Māori had almost none of the experiences of Ngāpuhi in terms of contact with Pākehā, with traders, or any long-term relationship with missionaries, Indeed, the purchase deed of the New Zealand Company, which E J Wakefield took to Whanganui at the same time, probably seemed of greater importance than the treaty and was signed by many more rangatira. Yet Whanganui Māori were aware of the benefit that establishing relations with Europeans could bring, and the Tribunal concluded that they expected the process of engagement to continue and advance as more Pākehā arrived.[170] Whanganui Māori may have regarded the two signings as very similar; both, the Tribunal said, conveyed 'the common message that Europeans would be arriving and that understandings needed to be arrived at about where and how they would live and how their leaders and rangatira would interact'.[171] But they would not have had any reason for supposing that the use of the word 'Kawanatanga' in the treaty 'was intended to convey the full power and authority of the "sovereignty" that Māori ceded in the English version'.[172] By signing the treaty, Whanganui rangatira were agreeing to embark on a relationship with the incoming Pākehā population. 'They did not know very much about what it was going to look like, but they were agreeing in good faith to venture into the future with these new people'.[173]

The Tribunal, having raised the question of different Māori understandings of the treaty in light of their previous interaction with Pākehā, stated that 'the Waitangi Tribunal does not determine the meaning and effect of the Treaty for different groups of Māori in light of their own experience of engaging with the Treaty and signing it'. It made it clear, however, that the Crown's treaty duties applied whether or not there was Māori consent, because the Crown had gained the benefits of the treaty everywhere.[174] The Tribunal hesitated to agree that the treaty does not bind Māori if they did not consent to it, arguing that it would not benefit Māori if this were said now, for they would not regain sovereignty or the lands they did not want to sell (despite their rights under the treaty to retain them).[175]

169. Waitangi Tribunal, *Ko Aotearoa Tēnei*, *Te Taumata Tuarua*, Wai 262, vol 2, p 450.
170. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, pp 135–137.
171. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 150.
172. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 147.
173. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 151.
174. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, pp 143–144. The Tribunal specified the *Rekohu* report and the *Te Urewera* report as having reached this conclusion after considering that neither the Moriori nor certain groups in Te Urewera were offered the opportunity to sign the treaty.
175. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 144.

In its discussion of the treaty principle of partnership, the Tribunal concluded that

> Māori in Whanganui had every reason to believe that the new society would proceed on the basis of partnership between their leaders and the new arrivals. This included establishing settlers on the land and working cooperatively with them. It also involved maintaining Māori authority in their own spheres and cooperating in areas of intersecting interest.[176]

It added, 'Where there is an ethic of partnership, there is no room for one partner to impose changes on the other without participation and agreement.'[177]

In part 1 of *Te Mana Whatu Ahuru*, the Tribunal reached a similar conclusion about the nature of partnership, though through a rather different route. In its view, the treaty represented a 'coming together of two peoples, each with their respective cultural, legal, and political traditions'. Its approach to determining the treaty's meaning and effect was based on the meeting of two legal traditions: one based on European law, the other on tikanga. In both traditions, they said, there needed to be consent and acknowledgement of the other's authority.[178] The Tribunal considered the fundamental 'Treaty exchange' in this context:

> Māori communities retain their tino rangatiratanga, including their right to autonomy and self-government, and their right to manage the full range of their affairs in accordance with their own tikanga. As part of the Treaty exchange, the Crown guarantees to protect and provide for the exercise of Māori authority and autonomy.[179]

The Tribunal also saw the treaty as creating a shared realm in which their two authorities were to coexist. The power arrangement would be 'in the nature of one sovereign entity consisting of multiple governmental authorities'. The primary responsibility of Māori was the maintenance and well-being of their own communities and territories. The Crown's principal focus (spelled out in the treaty's preamble and in verbal explanations) was on control of settlers and settlement.[180]

The Tribunal suggested that kāwanatanga allowed the Crown to govern and make laws for particular purposes. To that extent, the Tribunal said, the treaty had modified the ultimate sovereign authority held by Māori communities; that authority had become instead a right to self-determination and autonomy – or self-government – that existed alongside the Crown's right to make laws and govern. Tino rangatiratanga must have been understood by Māori as at least an equivalent power to the Crown's kāwanatanga.[181] Thus, the Tribunal concluded that 'there would need to be further discussions between Māori and the Crown about how

176. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 156.
177. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 156.
178. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pts 1–2, p 180.
179. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pts 1–2, p 189.
180. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pts 1–2, pp 180–182.
181. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pts 1–2, pp 155–156.

these two forms of power would intersect and co-exist'.[182] The Tribunal offered the following explanation of the principle of partnership:

> The Treaty established a relationship that was subject to ongoing negotiation and dialogue, under which the Crown and Māori would work out the practical details of how kāwanatanga and tino rangatiratanga would co-exist. Both partners owe each other a duty to act honourably and in good faith. Neither partner can act in a manner that fundamentally affects the other's sphere of influence without their consent, unless there are exceptional circumstances.[183]

The Tribunal explained the function of the principle of partnership similarly in *Te Urewera* (2017), noting the meaning of the terms 'sovereignty', 'tino rangatiratanga', and 'mana motuhake' in their respective languages:

> The concepts of 'sovereignty' on the one hand, and 'tino rangatiratanga' or 'mana motuhake' on the other, connote absolute authority, and so cannot co-exist in different people or institutions. Thus, striking a practical balance between the Crown's authority and the authority of a particular iwi or other Maori group must be a matter for negotiation, conducted in the spirit of cooperation and tailored to the circumstances.[184]

Among the duties arising from the treaty partnership is the Crown's duty to engage with Māori on matters of importance to them. This is often referred to as the duty of consultation. The Tribunal has sometimes distinguished circumstances in which Crown consultation with Māori may be necessary, and has stated that the Crown must ensure consultation is in accordance with treaty guarantees or with treaty principles.

An early statement of this duty was made in *The Ngati Rangiteaorere Claim Report* (1990), which stated,

> In the view of the Crown the exercise of kawanatanga, or sovereignty in the English text, clearly included the right to legislate; but in our view this should not have been exercised in matters relating to Maori and their lands and other resources, without consultation. Likewise, in the implementation of such laws, Maori should have been involved in the decision-making process.[185]

The *Ngawha Geothermal Resource Report* (1993) considered that 'full discussion' with Māori was necessary before the Crown made decisions on matters which

182. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pts 1–2, p 156.
183. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pts 1–2, p 189.
184. Waitangi Tribunal, *Te Urewera*, Wai 894, 8 vols (Wellington: Legislation Direct, 2017), vol 1, p 134. The *Te Urewera* report was issued in successive pre-publication volumes between 2009 and 2015; part 1 was released in 2009, some years before our stage 1 report.
185. Waitangi Tribunal, *The Ngati Rangiteaorere Claim Report 1990*, Wai 32 (Wellington: GP Publications, 1990), p 31.

might 'impinge upon the rangatiratanga of a tribe or hapu over their taonga'. In its view,

> The Crown obligation actively to protect Maori Treaty rights cannot be fulfilled in the absence of a full appreciation of the nature of the taonga including its spiritual and cultural dimensions. This can only be gained from those having rangatiratanga over the taonga.[186]

The *Te Ika Whenua Rivers Report* (1998) put it this way:

> In our view, if there is to be consultation that satisfies the terms of the Treaty, there must first be recognition of the rights and interests of Maori under article 2. It is not possible for the Crown successfully to argue the proper exercise of kawanatanga in accordance with the terms of the Treaty without indicating the regard it has had to the guarantees contained in article 2. Likewise, it is not sufficient to consult without recognition of any right or interest and then argue that such consultation complies with the requirements of the Treaty.[187]

Similarly, the Central North Island Tribunal's view was that the Crown has a duty to 'consult Maori on matters of importance to them and to obtain their full, free, prior, and informed consent to anything which alters their possession of those lands, resources, and taonga guaranteed to them in article 2'.[188] It added that the test of what consultation is 'reasonable in the prevailing circumstances depends on the nature of the resource or taonga, and the likely effects of the policy, action, or legislation'.[189]

Tribunal reports concerning contemporary issues also made relevant comments on how the Crown and Māori should engage on matters of concern to Māori. In *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (2016), which followed an urgent inquiry, the Tribunal cited the finding of *Ko Aotearoa Tēnei* that decision-making under the treaty should take place on a sliding scale, depending on the nature and extent of the respective interests of treaty partners in the issue at hand. One of the Crown's duties as treaty partner, when it was preparing new legislation for Māori land in 2015, was 'not only to consult with Māori as to the governance of their lands' but also to seek and receive 'Māori agreement in respect to changing the law as to how they are to own, manage and control their lands under the law'.[190] The Tribunal did not accept that the Crown had an interest as great as Māori in the institutions

186. Waitangi Tribunal, *The Ngawha Geothermal Resource Report 1993*, Wai 304 (Wellington: Legislation Direct, 1993), pp 101–102.
187. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, Wai 212 (Wellington: GP Publications, 1998), p 108.
188. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 4, p 1236.
189. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 4, p 1237.
190. Waitangi Tribunal, *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993*, Wai 2478 (Wellington: Legislation Direct, 2016), p 202.

Māori had constituted under the 1993 Act to govern and manage their taonga tuku iho: 'Indeed, in this particular case, we find that the Māori interest in their taonga tuku iho, Māori land, is so central to the Māori Treaty partner that the Crown is restricted (and not unreasonably so) from simply following whatever policy it chooses.'[191]

Overall, the Tribunal concluded, the Crown must carefully consider and inform itself of the impact its laws and policies may have on Māori individuals and groups, principally by adequately engaging and consulting with them. This standard has also been expressed in other Tribunal reports as a standalone duty of consultation, or duty of informed decision-making.[192] Proceeding with law and policy without consulting Māori can only be treaty-consistent in exceptional circumstances, such as when delays might cause prejudice.[193] Ultimately, the Tribunal has maintained that the Crown must be accountable to its treaty partners in its formulation and implementation of law and policy.[194]

In a rather different inquiry, the Tribunal considered claims about the Crown's review, through Te Puni Kōkiri, of the Maori Community Development Act 1962 and the role of Māori Wardens. In the subsequent *Whaia te Mana Motuhake/In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (2015), the Tribunal adopted a treaty principle of 'collaborative agreement':

> this principle applies in legislative and administrative matters where the authority of the Crown to make law and the right of Māori to exercise autonomy overlap. It requires dialogue between the Treaty partners and . . . requires consultation and cooperation, possibly even negotiation towards obtaining Māori agreement in the development of administrative arrangements and legislation affecting Māori institutions.[195]

The Tribunal cited aticle 19 of the United Nations Declaration on the Rights of Indigenous Peoples, which articulates the duty of States to

> consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions . . . to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.[196]

191. Waitangi Tribunal, *He Kura Whenua ka Rokohanga*, Wai 2478, p 261.
192. For example, in Waitangi Tribunal, *Napier Hospital and Health Services Report*, Wai 692 (Wellington: Legislation Direct, 2001), pp 66–68, 256, 263, 324, 368.
193. Waitangi Tribunal, *The Offender Assessment Policies Report*, Wai 1024 (Wellington: Legislation Direct, 2005), p 12.
194. Waitangi Tribunal, *Tū Mai te Rangi! Report on the Crown and Disproportionate Reoffending Rates*, Wai 2540 (Wellington: Legislation Direct, 2017), p 23; Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry*, Wai 2575 (Wellington: Legislation Direct, 2019), p 133.
195. Waitangi Tribunal, *Whaia te Mana Motuhake/In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim*, Wai 2417 (Wellington: Legislation Direct, 2015), p 42.
196. Waitangi Tribunal, *Whaia te Mana Motuhake*, Wai 2417, p 40.

Though these reports concerned twentieth and twenty-first century matters, the Tribunal's discussion of the importance of the involvement of Māori in decision-making remains relevant to the nineteenth century.

2.3.5 Te mātāpono o te matapopore moroki/the principle of active protection

Active protection has long been seen as a key treaty principle. The Manukau Tribunal stated as early as 1985 that the treaty 'obliges the Crown not only to recognise the Maori interests specified in the Treaty but actively to protect them', and moreover that 'the omission to provide that protection is as much a breach of the Treaty as a positive act that removes those rights'.[197]

The *Orakei* report, which was the first detailed study by the Tribunal of British motives in annexing New Zealand, stressed the protective intentions of the Crown. This was evident in the great importance of the 'humanitarian impulses' that led the British government to intervene in New Zealand 'with a view to protecting the Maori people from the adverse consequences of colonisation'.[198] These motives were set out in detail in Lord Normanby's instructions to Hobson, which also made it clear that Hobson was to emphasise these intentions in seeking Māori assent to the treaty. The Tribunal further pointed to Normanby's concern that Māori should be protected by the Crown in their land transactions. It concluded that the Crown's obtaining, under the treaty, the 'valuable monopoly right to purchase land from the Maori to the exclusion of all others' imposed on the Crown 'certain duties and responsibilities'. The first duty of the Crown therefore was to ensure that Māori in fact wished to sell; the second was 'to ensure that they were left with sufficient land for their maintenance and support or livelihood', that is, 'that each tribe maintained a sufficient endowment for its foreseen needs'.[199] And the report reiterated the Manukau Tribunal's view that omission to protect Māori treaty interests was as much a Treaty breach as a positive act that removes or abrogates those rights.[200]

The Tribunal reported in *The Ngai Tahu Report* (1991) on extensive purchases conducted in the South Island within the first 20 years after the signing of the treaty, either by or under the auspices of the Crown. The theme of protection runs strongly through its discussion of treaty principles, which began with the tenet: 'The cession by Maori of sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga.' The Tribunal cited Mr Justice Casey in the *Lands* case approvingly ('the whole thrust of article 2 was the protection of Maori land and the uses and privileges associated with it') but added that

197. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, Wai 8, p 70.

198. The Ōrākei Tribunal discussed the Crown's motivations for signing the treaty as part of its wider consideration of the Crown's assertion of a right of pre-emption under article 2, and whether this imposed a reciprocal duty on the Crown to protect Māori interests. In its assessment of the treaty's provisions, the Tribunal considered that it should have regard to 'all relevant surrounding circumstances and any declared or apparent objects or purposes': Waitangi Tribunal, *Report on the Orakei Claim*, Wai 9, pp 193, 206.

199. Waitangi Tribunal, *Report on the Orakei Claim*, Wai 9, pp 193, 206.

200. Waitangi Tribunal, *Report on the Orakei Claim*, Wai 9, p 209.

'rangatiratanga [as confirmed and guaranteed in article 2] embraced protection not only of Maori land but much more'.[201]

The Crown also had an obligation to protect Māori treaty rights. The preamble to the treaty, the Tribunal pointed out, expressed the Queen's anxiety 'to protect the just rights and property of Maori. Article 3 extends the Queen's Royal protection and bestows all the rights and privileges of British subjects on the Maori people.' The duty of protection extends to the Crown's exercise of its right of preemption in a range of ways, including ensuring a 'meaningful exercise of rangatiratanga' when purchases were negotiated, and the Crown's duty to ensure that the land the tribe wished to retain was clearly identified.[202]

The Tribunal has drawn on the principle of active protection widely since that time, emphasising the context of British humanitarianism; the principle is derived, in other words, from British aims and concerns.[203] The *Te Tau Ihu* report found that the Crown's duty was 'not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable' and that its responsibilities, as affirmed by the Court of Appeal in 1987, are 'analogous to fiduciary duties'.[204] Active protection requires 'honourable conduct by, and fair processes from the Crown', as well as 'full consultation with – and where appropriate, decision-making by – those whose interests are to be protected'.[205] Accordingly, the Crown was required to '[guard] Maori from transactions to which they did not give full, free, and informed consent, or in which they might unknowingly harm their own interests'.[206]

In defining this duty as including article 2 guarantees, the Tribunal affirmed that the Crown is obliged actively to protect Māori autonomy. In *Te Mana Whatu Ahuru*, the Tribunal found that the Crown had a duty actively to protect Māori rights and interests,

> including the exercise of Māori authority – this included a duty not to ignore, deny, or interfere with Māori authority or relationships with lands and other taonga, and a duty to actively support those relationships to the greatest extent practicable in accordance with Māori wishes (including through legislation and institutional arrangements if that was what Māori communities sought).[207]

Tribunal inquiries have thus concluded that the treaty's guarantee to protect Māori exercise of tino rangatiratanga included the protection of their right

201. Waitangi Tribunal, *The Ngai Tahu Report 1991*, Wai 27, 3 vols (Wellington: GP Publications, 1991), vol 2, p 236.
202. Waitangi Tribunal, *The Ngai Tahu Report 1991*, Wai 27, pp 240–241.
203. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, pp 116–117, 390–391.
204. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, p 642 (cited in Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, Wai 785, vol 1, p 4).
205. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, Wai 785, vol 1, p 4.
206. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, Wai 785, vol 2, p 541.
207. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pts 1–2, p 188.

to manage their land, peoples, and taonga (that is, language, culture, and other taonga of an intangible nature) in accordance with tikanga.[208]

The Tribunal also found in the *Report on the Crown's Foreshore and Seabed Policy* that the law and policy relating to freshwater taonga was a matter requiring a collaborative approach.[209] In finding that '[t]he foreshore and sea were and are taonga for many hapū and iwi', the Tribunal stated:

> Māori had a relationship with their taonga which involved guardianship, protection, and mutual nurturing. This is not liberal sentiment of the twenty-first century but a matter of historical fact. The Crown's duty under the Treaty, therefore, was actively to protect and give effect to property rights, management rights, Māori self-regulation, tikanga Māori, and the claimants' relationship with their taonga; in other words, te tino rangatiratanga.[210]

In *Te Mana Whatu Ahuru*, quoting the *Report on the Crown's Foreshore and Seabed Policy*, the Tribunal observed that '[t]he Crown's guarantee of tino rangatiratanga was meaningless . . . unless also accompanied by the tikanga "that sustain and regulate the rangatira and his relationship to the people, and the land"'.[211]

Elsewhere, the Tribunal has also discussed how the duty of active protection and the principle of equity are 'closely linked'.[212] The Tribunal has noted that the Crown's obligations actively to promote Māori rights, citizenship privileges, and their well-being and socio-economic status under the principle of equity are heightened by its duty of active protection. We discuss this further in the following section.

2.3.6 Te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development

In the *Muriwhenua Fishing* report, the Tribunal made an early statement of Māori rights to development. It commented that Normanby's instructions to Hobson could be described as reflecting the principle that

> [N]othing would impair the tribal interest in maintaining personal livelihoods, communities, a way of life, and full economic opportunities, It was subject to the overriding principle of protecting Maori properties. It was even more important that settlement would not in itself be the excuse to relieve Maori of that which they wished to keep.[213]

208. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, Wai 1071, p 3; Waitangi Tribunal, *The Ngai Tahu Report 1991*, Wai 27, vol 3, pp 725–726; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui-Waitara Claim*, Wai 6 (Wellington: Waitangi Tribunal, 1983), p 53.
209. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, Wai 1071, p 28.
210. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, Wai 1071, p 28.
211. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pts 1–2, p 157.
212. Waitangi Tribunal, *Hauora*, Wai 2575, p 34.
213. Waitangi Tribunal, *Report on the Muriwhenua Fishing Claim*, Wai 22, p 216.

Further, it stated:

> It is the fundamental right of all aboriginal people, following the settlement of their country to retain what they wish of their properties and industries, to be encouraged to develop them as they should desire, and not to be dispossessed or restricted in the full enjoyment of them without a beneficial agreement.[214]

In the *The Ngai Tahu Sea Fisheries Report* (1992), the Tribunal similarly found that Māori had a right to develop their properties themselves, including developments made possible by scientific and technological developments.[215]

The *Te Tau Ihu* inquiry stated that when the treaty was signed, 'both settlers and Maori were expected to obtain or retain the resources necessary for them to develop and prosper in the new, shared nation state'. It also cited the reference in Lord Normanby's 1839 instructions to full payment for Māori 'who parted with land [which] would be the rise in value of what they retained, which would enable them to participate fully in the benefits of settlement'. Thus, the Tribunal surmised, it was critical that Māori retained sufficient land and resources.[216] *The Radio Spectrum Management and Development Final Report* (1999) interpreted the principle of mutual benefit to mean that 'Maori expected, and the Crown was obliged to ensure, that they and the colonists would gain mutual benefits from colonisation and contact with the rest of the world, including the benefits of new technologies'.[217]

The Tribunal's emphasis on the treaty's guarantee that Māori retain sufficient land and resources also extended to a guaranteed right of development. Citing the *He Maunga Rongo* report, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (2012) summarised that 'Māori had the right to develop as a people and to develop their properties.'[218] *He Maunga Rongo* itself noted that the Tribunal and the courts had generally accepted a development right, based on the 'strong emphasis, in the wording of both texts of the Treaty [the preamble, article 2, and article 3], on guarantees for the properties and taonga retained by Maori'. This was, it stated, 'part of the full property rights guaranteed by the Treaty and was fundamental to the expectation that Maori would use their properties to participate in the new opportunities, and share in the benefits, that were brought by the Treaty and by settlement'.[219]

214. Waitangi Tribunal, *Report on the Muriwhenua Fishing Claim*, Wai 22, p 220.
215. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, Wai 27 (Wellington: Brooker and Friend, 1992), p 256.
216. Waitangi Tribunal, *Te Tau Ihu o te Ika a Maui*, Wai 785, vol 1, p 5.
217. Waitangi Tribunal, *The Radio Spectrum Management and Development Final Report*, Wai 776 (Wellington: GP Publications, 1999), p 52.
218. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 4, p 1667 (Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim*, Wai 2358 (Wellington: Legislation Direct, 2012), p 50.
219. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 3, pp 891, 912.

The Tribunal went on to consider how the Crown's obligation of active protection applies to the development right and how a treaty development right might extend to modern circumstances and enterprises. It concluded that Māori in the Central North Island inquiry district have a treaty right of development, including:

- the right as property owners to develop their properties in accordance with new technology and uses, and to equal access to opportunities to develop them;
- the right to develop or profit from resources in which they have (and retain) a proprietary interest under Maori custom, even where the nature of that property right is not necessarily recognised, or has no equivalent, in British law;
- the right to positive assistance, where appropriate to the circumstances, including assistance to overcome unfair barriers to participation in development (especially barriers created by the Crown);
- the right of Maori to retain a sufficient land and resource base to develop in the new economy, and of their communities to decide how and when that base would be developed;
- the opportunity, after considering the relevant criteria, for Maori to participate in the development of Crown-owned or Crown-controlled property or resources or industries in their rohe, and to participate at all levels (such criteria include the existence of a customary right or an analogy to a customary right, the use of tribal taonga, and the need to redress past breaches or fulfil the promise of mutual benefit); and
- the right of Maori to develop as a people, in cultural, social, economic, and political senses.[220]

2.3.7 Te mātāpono o te mana taurite/the principle of equity

The Crown's obligation to treat Māori equitably arises from article 3, which promises all Māori the rights and privileges of British subjects.

Article 3 guarantees Māori equal citizenship rights, including equal rights to political representation.[221] As the Tribunal noted in the *Maori Electoral Option Report* (1994) regarding the franchise rights guaranteed by article 3: 'It is difficult to imagine a more important or fundamental right of a citizen in a democratic state than that of political representation. This right is clearly included in the protection extended by the Crown to Maori under article 3.'[222]

The report further affirmed that the Crown has a treaty duty to sustain Māori citizenship rights, including their right to political representation in central Government.[223] In *Tauranga Moana, 1886–2006* (2010), the Tribunal affirmed that through the guarantees in article 3, Māori are similarly assured representation at the local government level.[224]

220. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 3, p 914.
221. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pts 1–2, p 185.
222. Waitangi Tribunal, *Maori Electoral Option Report*, Wai 413 (Wellington: Brookers, 1994), p 12.
223. Waitangi Tribunal, *Maori Electoral Option Report*, Wai 413, p 15.
224. Waitangi Tribunal, *Tauranga Moana*, Wai 215, vol 1, pp 384, 387, 477, 479–480.

The Tribunal stated in the *Te Arawa Mandate Report* (2004) that the principle of equity obliged the Crown 'to apply the protection of citizenship equally to Maori and to non-Maori, and to safeguard Maori access to the courts to have their legal rights determined'.[225]

In *He Maunga Rongo* the Tribunal applied the principle to the sphere of economic development, pointing out that 'British politicians and officials recognised that specific efforts were needed' from the Crown not just to grant Māori formal legal equality with settlers (as is implied in article 3 of the treaty) but also to ensure equality in practice, including the 'equal ability to utilise properties and resources to participate in new economic opportunities'.[226]

More broadly, the Tribunal has outlined the principle in accordance with the obligations arising from kāwanatanga, partnership, reciprocity, and active protection as requiring the Crown to act fairly to both settlers and Māori and to ensure that settlers' interests were not prioritised to the disadvantage of Māori. Where disadvantage did occur, the principle of equity, along with those of active protection and redress, required that there be active intervention to restore the balance.[227]

Various Tribunal panels have also drawn attention to the difference between equal and equitable treatment, and we return to this issue later.

2.3.8 Te mātāpono o te whakatika/the principle of redress

This principle derives from the Crown's partnership obligation to act reasonably and in good faith, and its duties under active protection. This means that the Crown should remedy treaty breaches and the prejudice that arises from them. The Crown is required to act in a way that restores both its own honour and integrity, and the mana and status of Māori.[228] The Court of Appeal, in its 1987 decision on the *Lands* case, affirmed the Crown's 'duty to remedy past breaches' identified by the Tribunal as an enduring one, except in 'very special circumstances, if ever'.[229]

In *The Offender Assessment Policies Report* (2005), the Tribunal – citing the *Lands* case – said that

> The principle of redress derives from the Crown's obligation to act reasonably and in good faith. It is relevant when a breach of Treaty principle and resulting prejudice to Māori is established. In that situation, the Crown is obliged to restore its honour by providing a remedy for the wrong that has been suffered.[230]

225. Waitangi Tribunal, *Te Arawa Mandate Report*, Wai 1150 (Wellington: Legislation Direct, 2004), p 94.
226. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 3, p 945.
227. Waitangi Tribunal, *Te Kāhui Maunga: The National Park District Inquiry Report*, Wai 1130, 3 vols (Wellington: Legislation Direct, 2013), vol 1, p 17.
228. Waitangi Tribunal, *The Tarawera Forest Report*, Wai 411 (Wellington: Legislation Direct, 2003), p 29.
229. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, pp 664–665.
230. Waitangi Tribunal, *Offender Assessment Policies Report*, Wai 1024, p 13.

In its report on stage 1 of the National Freshwater and Geothermal Resources inquiry, the Tribunal considered the finding made in *Te Ika Whenua Rivers* that the Crown must 'redress Treaty breaches by taking positive steps to make amends, including compensation for loss'.[231] The Tribunal commented that this requirement 'applies just as much if not more to present or ongoing breaches as it does to historical breaches'.[232] In respect of Crown redress for treaty breaches of Māori rights and interests in water bodies, it suggested,

> If the claimants and the interested parties have residual proprietary rights (as the case examples suggest that they do), then the Crown's Treaty duty is to undertake in partnership with Māori an exercise in rights definition, rights recognition, and rights reconciliation. If we follow the reasoning of the Te Ika Whenua Rivers Tribunal, it might result in a new 'form of title' that recognizes the customary and Treaty rights of Māori in their water bodies. Or it might, as the Crown suggests, take the form of putting into effect the recommendations of the Wai 262 Tribunal so that kaitiaki can have control of taonga or partnership arrangements where appropriate. It might be a combination of both or something else altogether.[233]

2.4 Our View of ngā Mātāpono o te Tiriti / the Treaty Principles, and the Rights and Duties that Arise from the Treaty Guarantees

In our inquiry, we have placed particular importance on the following treaty principles:

- te mātāpono o te tino rangatiratanga;
- te mātāpono o te kāwanatanga;
- te mātāpono o te houruatanga/the principle of partnership;
- te mātāpono o whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect;
- te mātāpono o te matapopore moroki/the principle of active protection;
- te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development;
- te mātāpono o te mana taurite/the principle of equity; and
- te mātāpono o te whakatika/the principle of redress.

As we stated in the introduction, it is important in this inquiry that ngā mātāpono o te Tiriti/the principles of the treaty reflect the expectations and understandings of Te Raki Māori as well as those of the British, which have often been emphasised. The instructions of Lord Normanby to Hobson have been seen as the crucial statement of British understanding of the Crown's responsibilities to

231. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, Wai 212, pp 134–135 (Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim*, Wai 2358, p 79).
232. Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim*, Wai 2358, pp 79–80.
233. Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim*, Wai 2358, p 80.

Māori as they embarked on the annexation and colonisation of New Zealand. But, as is evident from many Tribunal reports, they cannot stand alone.

In Te Paparahi o te Raki, our starting point is the context and the circumstances in which rangatira of Te Raki entered into te Tiriti. These were, as we explain later, unique. Ngā mātāpono/treaty principles, as we apply them in this inquiry, are based in the actual agreement entered into in 1840 between Te Raki rangatira and the Crown, which for Te Raki rangatira did not involve a cession of their sovereignty. Te Raki Māori leaders expected effective recognition from the Crown of their tino rangatiratanga over their own affairs and lands. They agreed to share power and authority with Britain, and expected the Crown to exercise its authority over the growing number of settlers in their rohe.

In light of this, we will revisit in the following sections the way that certain treaty principles have been expressed, and their significance, as well as the rights and duties that arise from the treaty guarantees.

2.4.1 Te mātāpono o te tino rangatiratanga

In this inquiry, we attach great weight to the principle of tino rangatiratanga, often referred to as the principle of autonomy. We prefer the former term. It connects the principle directly to the words of te Tiriti – a matter of great importance to the claimants. It also reflects the claimants' deeply held view that only the Māori text, te Tiriti, is of any relevance to them because that was what their tūpuna understood and committed themselves to. Te Tiriti had mana, its own authority, in ways the English version did not. In the words of Erima Henare, 'It is to that Tiriti that our ancestors, our tūpuna affixed their tohu tapu from the ngū of their noses, making it tapu.'[234] Ngāpuhi leader Tā James Henare has also explained the sacredness of te Tiriti:

> [T]he most important thing for me and the Māori people is – for the Treaty to be made honourable and prestigious. The main thing for me is the spiritual side of the Treaty. What good is the spirituality when it has no integrity? When the integrity of the treaty exists, the integrity of a spiritual nature will also exist and the integrity of all the customs that come with the Treaty will also be spiritual. Spirituality cannot be seen by the human eye; however the body of the Treaty was signed by our ancestors.[235]

This is the context in which Ngāpuhi interpret the significance of te Tiriti both in and after 1840.

We begin, as the claimants did, with te kawa o Rāhiri (the law of Rāhiri) – and we discuss this further in chapter 3. Dr (now Tā) Patu Hohepa, giving evidence for Hokianga claimants, spoke of rangatiratanga, tikanga, and mana in the context of

234. Erima Henare (doc A30(c)), p 6.

235. Tā Himi Henare, interview, 'Ngā Pukorero o te wa ko te reo o kui o koro ma' (Manuka Henare, Angela Middleton, and Adrienne Puckey, 'Te Aho Claims Alliance (TACO): Oral and Traditional History', Te Aho Claims Alliance Report, Mira Szászy Research Centre, University of Auckland Business School, 2013 (doc E67), p 238).

te kawa o Rāhiri. He explained why the founding tupuna Rāhiri kept his two sons apart; their separate communities could then thrive, and when trouble threatened, they could unite to support each other:

> i puta mai nga tikanga me nga ture i te wa o Rahiri, heke mai ki nga kuia me nga kaumatua o Hokianga me Taumarere. Te Kawa o Rahiri . . . links us back to Kupe and to Maui and to all those . . . from whom we descend. It reflects who we are and how we exercise authority over and between each other. . . . [it] dictates the way in which rangatiratanga is exercised within and throughout Hokianga.
>
> To understand Te Kawa o Rahiri requires one to understand the way that conflict holds us as Ngapuhi together, providing for a convergence of our laws and tikanga, shaping our expression of mana. This unification and convergence comes through the sons of Rahiri, Uenuku Kuare and Kaharau Manawakotikoti and their wives. These two sons were kept apart so that they could work together which is highlighted by the whakatauki:
>
> *Ka mimiti te puna i Hokianga,*
> *Ka totō te puna i Taumārere*
> *Ka mimiti te puna i Taumārere,*
> *Ka totō te puna i Hokianga.*
> *When the Hokianga spring runs dry,*
> *the Bay of Islands spring flows*
> *[W]hen the spring of the Bay of Islands runs dry,*
> *the Spring of Hokianga flows.*[236]

Dr Hohepa also told us during closing submissions that

> . . . Te Kawa o Rahiri dictates the way in which rangatiratanga is expressed within a Ngapuhi context. I hesitate to say that it is an expression of sovereignty[,] [a] . . . foreign term[,] . . . it is not sovereignty, it is something more. . . . Te Kawa o Rahiri tells us we have rangatiratanga as a hapu but we, each and every one of us have to be rangatira of that kaitiakitanga.
>
> The rangatira I am referring to is not the English translation chief, it is the one who binds the group together. So it is the group that is in charge and it is why, under Te Kawa o Rahiri the people are the chiefs of the chiefs and the debate that surrounds the exercise of rangatiratanga binds us together. . . .
>
> He Whakaputanga can be seen as a reflection of Te Kawa o Rahiri when seen through the lens of support by a number of hereditary leaders.

236. This translation is from Dr Hohepa's evidence: Patu Hohepa, 'Hokianga: From Te Korekore to 1840' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2011) (doc E36), p 172. We note that the whakataukī is stated in slightly different ways but that the imagery is consistent whichever version is given. That imagery is of the intertwining of the east and the west coasts, of Taumarere and Hokianga, of descendants of Rāhiri's sons Kaharau and Uenuku-kūare; their actions affect each other. The whakataukī speaks to the alliance of the destinies of Ngāpuhi on the Te Tai Tamawāhine (eastern) and Te Tai Tamatāne (western) coasts; Nuki Aldridge (doc B10), p 33; Patu Hohepa (doc A32), p 4; John Klaricich (doc C9), pp 13–14; Marsha Davis (doc C21), p 16.

> Through Te Tiriti o Waitangi our rangatira sought to protect our ability to maintain our rangatiratanga and the Crown promised to assist us in this endeavour.[237]

In his kōrero, Dr Hohepa moved from te kawa o Rāhiri to he Whakaputanga o te Rangatiratanga o Nu Tireni, stressing the link between them, and to te Tiriti. He looked to the future, 'where Te Kawa o Rahiri would be maintained by us as espoused by our rangatira within He Whakaputanga, and which the Crown promised to respect when it signed Te Tiriti o Waitangi'. He stressed that in te Tiriti the rangatira sought to maintain their tino rangatiratanga, and that the Crown had promised to support them in this.[238]

The significance of he Whakaputanga to Ngāpuhi was impressed upon us from the time of our arrival in Te Raki. In considering the immediate context in which te Tiriti was signed, we place particular importance on the unique circumstances of the declaration to which the rangatira had put their tohu, on or soon after 28 October 1835. He Whakaputanga must be seen in the context, outlined in our stage 1 report, of the relationship between Te Raki rangatira and the British monarchy that had developed over the previous 15 years, in particular. Hongi Hika's visit to England in 1820, at a time of increasing relations with traders and more recently, missionaries, was regarded by the claimants as a 'momentous event' in their history.[239] The meeting of Hongi and Waikato with King George IV, following their visit to the House of Lords, was of especial significance. Hongi returned home believing that he and King George had established a personal relationship, and had reached agreement that soldiers would not be sent to New Zealand, since it was the King's wish that the country be preserved to Māori.[240]

In 1831, after the arrival of a French warship caused some anxiety, Hongi Hika's visit was followed by a Ngāpuhi petition to King William IV, seeking his friendship and his care for them. Secretary of State for War and the Colonies Lord Goderich replied formally at the command of the King in 1832, and explained that James Busby was being sent to reside in New Zealand as His Majesty's Resident, who would investigate complaints made about unwelcome acts of any British subjects. In 1833, at a time when British commercial interests in New Zealand were increasing, Busby arrived and established himself at Waitangi. And in 1834, Busby held a hui with the rangatira at which they selected a flag to be flown on New Zealand vessels, which the King approved, and which the Royal Navy was instructed to respect.[241]

237. Closing submission of Patu Hohepa on behalf of Hokianga Whakapau Karakia (#3.3.203), pp 3–6.

238. Closing submission of Patu Hohepa on behalf of Hokianga Whakapau Karakia (#3.3.203), pp 4, 6.

239. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 95.

240. This detail was contained in a later letter Hōne Heke wrote to Queen Victoria in 1849, which is cited in our stage 1 report on page 100; we suggested there that while we cannot be certain of the accuracy of the account, Heke's version is plausible.

241. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 122–134.

The following year, Busby drew up the Declaration of Independence at a time of apparent threat by an Anglo-French adventurer, Charles Philippe Hippolyte de Thierry, who had written to Busby to inform him of his imminent arrival with armed troops to establish a 'Sovereign Government' of an independent New Zealand.[242] Thirty-four northern leaders initially put their names to the document. They represented both the northern and southern hapū alliances of Ngāpuhi (we discuss these hapū groups further in chapter 3), the great majority from the Bay of Islands and Hokianga. More northern rangatira signed between 1836 and 1838, including leaders from Hokianga, Te Rarawa, Ngāre Raumati, Te Aupōuri, Waipoua, and Tangiterōria. Te Hāpuku of Hawke's Bay (1838) and Te Wherowhero of Waikato (1839) later added their names.[243]

Extensive evidence on the meaning and significance of he Whakaputanga was heard in stage 1 of our inquiry, and we noted then that much of this evidence had not been heard publicly before. Rather, a British view of its significance has long prevailed, based on the English text and British expectations of the commitments they understood the rangatira to have entered into. The te reo Māori text of he Whakaputanga, however, was significantly different; and this was, in our view, the definitive document embodying the 'unilateral declaration' of its signatory rangatira.[244] Busby's English text was translated into Māori by Henry Williams; it is possible that Eruera Pare, a young relative of Hongi Hika who copied the text, assisted Williams. We rely here on back-translations (from the Māori text of he Whakaputanga into English) by northern scholars, and refer readers to these in our stage 1 report.[245] Given their differing translations, we have provided a summary of the four articles here:

1. the rangatira declared their 'rangatiratanga' in respect of their territories, their paramount authority, and leadership of their country, and declared the sovereign state of their land[246] under the title of te Whakaminenga o nga

242. Charles de Thierry was an adventurer born of French parents who had lived much of his life in England, had met Hongi, Waikato and Kendall there, and had long cherished the hope of establishing a colony in New Zealand. His 1835 announcement however came out of the blue. Busby, though evidently not viewing de Thierry as representing an act of French aggression, decided to take steps against his pretensions lest he destabilise intertribal politics and to call a meeting of chiefs to 'declare the Independence of their Country': Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 159–160.

243. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 165–167.

244. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 198.

245. The full back-translations of Dr Patu Hohepa, Mr Nuki Aldridge, Dr Manuka Henare, and Professor Margaret Mutu are reproduced in *He Whakaputanga me te Tiriti* at pages 174–175, with our detailed discussion of the interpretation of the four articles of He Whakaputanga at pages 171–183.

246. We noted in our report that several claimants gave evidence about the meaning of 'wenua rangatira', suggesting it contained nuances that could not easily be captured in English, and cited John Klaricich as representative of these; the phrase, he said, was 'about belonging, about land at peace explicit in practice of custom, uniquely Maori'; 'wenua' referred not to land as a possession but to its nurturing and sustaining qualities: Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 172–173.

Hapu o Nu Tireni (the sacred confederation of the tribes of New Zealand/ the assembly of the hapū of New Zealand);[247]

2. the sovereignty/kingship ('Kingitanga'), the mana within the land of the Confederation was declared to lie solely with the true leaders ('Tino Rangatira') of the gathering; no foreigner was allowed to make ture (laws, or perhaps decisions) within their territories, or to govern except under their authority;[248]
3. the rangatira agreed to meet in a formal gathering (rūnanga) at Waitangi in the autumn each year to enact laws (wakarite ture) in the interests of justice, peace, and trade;
4. the rangatira agreed that a written copy of the declaration should be sent to the King of England, and because of their care of Pākehā who lived in New Zealand, they asked the King to remain as their protector (matua) in their inexperienced statehood (tamarikitanga), lest their authority and leadership be ended.

The rangatira, in our view, intended he Whakaputanga as an expression of the highest level of authority within their territories. They asserted their tino rangatiratanga – their rights as leaders of their hapū subordinate to no one else within their territories. They asserted their kīngitanga – that their status was equal to that of the King, and that there should be no leaders above them. Taken together, these assertions of mana, tino rangatiratanga, and kīngitanga undoubtedly amounted to an assertion of their authority to make and enforce laws, and therefore of their sovereignty. Despite Busby's wish to create a chiefly legislature so that it could carry out his instructions and to establish an executive under his control, it does not seem that the rangatira saw he Whakaputanga as heralding any new development in the existing forms of their political organisation. They signed it as leaders of autonomous hapū and did no more than agree to deliberate and act in concert when circumstances required it.[249]

The final part of he Whakaputanga concerned the relationship of the rangatira with the British monarch and their wish that he would be a matua for them, 'kei whakakahoretia to matou Rangatiratanga'. That is, it is clear that Māori requested the protection of the King specifically from threats against their rangatiratanga – such as that posed by de Thierry, the self-proclaimed 'Sovereign Chief'.[250] They were not seeking 'some kind of formal protectorate arrangement'; rather, as we concluded in our stage 1 report it was a 'written assertion of the mana,

247. We also noted that 'Te Whakaminenga' potentially had different meanings to different parties: to many claimants it was a formal assembly of rangatira from autonomous hapū, gathering together to act in concert in response to increased European settlement. Some stated that Whakaminenga existed prior to 1835; others that it was created by he Whakaputanga: Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 177–179.

248. We stated in our stage 1 report that all witnesses who spoke 'were consistent in a view of power or authority deriving from the land, as distinct from being simple authority over it': Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 180.

249. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 201.

250. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 202.

rangatiratanga, and independence of those who signed, supported by a commitment to unify in the face of foreign threat'. We saw it also as a renewed declaration of friendship with Britain and its King, initially forged between Hongi Hika and King George, 'based on mutual benefit through trade, mutual commitments of protection, and British recognition of rangatiratanga and mana i te whenua'.[251]

It is crucial not to lose sight of Te Raki Māori understandings of the significance of he Whakaputanga. It seems doubtful that rangatira had relinquished their assertions of mana and independence by 1840. On the contrary, they may well have felt there was nothing in te Tiriti to challenge that position.[252] The rangatira were being assured in te Tiriti of the retention of their tino rangatiratanga rights, and they had requested Britain to use its power to protect their exercise of these rights. He Whakaputanga was an unambiguous declaration that hapū and rangatira authority continued in force, and that Britain had a role in making sure that state of affairs lasted as Māori contact with foreigners increased.[253] By contrast, as far as the British were concerned, the only purpose of he Whakaputanga in 1840 was to provide a basis for the establishment of British authority, through a cession of sovereignty. Hobson assumed that the treaty would supersede the Declaration of Independence.[254] But he Whakaputanga provides a unique context in which the signing of te Tiriti by Ngāpuhi rangatira must be understood. It has remained significant ever since in the political history of the north.

Accordingly, Te Raki rangatira expected their authority to continue to be recognised and respected once they had reached this significant agreement with the new Kāwana (Governor). That, to them, was what the Tiriti agreement meant. That was their understanding of the basis on which their relationship with the British would be conducted, and on which they would assess it. Interpreting te Tiriti's guarantee of tino rangatiratanga and the significance of that guarantee to the hapū and iwi of Te Raki must be grounded in their worldview, experience, and understandings. We introduced this worldview in our stage 1 report and will discuss it further in our next chapter.

We heard kōrero about the relationship of rangatira with their hapū, about the relationships between hapū, about Māori systems of law and authority, and about the web of spiritual relationships that was central to understanding all of these.[255] Rangatira embodied the mana of their atua (ancestor-gods); they exercised authority in relation to both territories and their hapū, whose members also were descended from the atua. Mana was bestowed by virtue of their relationship with people (mana tangata), land (mana whenua), and tūpuna (mana tūpuna); all of which embodied atua.[256]

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251. Waitangi Tribunal, *He Whakaputanga me teTiriti*, Wai 1040, p 203.
252. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 520–521.
253. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 502.
254. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 520.
255. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 23.
256. Henare, Petrie, and Puckey, '"He Whenua Rangatira": Northern Tribal Landscape Overview' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2008) (doc A37), pp 224–232, 365–366; Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 31.

And with the authority rangatira might exercise, and the respect they were entitled to if they earned it, Erima Henare explained, came obligation: 'Rangatira . . . were also duty bound to protect the mana of the hapū, its lands and the lives that were led there . . . Because it was the hapū who gave Rangatira their status, it was to the hapū that Rangatira owed their allegiance.'[257]

Each polity 'exercised its own mana and lived according to its tikanga secure in the uniqueness it had developed over centuries'.[258] But relationships between groups, based on whakapapa, were influenced by how close whanaungatanga (kinship) was; and the principle of manaakitanga (encompassing values of generosity, kindness, and support for others), which sustained each community, also ensured relationships with other groups were maintained.[259]

These tikanga, and the values that underlay them, were reflected also in the relationships and dealings of hapū and their rangatira with the Pākehā who came to live in Te Raki. And they were reflected also in the approach of iwi and hapū to 'formalising some relationship by treating with the British Crown'. In the words of indigenous rights lawyer Moana Jackson, who appeared before us, the evidence of all the kōrero in te reo before, and at the time of signing of te Tiriti indicates that 'rangatira were mindful of their responsibility to preserve and even enhance the mana they were entrusted with. In 1840 they . . . could only act according to law and commit the people to a relationship that was tika in terms of their constitutional traditions.'[260]

In our view, he Whakaputanga was, above all, an affirmation of tino rangatiratanga. Te Tiriti continued this affirmation, and in fact strengthened tino rangatiratanga rights and responsibilities. While it permitted a new, limited Crown presence in New Zealand, Te Raki Māori understood it as an agreement that would sustain and guarantee those rights and responsibilities that their communities had possessed and practised for generations prior to the time of the treaty signings.

In Te Raki, where the treaty was first signed, where it was debated at considerable length by rangatira, where assurances were given by missionaries and by the Queen's representative Hobson himself in a hui that clearly seemed momentous at the time, where accounts of that hui and the whaikorero have survived (even if they are not as comprehensive as we would wish), we have been able to reach conclusions about how Ngāpuhi and Te Raki rangatira understood te Tiriti. We consider that it is not sufficient to suggest (as the Crown does) that they 'are in a similar position to other tribes who signed the treaty but did not intend to cede sovereignty'. Te Raki rangatira were clear about the history and nature of their relationship with the British Crown and what they therefore expected from te Tiriti. They were dealing with the Kāwana sent by the Queen, who had not indicated that their own authority would be compromised in any way. He had not explained that the British intended to assume an overriding authority, despite having every

257. Erima Henare (doc A30(c)), p 12.
258. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 12.
259. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 33.
260. Moana Jackson (doc D2), p 18.

opportunity to do so. The rangatira did not regard kāwanatanga as undermining their own authority. They regarded the treaty 'as enhancing their authority, not detracting from it'.[261]

These understandings, in our view, must guide us in our interpretation of te mātāpono o te tino rangatiratanga as we assess Crown acts and omissions over the decades that followed.

2.4.2 Te mātāpono o te kāwanatanga

Our consideration of the principle of kawanatanga is informed by the understandings both of Te Raki rangatira and of the Crown, though it is clear that there was not in fact a great deal of common ground between them.

In our stage 1 report we considered, based on the detailed specific evidence and legal submissions presented to us, that the rangatira who signed te Tiriti at Waitangi understood 'the authority over New Zealand that the Governor would have – te kāwanatanga katoa – [to be] primarily the power to control British subjects and thereby keep the peace and protect Māori'.[262] That is, the Governor would have more power than Busby to achieve these aims and would 'create the conditions for peace and prosperity'.[263] The Governor would also deal with a particular cause of concern for Te Raki Maori: we considered that 'rangatira would have understood that – in keeping with its offer of protection – the Crown would enforce Māori understanding of pre-treaty land transactions, and therefore return land that settlers had not properly acquired'.[264] We concluded that 'the rangatira may also have understood kāwanatanga as offering Britain's protection against foreign threats'. Notably, the rangatira were aware of the interest of the French in New Zealand and in the Pacific, which was generally presented to them as a danger to their country and their independence.

In short, Te Raki rangatira expected the authority of the Kawana would be confined to his own sphere, and that the treaty required the Crown to engage with Te Raki rangatira on matters that might impact the respective spheres of each of them.

Yet as we have seen, the Crown interpreted the treaty to entitle it to assert sovereignty over New Zealand and its peoples. This was a move that reflected the shift in British policy from 'minimum intervention' in the Pacific (initially strongly influenced by the missionary societies) to its acceptance of an increase in British authority in New Zealand, and finally of the desirability of securing sovereignty over the whole country. At the same time the Government moved to adopt a plan for the establishment of a settlement colony in New Zealand. These twin decisions would shape the country's future. But there was a third decision also: because Britain had previously recognised New Zealand's independence, the Crown required Māori to consent to the establishment of any form of British jurisdiction

261. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 519.
262. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 519.
263. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 524.
264. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 519.

in their islands.[265] This led to the composition, public discussion and signing of the treaty which (following he Whakaputanga) was in two languages; it recorded Māori consent to the Crown's sovereignty only in English and, while some of the guarantees made to Maori were also expressed in English, the crucial guarantee in their own language was that of their tino rangatiratanga over their whenua, their kāinga, and all their taonga. In all the kōrero that preceded the signing by Te Raki rangatira, what they sought from the Kāwana and the missionaries – and believed they had received – were assurances that they would indeed retain their own independence and authority.[266]

The Crown's treaty obligation was accordingly to foster tino rangatiratanga, not to undermine it. When tensions arose with Te Raki Māori after its proclamations of sovereignty, it must refrain from coercing them into submission to Crown authority by the use of force, or the threat of force – an obligation which was greater when kāwanatanga was newly established, and the Crown was aware that Ngāpuhi prized their independence and were apprehensive about Crown actions. The Tūranga Tribunal affirmed, the Crown stood for 'just and fair government'.[267] Its duty from the outset was to ensure treaty rights and guarantees were recognised in its laws and policies – especially those affecting hapū autonomy and tikanga, and hapū retention, control and management of their lands and resources, including the determination of titles. Laws must be equitable (see our discussion of the principle of equity in section 2.4.7). Where Government decisions or policies, or their impacts, were discriminatory, or placed unreasonable limitations on tribal or hapū exercise of tino rangatiratanga, they were not in accordance with the agreement reached with Te Raki Māori in February 1840 as to the respective spheres and responsibilities of kāwanatanga and rangatiratanga.

In accordance with the principle of kāwanatanga, the Crown had particular responsibilities to Māori when the British Parliament considered and passed the New Zealand Constitution Act in 1852, heralding major constitutional change. The principle required the Crown to ensure that its treaty duties were not abrogated as self-government was granted to the colonial Government, which progressively assumed responsibility for the Crown–Māori relationship. It had to ensure engagement with Māori on these changes, and their effective participation in the new New Zealand Parliament and in the national and provincial governments. And in the new political landscape the authority of Māori leaders must be recognised and given effect, and the structure and functions of any district or national rūnanga under consideration must be negotiated and agreed with them.

The Crown had further responsibilities in the latter part of the nineteenth century when it devolved governing authority and functions to a range of new local authorities, to ensure that those authorities would also exercise their functions in accordance with treaty obligations. Given the impact of decisions taken at local

265. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 333.
266. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 517–520.
267. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, Wai 814, vol 2, p 737.

level on Māori communities and their authority, resources, and infrastructure, this was particularly important.

We accept that it might well be the case that in some situations the Crown must balance its treaty obligations to Māori against the interests of other sections of the community – for instance, in exceptional circumstances, such as war, or in the interests of public safety, or in matters involving the national interest. But even so, as the Tribunal has found in the past, such a balancing exercise must not be undertaken 'without restraint'; that is, it must not diminish the authority of tribes and hapū.[268] And in the absence of such exceptional circumstances, the Crown had and has no right to impinge on the rights of Te Raki hapū and iwi to make their own decisions.

2.4.3 Te mātāpono o te houruatanga/the principle of partnership

The treaty marked a new stage in the relationship between Ngāpuhi – and their sphere of autonomous authority expressed in te Tiriti as te tino rangatiratanga – and the British Crown. With the signing of the treaty, the basis for a partnership was laid. In February 1840, rangatira had sought and received assurances that they would retain their independence and chiefly authority, and that they and the Governor would be equals.

Eruera Maihi Patuone, according to Bishop Pompallier, head of the French Catholic mission at Kororāreka, brought 'his two index fingers side by side' to demonstrate that he and Hobson 'would be perfectly equal, and that each chief would similarly be equal with Mr Hobson'.[269] This was the basis on which rangatira expected their relationship with the British officials to develop.

In Te Raki, this understanding of equal authority was the origin of te mātāpono o te houruatanga/the principle of partnership. We understand that the imagery of 'houruatanga' conveys not just working together, but moving forward together and beside each other. This principle, as expressed by the Tribunal in *Ko Aotearoa Tēnei*, has been seen as the overarching one. This is because it emerges from the agreement of 1840 that Māori entered into with the Crown, which the Tribunal describes as 'an original Treaty consensus between formal equals'.[270] We agree that in Te Raki the treaty was entered into by 'formal equals'. But we must query whether there was 'consensus'. On the face of it, there was agreement; but as we have shown in our stage 1 report, Te Raki rangatira did not agree to some key terms of the treaty as set out in English because these were not explained to them (we discuss this issue further in chapter 4).[271] Because the rangatira made no cession of sovereignty, we do not see the authority granted to the Crown – kāwanatanga – as a superior authority, an overarching power to govern, make, and enforce law, albeit 'qualified' by the requirement to give effect to treaty guarantees, including the right

268. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 4, p 1239.
269. Peter Low, 'Pompallier and the Treaty: A New Discussion', *New Zealand Journal of History*, vol 24, no 2 (1990), p 192 (Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 518–519).
270. Waitangi Tribunal, *Ko Aotearoa Tenei*, *Te Taumata Tuarua*, Wai 262, vol 1, pp 18–19.
271. Waitangi Tribunal, *He Whakapjutanga me te Tiriti*, Wai 1040, pp 526–528.

of Māori to exercise tino rangatiratanga. To that extent we depart from the framing of the principle of partnership by the Tribunal in earlier reports for some other inquiry districts. Rather, the Crown's authority was expressly limited in Te Raki to its own sphere. Alongside it, and equal to it, was that of tino rangatiratanga.

The treaty partnership, therefore, required the cooperation of both parties to agree their respective areas of authority and influence, and both parties were required to act honourably and in good faith. The Crown could not unilaterally decide what Māori interests were or what the sphere of tino rangatiratanga encompassed: that was for Māori to negotiate with the Crown. Shared spheres of authority, as we pointed out in stage 1 of our inquiry, must also be agreed. Negotiating these spheres, and how they were to be managed, was in our view the key issue facing both Crown officials and Te Raki leaders as their relationship developed over time. The Crown was obliged, for example, to acknowledge rangatiratanga by recognising the need to engage with hapū and include them in decision-making about whether, or how British law was to operate in Māori communities or in cases where both Māori and settlers were involved. As the shared authority of the treaty partners developed, the need would arise for joint consideration of how two legal systems, one based in tikanga, and the other in British common law, could operate alongside each other. Similarly, the Crown was obliged, when it embarked on consideration of laws affecting the administration and alienation of Māori land, to ensure that its policies were transparent; that Māori leaders – including Te Raki leaders – were involved in their design and in decision-making; and that it would be Māori communities whose authority over their lands, their titles, and their alienation would be recognised and would be given force in New Zealand law, if that was what they wished, to enable their participation in the new economy.

These were not extraordinary standards. As the Tribunal has shown in various reports, on occasion, throughout the second half of the nineteenth century, Crown officials and Ministers did make attempts to engage with Māori leaders – which we take as evidence that they felt such a responsibility. Te Raki leaders, for their part, made numerous and sustained attempts to put their issues to Crown representatives, and to suggest their own policies. We consider in this report the outcome of these various initiatives.

Consistent with the treaty, the relationship of the Crown with Te Raki Māori should always have been based on dialogue and shared decision-making, as well as independent decision-making by either party where appropriate and where both parties agreed to this. Where unilateral Crown consultation has left hapū and iwi feeling disempowered, but trapped in processes that seem to them to offer the shadow of participation rather than the substance, it has not met the test of partnership. In accordance with the principle of partnership, the Crown's duty was always to engage with Te Raki Māori leadership actively (rather than merely consulting), and to ensure their role in shaping policy. True partnership remains the ideal; the foundation of any renegotiation of the relationship between Te Raki Māori and the Crown.

2.4.4 Te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect

It seems to us that mutual recognition and respect are vital qualities in the treaty relationship, and we consider this to be an important treaty principle in our inquiry. In Te Raki, we trace the principle to the treaty itself and the expectations of those who entered into the agreement. They were expectations that for Te Raki Māori were grounded in their experience of Pākehā who had come to trade or to settle amongst them; as well as in their experience of British missionaries, and the interest of many in the Christian religion and in literacy. Ngāpuhi understood that their rangatira had established a mutually respectful relationship with the British monarchy reinforced by the article 4 of he Whakaputanga, which set out the terms of the relationship between rangatira and Britain. That relationship was underpinned by Te Raki Māori enthusiasm for western technology, for the extent of international trade and transport networks that opened to them and the array of shipping that visited their ports, and by their aspirations for future development, with Britain as an ally.[272]

By 1840 the British approached their relationship with Māori with considerable respect, though also with some ambivalence. On the one hand, Māori often enjoyed a high reputation among those European theorists who ranked indigenous peoples by various measures of 'civilisation'; on the other, there were dire warnings from Busby and the missionaries during the 1830s of a calamitous decline in the Māori population through intertribal warfare and introduced diseases, leaving them increasingly incapable of controlling the fast-growing settler population.[273] Normanby's subsequent instructions to Hobson thus stressed the importance of securing the 'surrender' from Māori of a 'national independence which they are no longer able to maintain'.[274] The Crown's expectation was that Maori welfare would be best served by their acceptance of the Queen's sovereignty. Yet, as we have shown in our stage 1 report, Normanby also wrote at length on the importance of safeguarding Māori in land transactions, protecting their long-term interests and – for the meantime – ensuring that they might observe their own customs.[275]

There seemed to be at least the basis for a relationship between Māori and the Crown based on recognition and respect for each other's values, beliefs, laws and institutions. But that relationship would be sorely tested over the decades that followed, in particular for Māori, as they saw their tino rangatiratanga repeatedly challenged and undermined. The respect of Te Raki Māori for the governing and legal institutions of the British would be tested against their understanding of te Tiriti and the extent to which they experienced Crown recognition of their own institutions. Given their understanding of te Tiriti, we think that that was a fair

272. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 182–183.
273. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 229.
274. Cited in Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 316–317.
275. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 319–320.

test for them to apply to the monarchy, the authority of Parliament, of magistrates and courts, including the Native Land Court.

We note the importance attached to mutual recognition and respect in the report of the Canadian Royal Commission on Aboriginal Peoples, which has emphasised the 'rebalancing of political and economic power between Aboriginal nations and other Canadian governments' as the key to progress towards self-government of Aboriginal peoples, and their securing an adequate land and resource base, as well as equality in social and economic well-being.[276] The commission's vision of this renewed relationship was based on several principles, among them mutual recognition and mutual respect. It also emphasised that mutual recognition 'means that Aboriginal and non-Aboriginal people acknowledge and relate to one another as equals, co-existing side by side and governing themselves according to their own laws and institutions'.[277] It was important also, it suggested, that mutual recognition can be justified in terms of the 'values of liberal democracy in a manner appropriate to a multinational society'. This laid the basis for building a 'strong and enduring partnership between Aboriginal and non-Aboriginal people in Canada'. For people of all cultures, mutual respect is also characterised by qualities of 'courtesy, consideration and esteem extended to people whose languages, cultures and ways differ from our own'; it was thus essential to 'healthy and durable relations between Aboriginal and non-Aboriginal people in this country'.[278]

We see this expression of mutual recognition and respect between indigenous and non-indigenous peoples and institutions as entirely appropriate to the New Zealand context and the treaty relationship. We are mindful of our earlier discussion of the kawa of Rāhiri's people, of the values, laws, and institutions of ngā hapū o Te Paparahi o Te Raki. In our view, it was the duty of the Crown at the outset to recognise and respect mana, tikanga, kawa, mātauranga, kaitiakitanga, and te reo Māori. At the heart of Māori values and the Māori way of life was and is tikanga. The Crown must recognise and respect tikanga Māori values and Māori systems of law. As counsel put it to us, ngā hapū o Te Raki referred to tikanga in a number of contexts 'which may generally be described as the framework of law and custom and the application of that in the way of life of Ngā Hapū'. Tikanga, counsel said, 'still lies at the heart of Māori society, is unique to each iwi, and is dynamic. . . . [T]he application and practices of tikanga have been maintained.'[279] Tikanga is fundamental to the 'ongoing distinctive existence as a people', even though it may adapt over time to changing circumstances. It underlies the ways in which Te Raki

276. Royal Commission on Aboriginal Peoples [Canada], *Report of the Royal Commission on Aboriginal Peoples*, 5 vols (Ottawa: Canada Communication Group, 1996), vol 5, pp 1, 16, https://www.bac-lac.gc.ca/eng/discover/aboriginal-heritage/royal-commission-aboriginal-peoples/Pages/final-report.aspx, last modified 2 November 2016.

277. Royal Commission on Aboriginal Peoples [Canada], *Report of the Royal Commission on Aboriginal Peoples*, vol 1, pp 645–646.

278. Royal Commission on Aboriginal Peoples [Canada], *Report of the Royal Commission on Aboriginal Peoples*, vol 1, p 649.

279. Ko te tapaetanga whakakopani mo te take o te reo Māori, tikanga, wāhi tapu, taonga (#3.3.221), pp 56, 61.

Māori control their land, their water, and their taonga, manage their relationships, and resolve disputes. Tikanga has its own mana whakahaere and is central to how Te Raki Māori live everyday life 'with all its customs and procedures'.[280] It is itself, counsel said, a taonga.[281]

We note that previous Tribunal reports have variously emphasised the Crown's obligation to recognise and respect Māori concepts and systems, particularly tikanga and the Māori sphere of authority outlined in the treaty.[282] For the Crown, its recognition and respect of hapū communities, their authority over their lands and waters, taonga (including awa, maunga, and ngahere), and their values, rights, and spheres of authority, should be evident in the importance it places on the treaty guarantee of tino rangatiratanga.

What did this mean in practice in the nineteenth century? It points in our view to the duty of the Crown, as the coloniser, to understand the take by which Te Raki Māori held land and resources; recognition of the relationship between rangatira and their community, and the importance of that relationship to decision-making in Māori communities; recognition of the responsibility to be transparent in dealings with land, as being essential to community well-being; respect for kaitiakitanga; respect for sites that should be protected in course of land transactions, in particular wāhi tapu; and understanding of Māori relationships with their waterways.

2.4.5 Te mātāpono o te matapopore moroki/the principle of active protection

The Tribunal has often stated that the principle of active protection is inclusive of the Crown's duty to protect Māori interests and their exercise of tino rangatiratanga. We accept that this duty is widely understood and utilised, and that it had and continues to have an important role in the context of treaty claims and settlement processes.

The statements of royal protection in the treaty and in the instructions sent to Captain Hobson still resonate today. They reflect a British articulation of the duty of protection they believed should characterise the Crown's relations with Māori as it assumed sovereignty. The opening statement in the preamble of the treaty states that Her Majesty is 'anxious to protect [the] just Rights and Property' of the native chiefs and tribes; and by article 3 the Queen 'extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects'. Article 2 states the Crown's guarantees of 'full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties . . . so long as it is their wish and desire to retain the same in their

280. Ko te tapaetanga whakakopani mo te take o te reo Māori, tikanga, wāhi tapu, taonga (#3.3.221), pp 75, 86.

281. Ko te tapaetanga whakakopani mo te take o te reo Māori, tikanga, wāhi tapu, taonga (#3.3.221), p 137.

282. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 390; Waitangi Tribunal, *The Taranaki Report*, Wai 143, p 5; Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuarua*, Wai 262, vol 1, pp 237, 299–300; Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pts 1–2, p 157.

possession.'[283] Finally, Lord Normanby's instructions to Captain Hobson spell out further the nature of Crown protection:

> All dealings with the aborigines for their lands must be conducted on the same principles of sincerity, justice, and good faith, as must govern your transactions with them for the recognition of Her Majesty's Sovereignty in the Islands. Nor is this all: they must not be permitted to enter into any contracts in which they might be the ignorant and unintentional authors of injuries to themselves.[284]

Protection of Māori interests, then, was a duty the British imposed on themselves, as they embarked on the annexation and colonisation of New Zealand, intending to secure large tracts of land for the new settlers. We note that there is some irony in the fact that despite protection being conceived as a British duty, Te Raki Māori had long extended their protection, in the form of manaakitanga, to Pākehā who lived among them, and to visiting traders.

Yet it has emerged that active protection is also a treaty principle about which the claimants in this inquiry felt conflicted, given its paternalistic implications (see our summary of claimant positions in section 2.2). We do not think this interpretation is surprising. It is a principle, after all, that reflects a power imbalance and the duty assumed by the imperial power towards the 'Native' people of New Zealand as it established its Government there.

In the Wai 262 inquiry, the Tribunal, as we noted earlier in section 2.3, put its finger on this difficulty when it pointed to the difference between the emphasis on partnership in New Zealand and the stress in other post-colonial states on 'the power of the state and the relative powerlessness of their indigenous peoples' – hence their placement of State fiduciary or trust obligations 'at the centre of domestic indigenous rights law'. The Tribunal observed that 'we do of course have our own protective principle that acknowledges the Crown's Treaty duty actively to protect Māori rights and interests.' However, that is not the framework for the treaty relationship, the Tribunal stated, 'Partnership is'.[285]

Some claimants spelt out the tension associated with the reliance on 'active protection' more explicitly. Dr Patu Hohepa stated that 'Te Kawa o Rahiri would be protected and maintained, not by anyone else, but by us'.[286] Annette Sykes, counsel for Ngāti Manu and other groups, though generally supportive of the principle of active protection, was nevertheless conscious also of its origins and its limitations. She submitted that 'the idea of "active protection" is flawed'. It was similar, she said, to the Crown's '"fiduciary duty" . . . being promoted by virtue of the decisions of the Courts . . . highlighting the importance of relationships that can be characterised by residual obligations arising out of the honour of the Crown. It necessarily implies a superior or supreme power.' In short, 'the current "active protection"',

283. Treaty of Waitangi Act 1975, sch 1.
284. Normanby to Hobson, 14 August 1839, BPP, vol 3, p 87.
285. Waitangi Tribunal, *Ko Aotearoa Tēnei*, *Te Taumata Tuarua*, Wai 262, vol 1, p 19.
286. Closing submission of Patu Hohepa on behalf of Hokianga Whakapau Karakia (#3.3.203), p 6.

in her view, 'is embedded in an unequal power relationship that pervades all the institutions of government'. Because the Crown asserts unilateral and undivided sovereignty, it circumscribes partnership and reciprocity. Nor can it be argued that the Crown has an ongoing duty to protect Māori only until this relationship is perfected: 'The prevailing concept of Crown sovereignty does not allow it to be perfected.'[287]

We agree with counsel for Ngāti Hine that had the Crown observed its obligations under both texts of the treaty from 1840 – particularly its commitment to recognition of tino rangatiratanga – the duty of active protection might not have assumed such importance.[288] In our view, to say the Crown is obliged to 'protect' the rights and authority guaranteed under article 2 is problematic in Te Paparahi o Te Raki. It misunderstands the fundamentally separate, equivalent spheres of authority that were recognised by the treaty and understood by Te Raki rangatira; the Crown cannot paternalistically 'protect' what it has no authority over. The Crown, after all, had guaranteed through the treaty that it would not take steps to undermine or usurp Māori autonomous control over their people, land, resources, and taonga.

We accept, however, that the principle of active protection has served a very useful purpose, as claimants acknowledged, precisely because the Crown's commitment to tino rangatiratanga was often absent. In its very expression, the duty calls for active effort from the Crown jointly to realise the potential of the treaty as a living, evolving agreement. We consider the active protection of tino rangatiratanga is not a Crown duty arising from its sovereign authority, rather it is an obligation on its part to help restore balance to a relationship that became unbalanced. Because the Crown expanded its sphere of authority far beyond the bounds originally understood by Ngāpuhi in February 1840, this duty is heightened so long as the imbalance remains. But as the fundamental relationship between Te Raki Māori and the Crown is renegotiated, we see this duty as sitting alongside the other treaty principles we have highlighted in this inquiry.

Partnership, not active protection, is the framework for governance of New Zealand; this unique arrangement is one to be celebrated and cherished.[289] In the interests of pursuing this ideal partnership, we consider that the treaty standards embodied in the principle of active protection as articulated in previous Tribunal reports are still useful for assessing Crown actions and omissions, and for reminding the Crown of its obligations where such actions and omissions, particularly in respect of land loss, have caused prejudice to Māori. We use it in this report accordingly. However, we prefer to emphasise the principle of mutual recognition and respect as better reflecting the treaty-based partnership that Te Raki Māori entered into.

287. Memorandum 3.2.2318, pp 10–11.

288. Supplementary submissions for Wai 49, Wai 682, Wai 1464, Wai 1546, Wai 68, Wai 149, Wai 455, Wai 565, Wai 1440, Wai 1445, Wai 1518, Wai 1520, Wai 1527, Wai 1551, Wai 1677, Wai 1710, and Wai 2182 (#3.3.241), p 16.

289. Waitangi Tribunal, *Ko Aotearoa Tēnei*, *Te Taumata Tuarua*, Wai 262, vol 1, pp 17, 19.

2.4.6 Te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development

Te Raki Māori expected, both from their understandings of the words of te Tiriti and from oral explanations of it, that they would benefit from the agreement they made with the Crown in 1840. This included benefiting from the presence of a British Kāwana and settlers in New Zealand; for example, through trade opportunities and new technologies. Additionally, 'Māori had the right to develop as a people and to develop their properties.'[290] The treaty guarantee of full rights in properties (including taonga to which British law did not recognise a property right) and of tino rangatiratanga over them included a right to develop them if Māori so chose. To this end, they expected (and the treaty promised) that they would retain enough lands and other resources to ensure their current and future economic well-being. The Crown's duty was to ensure that Te Raki hapū each retained the lands and resources that they wished to retain or would need to engage with the new economy and benefit from the treaty and from colonisation. Clearly Māori had the right to take part in new opportunities and commercial ventures, and the further right to positive assistance (such as Government funding) to do so – often expressed in Tribunal reports as their right to development. The Crown must also assist hapū by providing suitable land titles which would enable them to borrow using their collectively held land as security. These were all ways in which the Crown was required to make specific efforts to help Māori become 'equal in the field' with settlers – an obligation that Crown representatives and officials often recognised.[291] In such ways, Te Raki Māori would both contribute to and benefit from the economic development of the colony, alongside settlers.

2.4.7 Te mātāpono o te mana taurite/the principle of equity

The principle of equity and the duties that arise from it are wholly applicable to the claims in our inquiry. Through article 3 of the treaty, Te Raki Māori were guaranteed equitable treatment and citizenship rights and privileges, and the Crown undertook actively to promote and support both. Equity requires the Crown to focus attention and resources to address the social, cultural, and economic requirements and aspirations of Te Raki Māori. Providing the same or similar service across Māori and non-Māori population groups may be quite unlikely to satisfy the principle of equity. The Crown must actively address inequities experienced by Māori, and this obligation is heightened if inequities are especially stark. At its heart, satisfying the principle of equity requires fair, not just equal or the same, treatment. This is a duty to be undertaken in partnership with Te Raki Māori communities.

The principle required the Crown to act fairly as arbiter between Māori and settlers; it could not advance settler interests at the expense of Māori. This had

290. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 4, p 1667 (Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim*, Wai 2358, p 50).
291. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 3, pp 89–93.

important implications for Māori political representation in national, provincial, and local bodies that make laws or by-laws expected to apply to Māori. It also applied to Māori voting rights. It applied in the design and operation in Māori districts of introduced law in respect of offences, crimes, and sanctions, and in decisions about the role of Māori in both processes. Similarly, equity applied to consideration of the Crown's assertion of a right of pre-emption and to its handling of old land claims; in particular, through the legislation of the late 1840s and 1850s, and its application to Crown settlement of these claims.

The Crown had a further duty to ensure that Māori land titles were equitable, especially as the basis of new titles was imported from a very different legal and social context. The Crown was aware that Māori land rights were held from the community, and that Māori developed their land and resources collectively. Its duty, therefore, was to ensure that titles provided to Māori under the Crown's Native Land regime were both culturally and legally appropriate, so that they acknowledged the rights of Te Raki hapū and conferred the same benefits on them as general titles did on settlers.

2.4.8 Te mātāpono o te whakatika/the principle of redress

Where the Crown has breached the treaty agreement through its legislation, policy, actions, or omissions, Te Raki Māori are afforded the right to redress from their treaty partner, including financial or other compensation. This right may arise from assault on or sustained undermining of hapū and iwi autonomy; or from breaches resulting from failure to protect taonga; or involving land loss or other loss of resources or resource rights. Importantly, the fact that this principle is 'derive[d] from the Crown's obligation to act reasonably and in good faith' raises the question of broader Crown obligations to redress prejudice in the decades before historical claims could be made to the Tribunal.[292] In our view, the Crown had an obligation to investigate fully claims of injustice or prejudice or both made in the many petitions Te Raki Māori submitted. Where it found its actions were inconsistent with promises made in the treaty, it had a further obligation to provide timely and adequate redress. The Crown has in fact shown it did recognise such an obligation, in that it has on occasion entered into direct negotiations to settle Māori claims, acknowledged prejudice, and provided some limited redress in the period preceding the establishment of a Tribunal process.

Substantive redress is an important step in re-establishing the mutual recognition and respect embodied in the treaty relationship, for restoring the honour of the Crown, and providing a renewed opportunity for giving effect to the treaty's guarantee of tino rangatiratanga and, ultimately, te mātāpono o te houruatanga.

2.5 Kōrero Whakatepe / Concluding Remarks

In laying out the principles that we see as particularly relevant to this part of our stage two inquiry, we have focused on how the treaty's principles, rights, and

292. Waitangi Tribunal, *The Offender Assessment Policies Report*, Wai 1024, p 13.

duties suggest a pathway for the realisation of the treaty partnership in our inquiry district, and particularly for proper recognition of the rights and responsibilities that Te Raki Māori expected they would retain. In summary, they are:

- *Te mātāpono o te tino rangatiratanga:* In te Tiriti, Te Raki Māori, their hapū, and iwi are guaranteed their tino rangatiratanga. Te Tiriti had its own mana, affirming and sustaining the authority of rangatira alongside that of the Kāwana. Rangatira upheld the mana of hapū through the exercise of tikanga (law), including the rights they had possessed and the responsibilities they had fulfilled for generations. The hapū is the source of their authority, and the requirements of whanaungatanga and manaakitanga form the bonds that hold together communities. For Ngāpuhi, conflict also holds the hapū together; though distinct and autonomous, they also align to offer mutual support. Thus rangatiratanga, tikanga, and mana must be understood in the context of te kawa o Rāhiri (the law of Rāhiri). He Whakaputanga o te Rangatiratanga o Nu Tireni (the Declaration of Independence of New Zealand) of 1835, supported by a number of hereditary leaders, was above all an affirmation of their tino rangatiratanga. Te Tiriti continued that affirmation, looking to the future while reinforcing the friendship between Te Raki rangatira and the British monarchy that had developed over the previous 20 years. Te Raki rangatira expected that, in accordance with te Tiriti, their authority would continue to be recognised and respected, and they would continue to exercise their rights and responsibilities to their hapū in accordance with tikanga.
- *Te mātāpono o te kāwanatanga/the principle of kāwanatanga:* In accordance with the treaty agreement entered into between Te Raki Māori and the Crown's representative in February 1840, the Crown would, through the new Kāwana, have the right to exercise authority over British subjects, and thereby would keep the peace and protect Māori interests. Rangatira may also have understood kāwanatanga as offering Britain's protection against foreign threats, and in keeping with its offer of protection, it would enforce Māori understanding of pre-treaty land transactions. Te Raki Māori expected that their authority in their sphere would be equal to that of the Crown in its sphere; and that questions of relative authority would be negotiated as they arose through discussion and agreement between the parties. The duty of the Crown was (and is) to foster tino rangatiratanga (Māori autonomy), not to undermine it, and to ensure its laws and policies were just, fair, and equitable, and would adequately give effect to treaty rights and guarantees, notably those affecting hapū autonomy and tikanga, and hapū retention and management of their lands and resources. In accordance with the principle of kāwanatanga, the Crown had a further duty to ensure that its treaty duties are not abrogated, as when it granted the colony a constitution and representative institutions in 1852, and self-government in 1856; it was important that the colonial Government exercise its functions in accordance with Crown treaty obligations.

- *Te mātāpono o te houruatanga/the principle of partnership:* Te Tiriti marked a new stage in the relationship of Te Raki Māori with the British Crown. The principle emerges from the treaty agreement itself; te houruatanga conveys that the partners will move forward together and beside each other. Because there was no cession of sovereignty by Te Raki rangatira, kāwanatanga, the authority granted to the Crown was not a superior authority, an overarching power, albeit 'qualified' by the right of Māori to exercise tino rangatiratanga. Rather, the Crown's authority was expressly limited in Te Raki to its own sphere. Alongside and equal to it, was that of te tino rangatiratanga. To that extent we depart from the framing of the principle of partnership by the Tribunal in earlier reports for some other inquiry districts. Negotiating and managing their respective spheres of authority, as well as shared spheres as the two populations intermingled, was the key issue for the treaty partners in the years after te Tiriti was signed. The Crown could not unilaterally decide what Māori interests were or what the sphere of tino rangatiratanga encompassed; that was for Te Raki Māori to negotiate with the Crown. The Crown's duty was and is to engage actively with Te Raki Māori on how it should recognise Te Raki tino rangatiratanga and, where agreed, give effect to it in New Zealand law. Partnership was and is the framework for governance in New Zealand; both parties must act honourably and in good faith.
- *Te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect:* Before 1840, the relationship between Te Raki Māori and the Crown was broadly based on mutual recognition and respect. These are vital qualities in the treaty relationship; each party must recognise and respect the values, laws, and institutions of the other. For Māori in particular, the relationship would be sorely tested as they saw their tino rangatiratanga repeatedly challenged and undermined. Their respect for British governing and legal institutions would be tested against their understanding of te Tiriti and the extent to which they experienced Crown recognition of their own institutions. We think that was a fair test for them to apply to the monarchy, the authority of Parliament, and the courts (including the Native Land Court. The Crown for its part must respect tikanga, which is at the heart of Te Raki Māori values, law, and the Māori way of life, as are mana, whanaungatanga, mātauranga, and kaitiakitanga. The Crown's recognition and respect of hapū communities and their authority over their lands and waters, and taonga, should be evident in the importance it places on the treaty guarantee of tino rangatiratanga.
- *Te mātāpono o te matapopore moroki/the principle of active protection:* This has been a widely understood and utilised principle, and has long been applied to the Crown's duty to protect Māori interests, including their land rights and their exercise of tino rangatiratanga. It reflects a British articulation of the duty of protection they believed should characterise the Crown's relations with Māori as it assumed sovereignty and embarked on the colonisation of New Zealand. In this inquiry, despite the claimants' recognition of its importance, we are mindful of their reservations about the principle

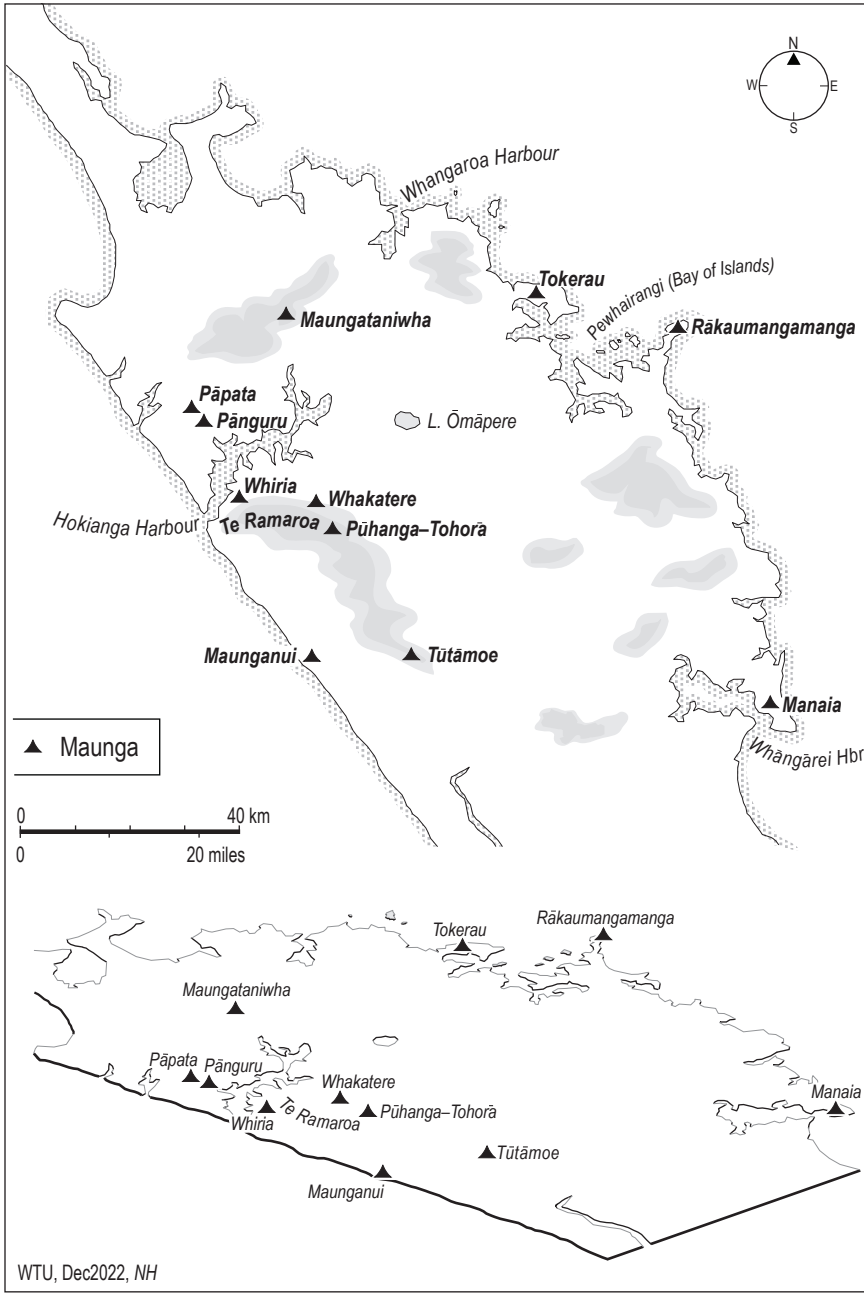
as reflecting a power imbalance, a duty undertaken by the imperial power when it assumed a superior authority, establishing its Government in New Zealand. Had the Crown observed its obligations under both texts of the treaty from 1840, particularly its commitment to recognition of tino rangatiratanga, the duty of active protection might not have assumed such importance. We consider that active protection is not a Crown duty arising from its sovereign authority. Rather, it requires the Crown to help restore balance to a relationship with Te Raki Māori that had become unbalanced as the Crown assumed an authority far beyond the bounds understood by Ngāpuhi when they signed te Tiriti in February 1840. We draw on the principle in this report because we consider that it is still useful for assessing Crown actions and omissions, and for reminding the Crown of its obligations where such actions and omissions have caused prejudice to Te Raki Māori. But we prefer to emphasise the principle of mutual recognition and respect as better reflecting the treaty-based partnership that Te Raki Māori entered into.

- *Te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development:* Te Raki Māori expected to benefit from the presence of a British kāwana and new settlers through trade opportunities and new technologies. It was the Crown's duty to ensure that they retained the land they needed for their present and future economic well-being. Māori had the right to develop as a people and to develop the properties and resources guaranteed to them by the treaty, including the right to engage with the new economy if they wished to do so. Their development right further included the right to positive assistance from the Crown where appropriate (for instance, where they faced unfair barriers to development). Te Raki Māori were to contribute to and benefit from the economic development of the colony, alongside settlers.
- *Te mātāpono o te mana taurite/the principle of equity:* Through article 3 of the treaty, Te Raki Māori were guaranteed equitable treatment and citizenship rights and privileges. However, equal treatment for Māori and non-Māori population groups is unlikely to satisfy the principle of equity. It is the Crown's duty to provide to Māori fair, not just equal or the same treatment, as provided to other citizens. The guarantee of tino rangatiratanga and the undertaking that Te Raki Māori tikanga would be recognised and respected also requires the Crown to focus attention and resources to address the social, cultural, and economic requirements and aspirations of Māori. The Crown cannot advance Pākehā interests at the expense of Māori. And it must address inequities experienced by Māori. This applied to Māori political and legal rights and to their property rights; to the assessment of their old land claims by Government commissions in accordance with legislation, and to the kinds of land titles provided to Māori by the Crown's Native Land regime.
- *Te mātāpono o te whakatika/the principle of redress:* Where the Crown breached the treaty agreement through its legislation, policy, actions, or

omissions, Te Raki Māori have the right to redress from their treaty partner, including financial or other compensation. From the outset, however, it was the Crown's duty to investigate fully claims of injustice or prejudice or both made in the many petitions or letters Te Raki Māori submitted, or in their direct approaches to Parliament, and to address those claims in light of the Crown's guarantees in both texts of the treaty.

Under the treaty agreement, it has always been the Crown's duty to give effect to the guarantee of tino rangatiratanga contained in the plain meaning of article 2. The Crown's progressive expansion of its own authority from 1840 in ways that have encroached on and often eroded that of Te Raki Māori has heightened this duty.

Today, the Crown has the power and capacity to recognise, respect, and give effect to the treaty guarantee of tino rangatiratanga. It has had this power since it signed te Tiriti. Its duty to give effect to the guarantee of tino rangatiratanga is as important today as it was in 1840. That is the basis for te houruatanga, a partnership in which each party to the treaty recognises the authority of the other, and together they decide how each will exercise that authority on matters in which both have important interests.



Map 3.1: Te Whare Tapu o Ngāpuhi.

CHAPTER 3

TĀNGATA WHENUA / PEOPLE OF THE LAND

Ka mimiti te puna i Hokianga
Ka totō te puna i Taumārere
Ka mimiti te puna i Taumārere
Ka totō te puna i Hokianga

When the Hokianga spring runs dry
The Bay of Islands spring flows.
When the spring of the Bay of Islands runs dry
The spring of Hokianga flows.[1]

3.1 Hei Tīmatanga Kōrero / Introduction

This chapter is about the peoples of the inquiry district prior to the signing of te Tiriti – who they were, where and how they lived, and what they valued and believed. It explores the principles and values that guided their lives; explains their systems of law, authority, and social organisation; describes their relationships with the many harbours, mountains, lakes, rivers, and other landforms and water bodies in their territories; traces the emergence and evolution of hapū and iwi through conflicts, migrations, and intermarriages; and summarises their responses to the arrival of Europeans. Some of this material has already been traversed in our stage 1 report. However, we return to it here to assist readers unfamiliar with that report, and to establish the important context for all the claims before us.

The chapter unfolds from the earliest traditions by tracing the cosmological origins and early waka and settlement traditions of the peoples of this district

1. This translation is from Dr Hohepa's evidence: Patu Hohepa, 'Hokianga: From Te Korekore to 1840' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2011) (doc E36), p 172. We note that the whakataukī may be stated in slightly different ways but that the imagery is consistent whichever version is given. That imagery is of the intertwining of the east and the west coasts, of Taumarere and Hokianga, of descendants of Rāhiri's sons Kaharau and Uenuku-kūare; their actions affect each other. The whakataukī speaks to the alliance of the destinies of Ngāpuhion the Te Tai Tamawāhine (eastern) and Te Tai Tamatāne (western) coasts; Manuka Henare, Hazel Petrie, and Adrienne Puckey, '"He Whenua Rangatira": Northern Tribal Landscape Overview (Hokianga, Whangaroa, Bay of Islands, Whāngārei, Mahurangi and Gulf Islands)' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2009) (doc A37), p 26; Nuki Aldridge (doc B10), p 33; Patu Hohepa (doc A32), p 4; John Klaricich (doc C9), pp 13–14; Marsha Davis (doc C21), p 16.

– traditions which, for many, converge on Rāhiri, the central unifying ancestor for Ngāpuhi. Section 3.3 then traces the emergence of Rāhiri's people from their Hokianga and Kaikohe homelands to exercise influence over much of the district, a process that reshaped relationships and led to the formation of new hapū and iwi groupings. Finally, section 3.4 describes the significant changes that occurred during the 1830s as the peoples of this region increasingly engaged with European traders and missionaries, and with the British Crown. The picture that emerges is one of autonomous peoples who pursued multiple strategies – including migrations, battles, intermarriages, alliances, and trading relationships – in vigorous pursuit of security, well-being, and mana.

In Ngāpuhi traditions, the territories of Ngāpuhi-tūturu (which Hokianga kaumātua Dr (now Tā) Patu Hohepa translated as '[r]eal Ngāpuhi' or 'genuine Ngāpuhi')[2] are encircled by 'nga poupou maunga o te wharetapu o Ngapuhi' ('[t]he mountain pillars of the sacred house of Ngapuhi').[3] These 12 maunga encompass territories north and south of Hokianga, as well as the Bay of Islands and Whāngārei. Each maunga is likened to a carved pillar supporting the roof of a house. According to Dr Hohepa, the maunga form the shape of a fern frond, with Whiria at its centre.[4] They are regarded as living entities, standing as 'guardians and sentinels' for Ngāpuhi hapū, 'who look to each other for support'.[5]

Claimants and historians also spoke of 'Ngāpuhi-nui-tonu' ('great everlasting Ngāpuhi') and Ngāpuhi-whānui (broad Ngāpuhi), terms that refer to iwi from Muriwhenua to Tāmaki, including Te Aupōuri, Te Rarawa, Ngāti Kahu, Ngāpuhi, and Ngāti Whātua.[6] During the 1830s, the term 'Ngāpuhi' was used in a more narrow sense, to describe the hapū of the 'northern alliance' (including Ngāi Tāwake, Ngāti Tautahi, Te Uri o Hua, and Ngāti Rēhia), thereby excluding southern alliance and Hokianga hapū such as Ngāti Manu, Ngāti Hine, Te Pōpoto, and Te Māhurehure.[7] Some sources said the name 'Ngāpuhi' was principally for purposes of warfare; otherwise, the people of Ngāpuhi were identified by their hapū.[8]

2. Patu Hohepa (doc Q10), pp 14–16; Hohepa, 'Hokianga' (doc E36), p 167.
3. Rima Edwards, supporting papers (doc A25(a)), p 39.
4. Hohepa, 'Hokianga' (doc E36), pp 39–40.
5. Hohepa, 'Hokianga' (doc E36), p 40.
6. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 23; Joseph Kingi (doc W34), p 3; Ricky Houghton (doc V6), p 2.
7. Mary-Anne Baker (doc W23), pp 14–15; see also Jeffrey Sissons, Wiremu Wi Hongi, and Patu Hohepa, *Ngā Pūriri o Taiamai: A Political History of Ngā Puhi in the Inland Bay of Islands* (Auckland: Reed, 2001), p 57; Angela Ballara, *Iwi: The Dynamics of Māori Tribal Organisation from c1769 to c1945* (Wellington: Victoria University Press, 1998), pp 131–132, 157; Angela Ballara, *Taua: 'Musket wars', 'land wars' or tikanga? Warfare in Māori Society in the Early Nineteenth Century* (Auckland: Penguin Books, 2003), pp 190, 192, 228; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 173–175, 197, 287, 366–367; Judith Binney, *The Legacy of Guilt: A Life of Thomas Kendall* (Wellington: Bridget Williams Books, 2005), p 209.
8. Robyn Tauroa and Thomas Hawtin (doc AA149), p 5; Peter McBurney, 'Traditional History Overview of the Mahurangi and Gulf Islands Districts' (commissioned research report, Wellington: Mahurangi and Gulf Islands District Collective and Crown Forestry Rental Trust, 2010) (doc A36), pp 221–222.

Te whare tapu o Ngāpuhi
He mea hanga tōku whare, ko Papatuānuku te paparahi
Ko ngā māunga ngā poupou,
ko Ranginui e tū iho nei te tuanui.
Puhanga Tohorā titiro ki Te Ramaroa
Te Ramaroa titiro ki Whiria
Ki te paiaka o te riri, ki te kawa o Rāhiri
Whiria titiro ki Pānguru, ki Pāpata
Ki ngā rākau tū pāpata e tū ki te hauāuru Pānguru–Pāpata titiro ki Maungataniwha
Māungataniwha titiro ki Tokerau
Tokerau titiro ki Rākaumangamanga
Rākaumangamanga titiro ki Manaia
Manaia titiro ki TūtamoeTūtamoe titiro ki Maunganui
Maunganui titiro ki Whakatere
Whakatere titiro ki Puhanga Tohorā.
Ehara ōku maunga i te māunga nekeneke; he maunga tū tonu, tū te ao, tū te pō.

My house is built with the Earth Mother as the floor,
The mountains the supporting carved pillars,
And the Sky Father standing looking down is the roof.
Puhanga Tohorā look at Te Ramaroa
Te Ramaroa look at Whiria
To the taproots of warfare, the laws of Rāhiri
Whiria look at Pānguru and at Pāpata
To the standing trees leaning from the westerly winds Pānguru–Pāpata look at Maungataniwha
Maungataniwha look at Tokerau
Tokerau look at Rākaumangamanga
Rākaumangamanga look at Manaia
Manaia look at Tutamoe
Tutamoe look at Maunganui
Maunganui look at Whakatere
Whakatere look at Puhanga Tohorā
My mountains are mountains that do not move;
Mountains that stand forever, day and night.[1]

1. Patu Hohepa, 'Hokianga: From Te Korekore to 1840' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2011) (doc E36), pp 38–39.

Dr Hohepa told us a number of traditions accounting for the name 'Ngāpuhi'. The earliest originates from Kupe's two chiefly wives, Hineiteaparangi and Kuramarotini, who were the first 'puhi' (women of exceptional rank, character, and ability).[9] In one tradition, Ngāpuhi was named for the taniwha Puhi-moana-ariki, who accompanied Nukutawhiti and Ruanui to Aotearoa.[10] In another, 'Ngāpuhi' refers to the many taniwha commanded by Puhi-moana-ariki, and are collectively known as Ngāpuhi-taniwha-rau.[11] A further tradition is that 'Ngāpuhi' refers to Puhi-moana-ariki of an ancient line of Ngāti Awa,[12] and that Puhi-moana-ariki, Puhi-kai-ariki, and Puhi-taniwha-rau are three names given to the son of the high-born Arikitapu, to commemorate the circumstances surrounding his birth.[13] In other traditions they were brothers or successive generations of tūpuna.[14] A further tradition is that Rāhiri named the group after Puhi-ariki, who travelled on the *Mataatua*.[15]

Just as there are many explanations for the origins of the name 'Ngāpuhi' (not all of which have been discussed here) so there are many different explanations of Ngāpuhi identity. Ngāpuhi identify with many maunga and awa,[16] and with ancestors from many waka including Kupe, Nukutawhiti, Ruanui, Puhi-moana-ariki, and Ahuaiti.[17] These multiple waka and lines of descent converged on Rāhiri, and for this reason – as well as his military prowess – he is usually regarded as the tribe's founding or unifying ancestor.[18]

In turn, since Rāhiri's time, Ngāpuhi bloodlines from many waka and tūpuna have continued to interweave and overlap. As a result, Dr Hohepa explained, all Ngāpuhi are 'multi-related (karanga maha) and kindred grouped (whanaungatanga)', and can travel freely and choose from multiple hapū identities.[19] His own Te Māhurehure hapū, for example, had 'several *manga hapū* (branches of hapū) which we can choose as ours at any time'. There were also many 'closely interlinked hapu' from within Hokianga – including Ngāti Hau –Ngāti Kaharau, Ngāi Tū (or Ngāi Tūteauru), Ngāti Korokoro, Ngāti Manawa, and several others – 'which any Te Mahurehure can transfer to' by choice; and many hapū outside of Hokianga,

9. Patu Hohepa (doc Q10), pp 14–15, Henare, Petrie, and Puckey, supporting papers to 'He Whenua Rangatira' (doc A37(b)), p [64].
10. Patu Hohepa (doc Q10), p 15.
11. Henare, Petrie, and Puckey, supporting papers to 'He Whenua Rangatira' (doc A37(b)), p [38].
12. Henare, Petrie, and Puckey, supporting papers to 'He Whenua Rangatira' (doc A37(b)), p [46].
13. Rima Edwards (doc A25), pp 51–52; Waitangi Tribunal, *He Whakaputanga me te Tiriti, The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry*, Wai 1040, revised ed, 2 vols (Wellington: Legislation Direct, 2014), vol 1, p 27.
14. Patu Hohepa (doc Q10), p 15; Henare, Petrie, and Puckey, supporting papers to 'He Whenua Rangatira' (doc A37(b)), p [46].
15. Henare, Petrie, and Puckey, supporting papers to 'He Whenua Rangatira' (doc A37(b)), pp [44]–[49]; Hohepa, 'Hokianga' (doc E36), p 162; Patu Hohepa (doc Q10), p 15.
16. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 24–25, 46–47.
17. Henare, Petrie, and Puckey, supporting papers to 'He Whenua Rangatira' (doc A37(b)), p [15].
18. Hohepa, 'Hokianga' (doc E36), p 168; Tony Walzl, 'Mana Whenua Report' (commissioned research report, Whangārei: Tai Tokerau District Māori Council, 2012) (doc E34), p 16; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 45, 60.
19. Hohepa, 'Hokianga' (doc E36), p 41.

including Ngāti Tautahi of Kaikohe, Te Kapotai of the Bay of Islands, Ngāti Hine of Taiāmai, and Te Parawhau of Whāngārei, who 'draw their linkages to us of Te Mahurehure, and of us to them, whenever required'.[20] This flexible approach to hapū identification is reflected in the saying 'Ngāpuhi kōwhao rau' ('Ngapuhi of a hundred holes'), describing the independence and interconnectedness of Ngāpuhi hapū.[21]

3.2 Te Ao o Ngāpuhi / The Ngāpuhi World

3.2.1 The origins of te ao o Ngāpuhi

As we set out in our stage 1 report, claimants told us that their tūpuna had understood their place in the universe through the principle of whakapapa (genealogical progression) by which all things could be traced back to the beginning of creation.[22] We were told all whakapapa begins in Te Korekore, the absolute nothingness.[23] Everything both material and spiritual emerged from here and took form: wairua (the spirit that infused all things), mauri (essential energy or life force), consciousness, darkness, light, sound, sky, earth, and water.[24] The physical world then began with Ranginui (the heavens, and the male principle) and Papatūānuku (the earth, and the female principle), from whom all elements of creation descend.[25]

Among their many children are Uru-tengangana (god of the stars and heavens), Tū-matauenga (god of mankind and warfare), Tāne-mahuta (god of forests, birds, and most other living things), Tangaroa (god of the sea and all within it), Rongomatāne (god of cultivated foods, and of peace and forgiveness), Tāwhirimātea (god of weather), Haumia-tiketike (god of foods that grow above the ground), Whiro (god of death, sickness, all bad things), and Rūāumoko (god of earthquakes and eruptions).[26] These brothers lived in Te Pō, in the tight embrace of darkness. They considered whether to let light into this world and made the momentous decision to separate their parents. Tāne pushed up with his feet against Ranginui, and Papatūānuku cried out in pain as light came into the

20. Patu Hohepa (doc Q10), p 23. For the locations of these four hapū outside Hokianga, see Wiremu Reihana (doc T10(b)), p 11; 'Te Kapotai Hapu Korero' (doc D5), pp 9–10; Erima Henare (doc D14), p [23]; Taipari Munro (doc I26), p 10.

21. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 14, 158–160, 470–471; Henare, Petrie, and Puckey, supporting papers to 'He Whenua Rangatira' (doc A37(b)), pp 48, 57; Johnson Erima Henare (doc A30(b)), pp 4–5; Moetu Tipene Davis (doc D13), pp 22–24; Patu Hohepa, transcript 4.1.1, pp 106, 112–113, 136.

22. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, vol 1, p 20.

23. Rima Edwards, supporting papers (doc A25(a)), p 2.

24. Te Ahukaramū Charles Royal (ed), *The Woven Universe: The Selected Writings of Rev Māori Marsden* (Masterton: The Estate of the Rev Māori Marsden, 2003), pp 16–18; Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, vol 1, p 20.

25. Rima Edwards, supporting papers (doc A25(a)), pp 3–4; Royal (ed), *The Woven Universe*, pp 16–18.

26. Rima Edwards, supporting papers (doc A25(a)), pp 5–11; see also Nuki Aldridge (doc B10), pp 11–13; Abraham Witana (doc C25), p 8.

world. Kua mārama Te Ao. All people descend from these atua (ancestor-gods).[27] Likewise, from Tāne-mahuta descend all trees, birds, butterflies, insects, small plants, and other flora and fauna that clothe the world. From Tangaroa descend all fish and reptiles. From Rongomatāne descend all cultivated plants such as kūmara, and from Haumia-tiketike descend ferns and other edible plants.[28] Because of this web of genealogy, Rima Edwards explained, 'ka noho whanaunga nga mea katoa o Te Ao' ('all things of the world are related').[29]

In Ngāpuhi tradition, as related to us by Mr Edwards, the motivating force behind this creation was a supreme being, Io, who dwelled within Te Korekore, and from whose consciousness the worlds of Te Pō and Te Ao Mārama were formed. Edwards referred to the various manifestations of Io, including Io Mātua te kore ('the first God who came out of Te Korekore'), Io te kākano ('the seed from which all things in the World grow'), Io te mana ('the supreme power of Io Matua Te Kore from beyond'), Io te mauri ('the living element in all things created to the world'), Io te tapu ('the pure spirit that is free of evil'), Io te wairua ('the spirit of Io that is given to the heart of the world'), Io te matangaro ('knowledge that cannot be seen or known by mankind'), and Io te wānanga ('the spring and source of all knowledge').[30]

Mr Edwards also explained how Io retained the greater part of his powers to himself, to Rangi and Papa and their children.[31] The powers of the children are evident in the battles that have raged between them, to this day, because of their disagreement and anger over the separation of their parents, when light came into the world. As the powers of the atua are unleashed on the world, they bring both destruction and sustenance. Tāwhirimātea in his anger floods the land but the floodwaters then flow to the sea, nourishing the children of Tangaroa, while the sea evaporates to the heavens, and brings life-giving rain; Tangaroa delivers floods and king tides that claim land and forests but also the fish that sustain mankind; Rongomatāne bears peace and goodwill; while Tū-matauenga brings war, and Whiro sows death and harm. By these means, the world is sustained in its original balance even as change occurs.[32]

3.2.2 Explorers from Hawaiki

In his traditional history of Hokianga, Dr Hohepa wrote that Tāne-mahuta made his home on Hawaiki, where he found shelter from the attacks of his brothers

27. Rima Edwards, supporting papers (doc A25(a)), pp 8, 10–12.
28. Rima Edwards, supporting papers (doc A25(a)), pp 7–8.
29. Rima Edwards, supporting papers (doc A25(a)), p 8.
30. Rima Edwards, supporting papers (doc A25(a)), pp 2–4; as noted in our stage 1 report, the existence of Io as a pre-European belief is the subject of ongoing discussion. Some scholars have argued that there is no evidence of Māori having any concept of a supreme being prior to contact with Europeans. Others note that contemporary descriptions of Io may have been influenced by Christianity, but regardless, the concept of Io as the source of all creation predates European arrivals. For further details see p 48, footnote 10 in Waitangi Tribunal, *He Whakaputanga me te Tiriti*, *The Declaration and the Treaty*.
31. Rima Edwards, supporting papers (doc A25(a)), pp 9–10.
32. Rima Edwards, supporting papers (doc A25(a)), pp 12–14.

Tāwhirimātea, Tangaroa, and Tū-matauenga. Hawaiki was both a mythical place of origin and a series of historical homelands from which early Polynesians set out to explore the Pacific Ocean.[33] The name 'Hawaiki' lives on in various parts of the Pacific, including Hawaii and Savai'i (in Samoa). Hawaiki is also a former name of Ra'iātea in the Society Islands.[34]

Claimants gave whakapapa showing 12 to 14 generations from the first humans (Hine-ahu-one and Tiki-nui) to the birth of Māui-tikitiki-a-Taranga,[35] the famed ancestor-god who harnessed the powers of fire and the sun, and whose epic voyages from Hawaiki led to his fishing up many islands including Te Ika a Māui (Māui's fish, or the North Island), before he was killed – in Whangaroa, according to the traditions of its hapū – by Hine-nui-te-pō while seeking the secret of immortal life.[36] According to Dr Hohepa, Māui traditions are known throughout much of the Pacific, in lands as dispersed as Hawaii, Rarotonga, and the Solomon Islands.[37] Dr Hohepa referred to Māui as occupying a time between gods (such as Tāne-mahuta) and humans, although others regarded him as a historical figure and 'pillar ancestor' for their own peoples.[38]

In Ngāpuhi traditions, Kupe, the great navigator, set out from his homeland (which Dr Hohepa identified as Ra'iatea) to find the southern land fished up several generations earlier by his ancestor Māui.[39]) Travelling with his whānau and crew on a double-hulled waka known variously as *Matahourua*, *Matahoura*, and *Matawhao*[40], they are said to have followed an octopus to Aotearoa or, alternatively, used a navigational aid handed down from Māui that represented Pacific navigational routes as the arms of an octopus.[41] It was Kupe's wife, Hine-i-te-aparangi, who first sighted land, which was subsequentally named 'Aotearoa.'[42]

In Hokianga traditions, Kupe's first landfall was at Te Pouahi on the harbour's northern shores. According to Hohepa, it was the glow of light above the shore, from the maunga later named Ramaroa, that enticed them to turn into the

33. Hohepa, 'Hokianga' (doc E36), pp 53, 59, 65; Nuki Aldridge (doc B10), pp 14–17.
34. Hohepa, 'Hokianga' (doc E36), p 63.
35. Rima Edwards, supporting papers (doc A25(a)), pp 23–24; Nuki Aldridge (doc B10), p 13.
36. Hohepa, 'Hokianga' (doc E36), pp 59, 86–87; Nuki Aldridge (doc B10), p 16; Rima Edwards, supporting papers (doc A25(a)), pp 28–29; Frances Goulton (doc S29), pp 13–14.
37. Hohepa, 'Hokianga' (doc E36), pp 55, 86–87, 89.
38. Rima Edwards, supporting papers (doc A25(a)), pp 24, 31–33; Nuki Aldridge (doc B10), p 16.
39. Hohepa, 'Hokianga' (doc E36), pp 65, 110, 115–116, 138; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 51; Rima Edwards, supporting papers (doc A25(a)), pp 32–35.
40. Mr Edwards said the names were used interchangeably: Rima Edwards, supporting papers (doc A25(a)), pp 33–34. In Dr Hohepa's view, the name *Matawhao* is a modern coinage and the original name *Matahourua* was a literal description of a double-hulled canoe: 'mata' for waka, and 'hou-rua' for the double hull: Hohepa, 'Hokianga' (doc E36), p 108. Another tradition has the *Matawhao* bound to the *Aotea* to make a double-hulled waka: Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 266.
41. Nuki Aldridge (doc B10), p 16; John Klaricich (doc C9), p 5. Another tradition is that Kupe followed a whale: Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 52.
42. Hohepa, 'Hokianga' (doc E36), p 132.

harbour.[43] Kupe named the harbour 'Te Puna o te Ao Marama' (the pool or spring of the world of light) in reference to the way the light 'rippled off the harbour waters' on their arrival.[44] It was from here that Kupe set out to explore the coasts of Te Ika a Māui and Te Waipounamu (Whangaroa tradition is that Kupe landed in that harbour first).[45] Though Kupe searched for signs of other people, most Ngāpuhi traditions hold that he found the islands uninhabited.[46]

3.2.3 Early settlement – Nukutawhiti and Ruanui

After returning to Hokianga, Kupe completed an uruuruwhenua (a ceremony to lay claim to the land). There, he and his whānau remained for several decades before he decided, in his old age, to return to Hawaiki.[47] According to Dr Hohepa, Kupe turned his son Tuputupuwhenua (also known as Tumutumuwhenua) into a taniwha and left him as guardian over the land.[48] Whereas Ngāpuhi traditions contain no record of Tuputupuwhenua having offspring, other northern traditions recall him and his wives – Kui and Tārepo – as important founding tūpuna.[49]

Along with his son, Kupe also left the taniwha Ārai-te-uru and Niua (or Niniwa) as guardians over the harbour mouth: Arai-te-uru to protect the rocky south headland, and Niua the north headland opposite.[50] Kupe's footprints, and those of his dog Tauaru, were left in soft clay (which eventually turned to rock) on the coast north of the Hokianga head. An anchor from Kupe's waka, and placenames such as Pākanae and Hokianga remain, continuing to mark his authority in the rohe.[51]

43. Hohepa cites 'many oral and written' accounts on this point: Hohepa, 'Hokianga' (doc E36), pp 133.

44. Hohepa, 'Hokianga' (doc E36), pp 133.

45. Hohepa, 'Hokianga' (doc E36), pp 34, 110, 133; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 51. Regarding Whangaroa traditions, see Claudia Brougham, 'Report to the Waitangi Tribunal on Whaingaroa Lands (Wai 58)' (commissioned research report, Kaeo: Te Rūnanga o Whaingaroa, 1994) (doc E2), pp 8, 12; Nuki Aldridge, Patricia Tauroa, Hemi-Rua Rapata, and Bryce Smith (doc E45), pp 12, 29.

46. Hohepa, 'Hokianga' (doc E36), pp 83, 104, 125, 127.

47. Hohepa, 'Hokianga' (doc E36), pp 105–106, 110, 124, 138.

48. Hohepa, 'Hokianga' (doc E36), pp 118, 138, 146; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 78, 170; Hone Sadler, Te Huranga Hohaia, transcript 4.1.1, Te Tii Marae, pp 157, 167. In some traditions Tuputupuwhenua or as Tumutumuwhenua was alive when Kupe left; in others he was turned into a taniwha.

49. Tuputupuwhenua's wives were Kui (Ngāti Kui or Te Tino o Kui) and Tārepo (or Te Repo): John Klaricich (doc C9), pp 5–8; Waitaha Grandmother Council (doc AA45), pp 2–3; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 118, 203–204, 239; Hohepa, 'Hokianga' (doc E36), pp 146, 159, 200; McBurney, 'Traditional History Overview' (doc A36), pp 40–42, 46, 63; Waitangi Tribunal, *Te Roroa Report*, Wai 38 (Wellington: Brooker and Friend, 1992), pp 5, 8–9, 360, 366. While most of these traditions refer to Tuputupuwhenua as Kupe's son, some say he predated Kupe and sprung directly from the earth or the gods.

50. John Klaricich (doc C9), pp 8–9; Hohepa, 'Hokianga' (doc E36), pp 34, 151.

51. Hohepa, 'Hokianga' (doc E36), pp 120, 135.

Claimants also spoke of Tūrehu and Patupaiarehe occupying lands in many parts of this district.[52] Many regarded these as spirit people, shrouded in mist, who lived in mountain forests[53] and served as their guardians;[54] others said they were founding ancestors who preceded or travelled with Kupe and intermarried with later arrivals.[55] 'To the old time Maori,' Whangaroa kaumātua Nuki Aldridge told us, 'they are real people and they figure in tangata whenua history, [though] their history is a closely kept secret.'[56]

On Kupe's return to Hawaiki, he found his homeland in a state of war. He passed on what he knew of Aotearoa. Some generations later, his descendant Nukutawhiti re-adzed *Matahourua* to create a larger waka, *Ngātokimatawhaorua* or *Ngātokimatahourua*. Nukutawhiti's relative Ruanui built a new waka, *Māmari*, and they set sail together for Aotearoa, following the route handed down from Kupe.[57] While *Māmari* is usually recalled as a separate waka, one account suggested that it may have been one of the hulls of *Ngātokimatawhaorua* (the other

52. Claimants and others told us of Patupaiarehe and Tūrehu occupying Hauturu and other Gulf Islands, the North Shore, and Mahurangi: McBurney, 'Traditional History Overview' (doc A36), pp 41–42; Michael Beazley (doc K8), p 8; Whāngārei and Mangakāhia Valley at Ngunguru, Hikurangi, Whatitiri, Pākotai, and Matawaia: Te Ringakaha Tia-Ward (doc J7), pp 2–3; Waimarie Bruce-Kingi (doc I25), p 6; Waimarie Bruce (doc P29), p 10; Tukaha Milne, transcript 4.1.24, Oromāhoe Marae, p 554; Moe Milne (doc W40), p 4; Mitai Paraone-Kawiti, transcript 4.1.22, Te Renga Parāoa Marae, pp 268, 277; Hokianga at Paremata (Utakura), Pikiparia (Kohukohu), and Kauati (Whakatere): John Marsden, transcript 4.1.23, Mātaitaua Marae, pp 183–184; Pairama Tahere, transcript 4.1.23, Mātaitaua Marae, pp 452, 455, 458; Oneroa Pihema (doc V13), p 11; Brougham, 'Report on Whaingaroa Lands' (doc E2), p 13; and Whangaroa at Tākou and Motueka-nui: Ani Taniwha, transcript 4.1.8, Kerikeri, p 245, as well as other locations in the Hauraki and Muriwhenua districts.

53. For descriptions of Patupaiarehe and Tūrehu, see John Klaricich (doc L1), p 5; Hohepa, 'Hokianga' (doc E36), p 54; see also Te Ringakaha Tia-Ward (doc J7), pp 2–3; Pairama Tahere, transcript 4.1.23, Mātaitaua Marae, pp 452, 455; Ani Taniwha, transcript 4.1.8, Kerikeri, p 245; McBurney, 'Traditional History Overview' (doc A36), pp 41–42; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 166–167, 203–204; Robyn Tauroa and Thomas Hawtin (doc AA149), p 10.

54. Dr Hohepa told us that Tūrehu played the same guardianship role for forests as taniwhā did for waterways: Hohepa, 'Hokianga' (doc E36), p 54. Tūrehu or Patupaiarehe were also said to have assisted Kupe's crew on their voyage to Aotearoa: Pairama Tahere, transcript 4.1.23, Mātaitaua Marae, pp 452, 455; looked after burial caves: Patu Hohepa (doc Q10), p 18; assisted tohunga with pure (cleansing rituals) and other spiritual endeavours: Te Ringakaha Tia-Ward (doc J7), pp 2–3; Mitai Paraone-Kawiti, transcript 4.1.22, Te Renga Parāoa Marae, pp 268, 277–278; and created the top-knot that Rāhiri wore when he was courting Ahuaiti: Te Ringakaha Tia-Ward, transcript 4.1.11, Korokota Marae, p 12.

55. Rima Edwards named Tūrehu as one of Kupe's crew, alongside Tuputupuwhenua and many others: Rima Edwards, supporting papers (doc A25(a)), p 53. Ngāti Tautahi, Te Orewai, and Ngāti Kahu of Mahurangi all traced Tūrehu or Patupaiarehe ancestors, as did people of Te Roroa, Kaipara, and Muriwhenua. Patupaiarehe and Tūrehu are also recalled as tribes living in the Gulf Islands and Mahurangi prior to Toi's arrival in Aotearoa: Pierre Lyndon, transcript 4.1.11, Korokota Marae, p 433; McBurney, 'Traditional History Overview' (doc A36), pp 40–41; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 160, 203–205; Wiremu Reihana (doc T10(b)), p 7.

56. Nuki Aldridge (doc B10), p 16.

57. Hohepa, 'Hokianga' (doc E36), pp 141–144; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 114–115, 170.

being *Tirea*).[58] This is one of several traditions of double-hulled waka with distinct names arriving in the north.[59]

When *Ngātokimatawhaorua* and *Māmari* arrived in Aotearoa, they made landfall at Hokianga.[60] *Ngātokimatawhaorua* is said to remain at or near Te Pouahi, resting in a limestone crevasse beneath the sandhills.[61] According to Dr Hohepa, these early settlers found no sign of Tuputupuwhenua or any descendants in Hokianga and its environs, and did not encounter other people for several generations.[62] Other waka traditions refer to descendants of Tuputupuwhenua and others such as Kui and Tūrehu occupying extensive areas both south and north of the harbour.[63] In Dr Hohepa's view, there is insubstantial evidence to indicate that the Hokianga was inhabited prior to the arrival of Nukutawhiti and Ruanui, and as such they were the first inhabitants of the area.[64]

The land that Nukutawhiti and Ruanui found was larger than Hawaiki, and abundant. Its 'vast subtropical rain forests' grew 'from the water's edge to far beyond the distant uplands'. These forests 'teemed with birdlife', and contained edible ferns and berries, and timber for new waka with which to explore the harbour and rivers. The harbour, ocean, and rivers were also rich in fish, shellfish, birds, and marine mammals. Notwithstanding this abundance, Dr Hohepa wrote, this new environment was unsuited to tropical crops such as hue and taro, and so adapting to it must have been challenging.[65]

Nukutawhiti and Ruanui established separate settlements on either side of the harbour entrance (there are differing traditions as to which belonged to each).[66] Both built houses where they could commune with their atua, and when a whale appeared in the harbour, both uttered incantations, seeking to create a storm on the shoreline opposite that would guide the great sea mammal towards their own so it could be offered to the gods. Neither succeeded – the whale swam out to sea – but from this event the harbour acquired a new name, 'Hokianga whakapau karakia' (Hokianga where the karakia became exhausted).[67]

58. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 115; Hohepa, 'Hokianga' (doc E36), pp 141–144; see also Brougham, 'Report on Whaingaroa Lands' (doc E2), p 28.

59. Rima Edwards, supporting papers (doc A25(a)), p 35; Buck Korewha (doc C4), pp 1–2; Manuka Henare, Angela Middleton, and Adrienne Puckey, 'Te Aho Claims Alliance Oral and Traditional History' (doc E67), pp 85–86.

60. Hohepa, 'Hokianga' (doc E36), pp 143–144.

61. Hohepa, 'Hokianga' (doc E36), pp 33, 154; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 78; John Klaricich (doc L1), pp 10–11. Alternative accounts of *Ngātokimatawhaorua*'s resting place include that it was left in the Waimā River (Hohepa, 'Hokianga' (doc E36), p 154).

62. Hohepa, 'Hokianga' (doc E36), pp 11, 146.

63. Waimarie Bruce (doc E47), pp 5, 10; Pereri Mahanga (doc I2), pp [11]–[12].

64. Hohepa, 'Hokianga' (doc E36), pp 12, 146.

65. Hohepa, 'Hokianga' (doc E36), pp 146–147.

66. Hohepa, 'Hokianga' (doc E36), pp 146–148; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 78, 171; Abraham Witana (doc C25), p 10. Most often, Nukutawhiti is said to have settled at Te Pouahi on the northern side and Ruanui on the southern, but Ruanui is then said to have explored the inland northern river valleys and Nukutawhiti the southern.

67. Hohepa, 'Hokianga' (doc E36), p 147; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 171; John Klaricich (doc C9), pp 11–12; Abraham Witana (doc C25), p 10.

Over time, Nukutawhiti and his people explored the harbour's southern shores and river valleys, gradually moving inland as far as Lake Ōmāpere and establishing a settlement and gardens near the current site of Ngāwhā pā, while also maintaining settlements at the harbour entrance and shores. Ruanui and his people meanwhile explored the northern shores and river valleys, gradually moving east to Whangaroa and north to Kaitāia.[68] Nukutawhiti's daughter Moerewarewa eloped with Ruanui's son on the *Māmari*, heading south towards Kaipara before moving inland to the lands south of Kaikohe.[69]

According to Dr Hohepa, the descendants of Nukutawhiti and Ruanui were the only occupants of Hokianga for about four generations, during which time there was peace and extensive intermarriage between the two groups.[70] The harbour and its rivers facilitated ongoing exploration and contact.[71] Over time, and before others arrived, they also spread out to occupy Whangaroa, Whāngārei, and Kaipara. At some point, according to Dr Hohepa, Nukutawhiti's people took the name 'Ngāpuhi', after the taniwha Puhi-moana-ariki who had guided them to Aotearoa (see text box 'Te Whare Tapu o Ngāpuhi', section 3.1).[72] Ruanui's people adopted the name 'Ngāti Te Aewa', from Puhi-te-aewa, and later became Ngāti Ruanui. In turn, sections of Ngāti Ruanui eventually became part of other far north tribal groups including Te Rarawa, Te Aupōuri, and Ngāti Kahu.[73]

Whereas most people of this district recall Nukutawhiti and Ruanui as founding ancestors, in Mahurangi and Hauraki traditions that honour is usually said to belong to Toi-te-huatahi (Toi the only child). In some traditions, Toi was indigenous to Aotearoa, while in others he travelled here from Hawaiki in search of his lost grandson, Whātonga. Traditions also differ over whether Toi arrived before or after Kupe, though Dr Hohepa states that he arrived after Kupe but before Nukutawhiti and Ruanui.[74]

One tradition is that Toi travelled on the waka *Te Paepae ki Rarotonga*, making first landfall at Hauturu (Little Barrier Island), which was then occupied by Patupaiarehe. According to Hohepa, he also landed at Tāmaki-makaurau and Whitianga, among other places, before settling at Whakatāne. Toi's people, Te Tini o Toi, are said to have occupied the Bay of Plenty and also to have spread throughout the Hauraki and Tāmaki districts, where Toi is recalled in several place names

68. Hohepa, 'Hokianga' (doc E36), pp 148–149, 154, 157–158; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 115–116, 171.

69. Hohepa, 'Hokianga' (doc E36), p 154; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 115–116, 172.

70. Hohepa, 'Hokianga' (doc E36), pp 157–158; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 173.

71. Hohepa, 'Hokianga' (doc E36), pp 83, 147–148; John Klaricich (doc C9), p 12.

72. Hohepa, 'Hokianga' (doc E36), pp 157–158.

73. Hohepa, 'Hokianga' (doc E36), p 158; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 173.

74. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 113, 177; Hohepa, 'Hokianga' (doc E36), pp 11, 160–161; McBurney, 'Traditional History Overview' (doc A36), pp 42–43.

including Te Moana-nui-a-Toi (the Hauraki Gulf). Over time, his descendants intermarried with other peoples and moved north into this district.[75]

3.2.4 Waka traditions

According to Ngāpuhi tradition, the descendants of Nukutawhiti, Ruanui, and Toi were followed by several other waves of settlers – all of whom are integral to this district's story. In the following sections, we set out some of the evidence we received from claimants regarding these traditions.

3.2.4.1 *Uru-ao*

One early arrival was *Uru-ao*, which is of uncertain origin,[76] and is said to have stopped at various locations in the north including Waitangi, Tākou, Whangaroa, Mitimiti, Whāngāpē, and Ahipara. There, its people – known as Waitaha – are said to have intermarried with descendants of Ruanui. Te Waiariki is a prominent tupuna from this lineage, and her descendants are said to have occupied much of Hokianga, as well as parts of Whangaroa. Some Hokianga and Whāngārei hapū continue to carry her name.[77]

All other waka are said to have originated from Hawaiki, which according to Dr Hohepa mainly refers to locations in eastern Polynesia.[78] *Kurahaupō*, *Tākitimu*, *Tinana*, *Māmaru*, *Waipapa*, and *Ruakaramea* all made landfall in the far north, while *Māhuhu-ki-te-rangi* landed at Kaipara, and *Mātaatua* stopped at Tākou Bay on the east coast before travelling on to the Bay of Plenty.[79] Through generations of migration, intermarriage, and conflict, the peoples of these waka intermingled with earlier arrivals and made settlements throughout this district. *Moekākara* made final landfall at Manukau Harbour,[80] and *Tainui* and *Te Arawa* first landed in the Hauraki and Tāmaki areas before continuing on to other destinations.[81]

3.2.4.2 *Kurahaupō and Tākitimu*

In Muriwhenua traditions, *Kurahaupō* made landfall at Takapaukura in the far north. Its crew settled the surrounding lands, where they encountered Tūrehu or other tāngata whenua. They intermarried, creating a new people

75. McBurney, 'Traditional History Overview' (doc A36), pp 42–43; Hohepa, 'Hokianga' (doc E36), pp 11, 160–161.

76. Pereri Mahanga (doc I2), p [11]; Ngaire Henare (doc U38), p 4.

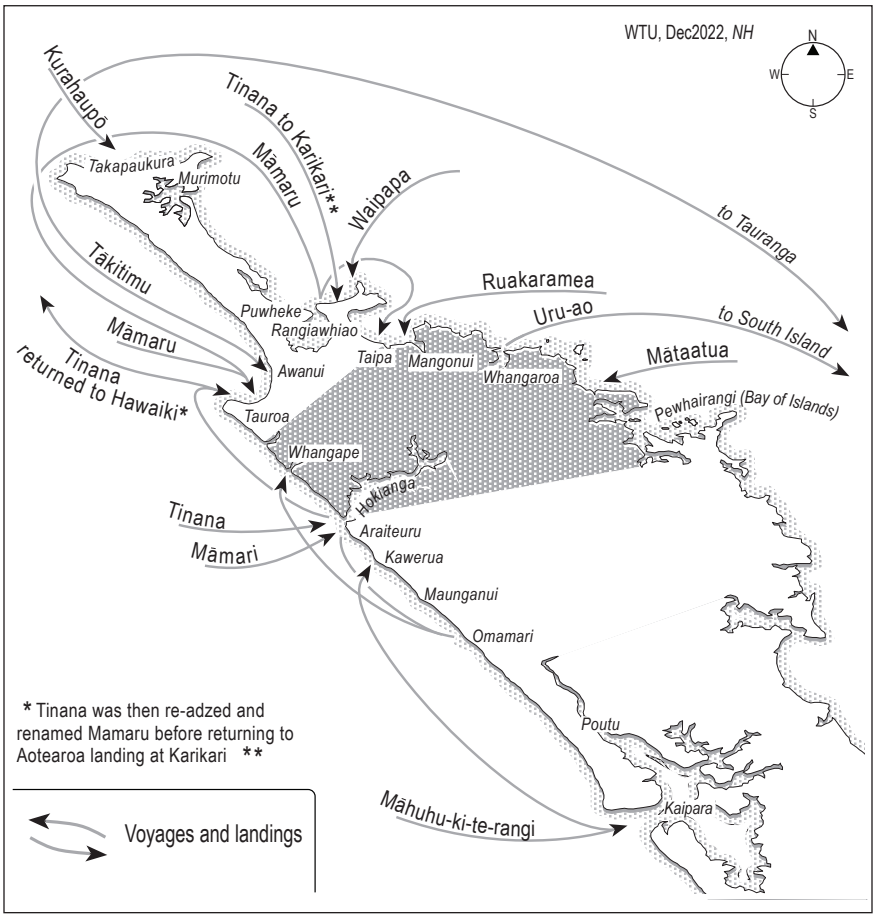
77. Joseph Kingi (doc X17), p 4; Waitaha Grandmother Council (doc AA45), pp 3–4; Hohepa, 'Hokianga' (doc E36), pp 139–140.

78. Hohepa, 'Hokianga' (doc E36), pp 74, 76.

79. Rima Edwards, supporting papers (doc A25(a)), p 36; Tim Nolan, mapbook in support of the evidence of Nuki Aldridge, mapbook commissioned by Crown Forestry Rental Trust (doc B10(b)), pl 6; see also Waitangi Tribunal, *The Ngāti Kahu Remedies Report*, Wai 45, 1 vol (Wellington: Legislation Direct, 2013), p 18.

80. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 180; McBurney, 'Traditional History Overview (doc A36), pp 50, 54.

81. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 210.



Map 3.2: Waka landings and voyages.

initially known as Ngāti Kaha (or Ngāti Kaharoa).[82] At about the same time as *Kurahaupō* arrived, *Tākitimu* made landfall near Awanui on the west coast of the Muriwhenua district. Its commander, Tamatea-mai-i-tawhiti,[83] married Te Kura

82. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45 (Wellington: GP Publications, 1997), p 17; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 116–117, 160, 162–164, 168; Brougham, 'Report on Whaingaroa Lands' (doc E2), p 28; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, Wai 22 (Wellington: GP Publications, 1996), pp 262–263. In some waka traditions, Whātonga travelled on *Kurahaupō*. After landfall in the far north, he continued down the west coast and then the east, settling with Toi-te-huatahi at Whakatane: Hohepa, 'Hokianga' (doc E36), p 128. In some traditions Te Ngaki is recalled as the name of the combined tāngata whenua-*Kurahaupō* people: Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 162.

83. Tamatea-mai-i-tawhiti is also known as Tamatea-ariki-nui.

of Ngāi Tuputupuwhenua, and their son Rongokako then married Muriwhenua of *Kurahaupō*. All iwi of this district (and indeed many other iwi throughout Aotearoa) are said to descend from them, and in particular from their son Tamatea-pōkai-whenua. His hapū, Ngāi Tamatea, had influence throughout the far north and, through later migrations and intermarriages, came to occupy Hokianga, Te Roroa, Kaipara, and Taiāmai territories, becoming important ancestors in Ngāti Whātua and Ngāpuhi history.[84]

3.2.4.3 *Tinana and Māmaru*

Tinana landed a little further south in Ahipara Bay. Its people settled there and began to explore further south towards Hokianga, where they encountered and intermarried with Ngāti Ruanui. Following many further migrations and battles from the 1600s through to the 1800s, and further intermarriages with sections of Ngāpuhi[85] and other hapū, they eventually became known as Te Rarawa, who continue to occupy the west coast north of Hokianga.[86]

After some time in Aotearoa, Tūmoana, commander of the *Tinana*, returned to Hawaiki, leaving his children behind.[87] In Hawaiki, *Tinana* was re-adzed and renamed *Māmaru*. It then returned to Aotearoa, landing on the Karikari Peninsula. According to one tradition, its captain, Parata, married Tūmoana's daughter Kahutianui, and in turn their descendants intermarried with those of Ngāi Tamatea (later Ngāti Kahu), thus uniting the *Māmaru*, *Kurahaupō*, and *Tākitimu* lines. Descendants of this marriage occupied much of the east coast from Rangaunu south to Whangaroa and beyond.[88] We received evidence that while Ngāti Kahu take their name from Kahutianui, Ngāti Kahu ki Whangaroa take their name from Kahutianui's mother Kahukura-āriki.[89] Another Ngāi Tamatea tradition records their connection with other tribes through the marriage of Kahukura-āriki, the son of Kahungunu and Hinetapu in this version, to Te Mamangi. Kahungunu was the son of Tamatea-uruhaea and the grandson of Muriwhenua, daughter of Pohurihanga of the *Kurahaupō* waka. Through both the male and female descent lines these two traditions converge, and together estab-

84. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 116–118, 160, 162–164, 168, 170, 192–193; Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), p 85; Brougham, 'Report on Whaingaroa Lands' (doc E2), pp 28, 32. The relevant whakapapa and Ngāi Tamatea southern migrations are described by Gary Hooker in 'Maori, the Crown and the Northern Wairoa District, A Te Roroa Perspective' (commissioned research report, Wellington: Waitangi Tribunal, 2000) (Wai 674 ROI, doc L2), pp 12–20; Waitangi Tribunal, *Te Roroa Report*, Wai 38, pp 10, 359.

85. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 366–367.

86. Henare, Petrie, and Puckey, '"He Whenua Rangatira"' (doc A37), pp 116–119, 164–166; Hohepa, 'Hokianga' (doc E36), p 202.

87. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 118–119. According to Abraham Witana of Ngāti Manawa, Tūmoana returned to Aotearoa and became an ancestor for sections of Te Rarawa and Ngāpuhi of northern Hokianga: Abraham Witana (doc C25), pp 10–11.

88. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 116–119, 123–124, 166–168.

89. Margaret Mutu (doc AA91), p 2; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 167–168.

lished the name Kahu for the tribe.[90] As well as Ngāti Kahu, hapū descending from intermarriage between peoples of these northern waka included Ngāti Kurī, Ngāi Tākoto, and Te Paatu.[91] The waka *Waipapa* and *Ruakaramea* appear to have been later arrivals in the far north. From them emerged Ngāti Tara, now generally known as a hapū of Ngāti Kahu occupying lands as far south as Kaingapipiwai.[92]

3.2.4.4 *Mātaatua*

Mātaatua is said to have travelled at about the same time as *Kurahaupō*, their two crews closely related.[93] According to northern traditions, *Mātaatua* landed at Tākou, where its crew remained for some time before continuing south. It then made landfall in the Bay of Plenty where many of its people remained, marrying into groups descended from Toi.[94] One of the groups to emerge from these intermarriages was the iwi Ngāti Awa.[95] Over time, their descendants migrated north into Tāmaki and southern Kaipara.[96]

Meanwhile, some early Ngāti Awa people returned to Tākou and settled there under the leadership of Puhi-moana-ariki. Their descendants spread out to occupy the Bay of Islands, Waimate, Whangaroa (where they intermarried with Ngāti Kahu), and northern Hokianga as far as Kaitāia and Ahipara. As noted in section 3.1, in some traditions Ngāpuhi is named for this Puhi-moana-ariki, whose descendants intermarried with those of Nukutawhiti.[97] Ngāti Miru and Te Wahineiti, who came to occupy lands from Whangaroa to the Bay of Islands, were also of *Mātaatua*,[98] while Ngāti Torehina of Whangaroa emerged from intermarriage between Ngāti Awa and other groups, notably Ngāi Tahu.[99]

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90. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 168–169; Waitangi Tribunal, *Report on the Muriwhenua Fishing Claim*, Wai 22, pp 260–261.

91. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 116–117, 160, 162–164, 168–169; Brougham, 'Report on Whaingaroa Lands' (doc E2), p 28; Pereniki Tauhara (doc X27(a)), pp 4–5; Waitangi Tribunal, *Report on the Muriwhenua Fishing Claim*, Wai 22, pp 262–263. According to Pereniki Tauhara, the name Ngāti Kahu emerged during the 1800s; prior to that, they and other hapū were still known as Ngāi Tamatea: Pereniki Tauhara (doc X27(a)), pp 4–5.

92. Waitangi Tribunal, *The Ngāti Kahu Remedies Report*, Wai 45, p 18; Arena Heta (doc B30), p 2.

93. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 116–117; Brougham, 'Report on Whaingaroa Lands' (doc E2), pp 29–30.

94. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 173–174.

95. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 177.

96. Te Uira Associates, 'Oral and Traditional History Report for Te Rohe o Whangaroa' (commissioned research report, Kaeo: Whangaroa Papa Hapū, 2012) (doc E32), pp 23–24; McBurney, 'Traditional History Overview' (doc A36), pp 52, 67–68; Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), pp 76–77.

97. Brougham, 'Report on Whaingaroa Lands' (doc E2), pp 29–30; Manuka Henare, Hazel Petrie, and Adrienne Puckey, 'Oral and Traditional History Report on Te Waimate Taiamai Alliance' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2009) (doc E33), pp 34–37; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 173–174, 177–178, 180, 212, 216; Buck Korewha (doc C4), p 7.

98. Henare, Petrie, and Puckey, 'Oral and Traditional History on Te Waimate Taiamai Alliance' (doc E33), pp 37–38; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 176–180.

99. Te Hurihanga Rihari (doc B15(c)), p 3. Though Mr Rihari did not say so, 'Ngāi Tahu' were probably of *Tākitimu* origins and related to Ngāti Kahu.

3.2.4.5 *Māhuhu-ki-te-rangi*

Māhuhu-ki-te-rangi landed first at Tākou. Finding that area occupied by tāngata whenua, the crew continued to explore the east coast, leaving people behind at several places. One who remained behind was Manaia, who is said to have travelled 'throughout Aotearoa', traversing the east and west coasts of Te Ika a Māui and crossing to Te Waipounamu before returning to the north, where his waka foundered near Whangaroa. He eventually settled at the southern entrance to the Bay of Islands. His descendants came to occupy coastal lands as far as Whāngārei, before intermarrying with southern peoples and moving into Mahurangi and various offshore islands. Manaia's people were initially known as Ngāti Manaia, and much later as Ngāti Wai.[100] Ngāre Raumati was founded by the ancestor Huruhuru and occupied the south-eastern Bay of Islands from about 1600. One claimant said Ngāre Raumati had Bay of Plenty origins and had travelled north with Puhimoana-ariki; other sources associated them with Ngāti Manaia. Huruhuru's major pā was at Rākaumangamanga.[101]

After exploring the east coast, *Māhuhu-ki-te-rangi* then rounded Te Reinga and travelled down the west coast, stopping at Kaipara. According to Te Roroa traditions, the lands between there and Hokianga were already settled by descendants of Tuputupuwhenua, with whom the people of *Māhuhu-ki-te-rangi* intermarried. In turn, their descendants intermarried with sections of Nukutawhiti's people,[102] and with Ngāi Tamatea, Ngāti Kahu, Ngāti Awa, and related peoples who were migrating south to escape conflict in their Muriwhenua homelands. These migrations and marriages contributed to the foundation of Te Roroa and Ngāti Whātua peoples.[103]

3.2.4.6 *Moekākara*

Moekākara (or *Tu-nui-a-rangi* in some traditions) landed at Te Ārai just south of Mangawhai. Finding the district already occupied, the crew remained only for a short time before moving on to a new settlement, Ōtāhuhu, at the Manukau Harbour. In the *Moekākara* tradition, Ōtāhuhu was named after the waka's captain Tāhuhunuiorangi. After Tāhuhunuiorangi's death, some of his Ngāi Tāhuhu people returned to Mangawhai before expanding north and west. Ngāi Tāhuhu and associated peoples Ngāti Rangi and Ngāi Tū are said to have occupied lands encompassing Whāngārei, northern Kaipara, Mangakāhia, Taiāmai, and southern areas

100. Te Warihi Hetaraka (doc C19), pp 3–4, 6; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 197–201.

101. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 182–183, 196, 371; Joseph Kingi (doc W34), p 10.

102. Hohepa, 'Hokianga' (doc E36), pp 199–201; Hooker, 'Maori, the Crown and the Northern Wairoa District' (Wai 674 ROI, doc L2), pp 12–14; Te Pania Kingi (doc B37), pp 2–3.

103. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 126, 205; Hohepa, 'Hokianga' (doc E36), pp 159, 199–199, 202; Waitangi Tribunal, *Te Roroa Report*, Wai 38, p 10. The migrations are described by Hooker: Hooker, 'Maori, the Crown and the Northern Wairoa District' (Wai 674 ROI, doc L2), pp 12–20.

of Hokianga and the Bay of Islands.[104] Some claimants said Ngāi Tāhuhu reached as far north as Ahipara.[105] Te Roroa traditions also refer to Ngāti Rangi occupying southern Hokianga and Taiāmai at about the same time as Ngāi Tāhuhu, but say this hapū had Ngāi Tamatea origins.[106] Over time, Ngāi Tāhuhu, Ngāti Rangi, and Ngāi Tū intermarried with other peoples, including Nukutawhiti's descendants. They are recalled as important founding ancestors for Ngāpuhi and for many Ngāpuhi hapū.[107]

3.2.4.7 *Tainui and Te Arawa*

While the waka mentioned earlier all made first landfall in the north, *Tainui* and *Te Arawa* landed in Hauraki and Tāmaki before their people migrated into Mahurangi and Kaipara. Both waka arrived in the Hauraki Gulf at about the same time, about eight generations after Toi. *Te Arawa*'s captain Tamatekapua gave new names to several of the gulf's islands and other features, while *Tainui* explored Tāmaki and Waikato. Several of their crew remained in Tāmaki, intermarrying with earlier tāngata whenua, and with descendants of Toi and others. Ngāi Tai (sometimes known as Ngāti Tai)[108] emerged from these and other intermarriages. They and other closely related hapū came to occupy territories in Hauraki, Tāmaki, and Mahurangi, including several of the islands in the Hauraki Gulf.[109] Among

104. McBurney, 'Traditional History Overview' (doc A36), pp 54–55; Henare, Petrie, and Puckey, 'Oral and Traditional History on Te Waimate Taiamai Alliance' (doc E33), p 38; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 192, 194–195; Walzl, 'Mana Whenua Report' (doc E34), pp 22–24; Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), pp 96–98; Ngaire Henare (doc U38), p 5. Some sources refer to pre-waka origins for Ngāi Tāhuhu: Hana Maxwell (doc AA118), p 2; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 173–174.

105. Paeata Brougham-Clark and Hone Mihaka (doc W42), p 12; Taipari Munro (doc U43(a)), p 7.

106. Hooker, 'Maori, the Crown and the Northern Wairoa District' (Wai 674 ROI, doc L2), pp 13–16, 43; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 205–206; Hohepa, 'Hokianga' (doc E36), p 182; Waitangi Tribunal, *Te Roroa Report*, Wai 38, pp 4–5.

107. Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), pp 69–70, 77–79, 88; Hohepa, 'Hokianga' (doc E36), pp 169–170; Waimarie Bruce (doc E47), p 8; Taipari Munro (doc I26), pp 3–4; Paeata Brougham-Clark and Hone Mihaka (doc W42), pp 10–12.

108. In his report on the traditional history of the district, Peter McBurney noted there are several *Tainui* tūpuna associated with the iwi names Ngāi Tai and Ngāti Tai. These include Taikehu, Taihaua, Taimanawaiti, Tainui, and Te Tai. The names Ngāi Tai and Ngāti Tai are often used interchangeably but are sometimes used to distinguish between Ngāi Tai south of the Tāmaki River and Ngāti Taihaua and Ngāti Taimanawaiti north of the river. Hapū names and uses, including the uses of 'Ngāi Tai' and 'Ngāti Tai', have changed over time: McBurney, 'Traditional History Overview' (doc A36), p 208; Jasmine Cotter-Williams (doc K5), pp 2–3, 9–11, 14, 20–21, 24; Jasmine Cotter-Williams, app (doc K5(a)), pp 12, 24.

109. For the origins of Ngāi Tai and related hapū, see McBurney, 'Traditional History Overview' (doc A36), pp 51, 208–210; Michael Beazley (doc K8), pp 9, 14–16, 18; Jasmine Cotter-Williams (doc K5(a)), p 8; Pei Te Hurinui Jones and Bruce Biggs, *Ngā Iwi o Tainui: The Traditional History of the Tainui People* (Auckland: Auckland University Press, 1995), p 40. Taihaua's descendants are said to have at one time exercised mana over territories from Tāmaki to Whangaparāoa or Orewa: Joseph Kingi (doc X17(a)), p 7; Rose Daamen, Paul Hamer, and Barry Rigby, 'Auckland', Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1996) (doc H2), p 24. More specifically, sources associated Ngāi Tai or related hapū (such as Ngāti Tai, Ngāti Taihaua, and Ngāti Taimanawaiti) with Devonport, Takapuna, Ōnewa (Northcote), Okura, Whangaparāoa, Pūhoi,

the early *Tainui* ancestors was Taihaua, whose descendant Taimanawaiti is said to have exercised mana over the territories north of a line from Maungawhau (Mount Eden) and the mouth of the Tāmaki River to Rangitoto and Tiritiri Matangi. In turn, one of his sons inherited mana over his Tāmaki lands, while another, Taihua, inherited the territories north of the Waitematā.[110] Ngāti Taimanawaiti are now commonly regarded as a hapū of Ngāi Tai. However, the claimant Jasmine Cotter-Williams told us they were an independent iwi with distinct whakapapa.[111]

Having landed at Hauraki and Tāmaki, *Tainui* and *Te Arawa* continued on to their respective Waikato and Bay of Plenty homelands.[112] In later generations, peoples of both waka would migrate north into Hauraki and Tāmaki, and in turn into Kaipara and Mahurangi. One such group was Ngāoho, who later divided into

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Tiritiri Matangi, Kawau, and Aotea: Michael Belgrave, Grant Young, and Anna Deason, 'Tikapa Moana and Auckland's Tribal Cross Currents: The Enduring Customary Interests of Ngati Paoa, Ngati Maru, Ngati Whanaunga, Ngati Tamatera and Ngai Tai in Auckland' (commissioned research report, Paeroa: Hauraki Maori Trust Board and the Marutuahu Confederation, 2006) (Wai 1362 ROI, doc A6), pp 22–23; McBurney, 'Traditional History Overview' (doc A36), pp 71, 78, 210; Michael Beazley, 'Te Uri o Maki Mahurangi and Offshore Islands Report', 2014 (doc K2), pp 16, 149, 172; Michael Beazley, responses to questions (doc K2(b)), p 5.

110. Jasmine Cotter-Williams (doc K5), pp 5, 14–15, 21–23; Jasmine Cotter-Williams (doc K5(a)), p 8; McBurney, 'Traditional History Overview' (doc A36), p 210; see also Belgrave, Young, and Deason, 'Tikapa Moana' (Wai 1362 ROI, doc A6), pp 22–23. Several sources referred to intermarriage between the Tāmaki-Hauraki Ngāi Tai and a related *Tainui* group from Tōrere in eastern Bay of Plenty: Beazley, 'Te Uri o Maki' (doc K2), pp 16–17, 127, 132–133; McBurney, 'Traditional History Overview' (doc A36), pp 47–49, 52; Peter McBurney, transcript 4.1.12, North Harbour Stadium, p 11; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 209–210. Ms Cotter-Williams said that the Tainui waka of Tiki-te-au-whatu (father of Taihaua) made its way to Potaka just north of Hick's Bay, then stopped off at Tōrere before returning to Tāmaki. Some of the crew left the waka at Tōrere; eventually their descendants would become known as Ngāi Tai. Many generations later, some of those descendants would make their way north to Tāmaki in an event known as Te Hekenga o Ngā Tuatoru, which reunited Tōrere descendants with those who had generations earlier returned to Tāmaki. Te Hekenga involved three granddaughters of Tamatea-toki-nui, chief of the Ngāi Tai at Tōrere, who asked them to rejoin their Tainui relatives in Hauraki. Te Whatatau of Te Uri o Te Ao (a hapū of Waiohua) who was visiting Ngāti Maru when the sisters arrived, eventually married two of them. Ms Cotter-Williams took issue with the historian Murdoch, who argued that at this time the people of Ngāti Tai also became known as Ngāi Tai, pointing to various documentations of the Ngāti Tai name. She also cited a document provided by Anaru Makiwhara to G S Graham in 1922. Her evidence was that Te Hekenga accelerated a process already under way by the nineteenth century of the development of Te Uri o Te Ao into Ngāti Tai, a tribal entity separate and distinct from Ngāti Taimanawaiti.

111. Jasmine Cotter-Williams (doc K5), pp 2–3, 7–9, 13–14, 16–17. Ms Cotter-Williams told us there were two *Tainui* waka, with Taihaua and his father on one and Hoturoa on the other. She said that Ngāti Taimanawaiti descended from the first waka which brought the original inhabitants of Tāmaki, and Ngāi Tai from the second: Jasmine Cotter-Williams (doc K5), p 7. The more generally known tradition is that there was one *Tainui* waka with Hoturoa as captain, and Taihaua and other Tāmaki settlers as crew: see, for example, Miria Tauariki, Te Ingo Ngaia, Tom Roa, Rovina Maniapoto-Anderson, Anthony Barrett, Tutahanga Douglas, Robert Joseph, Paul Meredith, and Heni Matua Wessels, 'Ngāti Maniapoto Mana Motuhake' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2012) (Wai 898 ROI, doc A110), pp 93, 99, 103–113; Jasmine Cotter-Williams (doc K5), pp 7–9.

112. McBurney, 'Traditional History Overview' (doc A36), pp 45, 47–49, 51; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 209–210.

various groups including Ngāriki, Ngāiwi, and Te Waiōhua, the latter emerging from intermarriage with Ngāti Awa.[113] They were followed by the *Tainui* tupuna Maki, whose people migrated north from Kāwhia, occupying Tāmaki (which is named for him), southern Kaipara, and the Mahurangi coast and islands, alternately fighting and intermarrying with Ngāoho, with Ngāti Taihaua and Ngāti Taimanawaiti, and with Te Roroa and Ngāti Manaia peoples who were migrating south.[114] According to some sources, Maki's people intermarried with Ngāti Awa at Tāmaki before moving north.[115]

In turn, other *Tainui* groups – Ngāti Maru and Ngāti Paoa – occupied Hauraki and Tāmaki during the 1700s, becoming involved in a series of conflicts against Maki's people and Ngāti Wai along the Mahurangi coast. Another *Tainui* group, Te Uri o Pou, was pushed out of Hauraki at this time, moving north and intermarrying with Ngāpuhi of upper Hokianga, where they became known as Ngāti Pou.[116]

All of these waka and iwi are integral to this district's story. Through multiple generations of contact, conflict, and intermarriage their many lines have interwoven and merged, ultimately forming the great tribal confederations that emerged in the 1800s – Te Aupōuri, Te Rarawa, Ngāti Kahu, Ngāpuhi, Te Roroa, Ngāti Whātua, and the Marutūāhu confederation of Hauraki. All but Marutūāhu are sometimes identified as part of an even larger coalition, Ngāpuhi-nui-tonu, which is said to occupy all lands from Tāmaki to Te Reinga.[117]

3.2.5 The lens of whanaungatanga

As discussed in our stage 1 report, early explorers and settlers brought from Hawaiki a way of understanding the world that was based on whanaungatanga (kinship) and whakapapa (genealogical lines of descent).

3.2.5.1 *Communion between spiritual and physical worlds*

In this conception of the world, all rights and obligations, and all power and authority, are handed down from Io Matua Te Kore to atua (ancestor-gods), and to their descendants in the natural and human worlds.[118] Throughout life there was constant dialogue between the ancestors and the spiritual world.[119]

As ancestors landed their waka, founded settlements, laid claim to resources, or engaged in any other significant event, they uttered karakia appealing to the gods

113. McBurney, 'Traditional History Overview' (doc A36), pp 56–58; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 203.

114. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 211–214; McBurney, 'Traditional History Overview' (doc A36), pp 66, 69, 72, 74–79, 100, 107–108; Beazley, 'Te Uri o Maki' (doc K2), p 8; Joseph Kingi (doc X17(a)), p 7; Peter McBurney, transcript 4.1.12, North Harbour Stadium, p 52.

115. Daamen, Hamer, and Rigby, 'Auckland' (doc H2), pp 31–32; Joseph Kingi (doc W34), p 8.

116. McBurney, 'Traditional History Overview' (doc A36), pp 223, 225.

117. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 23–24.

118. Rima Edwards, supporting papers (doc A25(a)), pp 9, 12–14, 43.

119. Hone Sadler, transcript 4.1.1, Te Tii Marae, pp 170, 175; see also Tom Murray (doc B25), p 5.

for their support.[120] Founding tūpuna such as Kupe, Nukutawhiti, Ruanui, and Tāhuhunuiorangi all built altars where these ceremonies could be completed;[121] and others established wānanga where spiritual knowledge and its practical uses could be handed down to new generations.[122] Taniwha (spiritual guardians) guided waka journeys, created landforms, and stood guard over lands and waterways.[123]

As Hone Sadler of Ngāti Moerewa explained, wherever early Māori went, 'i hīkoi tahi me ō rātou atua' (they walked with their gods), and therefore no activity occurred without karakia:

> Kua pēra katoa ki te taiao, ō tātou tūpuna i a rātou e hīkoi ana, i hīkoi tonu, i karakia tonu, karakia tahi, i hīkoi tahi me ō rātou atua. I hīkoi-tahi ai rātou me ō rātou atua ki tō rātou taiao. Hei ārahia atu nei i ā rātou i roto i wā rātou mahi katoa, kāhore he mahi kia timata, kia karakia anō, mehemea he tua rakau, mehemea he hī ika, mehemea he hanga whare, he iwi whakapono, he iwi marama ki tō rātou ao, e taea e rātou katoa i ngā karakia te tāhuri atu i ngā tohu o te ao, kia rite ki tā rātou e hiahia ana.
>
> Our ancestors when they walked the earth they prayed and they walked with their gods, they walked with their gods all through their world. They led them everywhere in all the things they did. There wasn't a single thing they did without karakia at first. Whether they went to fell a tree, when they went fishing, whether they were erecting a house, they were people of faith and belief. People who understood their world, they could achieve through their karakia, to read the signs of the world, to accomplish what they wanted.[124]

He spoke of atua as kaitiaki – caretakers or guardians – over the physical universe. Life was lived in service of them, and every action required their consent.[125] John Klaricich of Ngāti Korokoro told us that the physical and spiritual worlds could not be distinguished any more than 'raindrops are, when mixed with the waters of the earth'.[126]

3.2.5.2 *Tapu*

Earlier we noted Rima Edwards' definition of tapu as 'spiritual purity'.[127] Yet tapu has practical as well as spiritual connotations. To be tapu is to be set aside for

120. Hohepa, 'Hokianga' (doc E36), pp 144–145; John Klaricich (doc C9), pp 11–12; see also Rima Edwards, supporting papers (doc A25(a)), p 45; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 114.

121. Hohepa, 'Hokianga' (doc E36), p 124. For landing ceremonies completed by Nukutawhiti and Ruanui, see pp 33, 144–147. For Tāhuhunuiorangi's landing ceremony, see McBurney, 'Traditional History Overview' (doc A36), pp 54–55.

122. For example, see Pereri Mahanga (doc I2), pp [16]–[17].

123. Hohepa, 'Hokianga' (doc E36), pp 54, 149–152; Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 18–19, 24.

124. Hone Sadler, transcript 4.1.1, Te Tii Marae, pp 170, 175; see also Tom Murray (doc B25), p 5.

125. Hone Sadler, transcript 4.1.1, Te Tii Marae, pp 170, 175.

126. John Klaricich (doc C9), p 11.

127. Rima Edwards, supporting papers (doc A25(a)), pp 9–10.

service to atua, and therefore to be excluded from all other purposes.[128] Hence, in his uruuruwhenua ritual at Hokianga, Kupe appealed to the atua to make the land tapu, setting it aside for his descendants.[129] Likewise, tapu could reserve one person for a position of leadership, and another for a position of spiritual authority; it could demand that plants or wildlife were cared for and were only harvested or caught at certain times; and it could seal off locations associated with death, ill health, or ill fortune.[130] To comply with the requirements of tapu and therefore act as atua wished was to bring good fortune, whereas to violate the law of tapu was to invite spiritual misfortune manifesting in the forms of illness, injury, or even death. In this way, tapu acted as a form of social control that was based on spiritual authority and did not generally require physical enforcement.[131] As Mr Edwards explained to us in a stage 1 hearing,

> Ko te tapu he wairua horomata horekau nei he kino kei roto. Engari ki te takahia tera tapu ko nga hua ka puta he kino katoa. I konei ano ka puta te mana o Whiro. Ko te tapu tetahi mea e mataku ai te tangata Maori na runga i tana mohio ki te takahia e ia te tapu ka pa mai ki runga kia ia ki tana whanau, hapu Iwi ranei tetahi raruraru nui.
>
> Sacredness is an element that gains the respect of the spirit of man. Tapu is a state of spiritual purity that contains no evil. But if that sacredness is trampled on the outcomes are all bad. It is here that the mana of Whiro becomes active. Desecrating that which is made sacred brings enormous fear to the Maori person because he accepts that if he desecrates that which is sacred he invites great tragedy for himself his whanau hapu and Iwi.[132]

There is great respect also for Hinenuitepo, who holds the enormously sacred power over death. Because she defeated Mauitikitiki in his quest for eternal life, 'a great sacredness was placed upon the female element which places her mana above that of the male element in this respect'.[133]

3.2.5.3 *Mana*

Tapu was inextricably linked with mana, which Mr Edwards defined as 'supreme power'. Mana can be understood as the authority, handed down by atua, to take action in this world on their behalf. Mana was first imbued by Io Matua Te Kore

128. Royal (ed), *The Woven Universe*, pp 5–6.
129. Hohepa, 'Hokianga' (doc E36), p 124; for landing ceremonies, see Hohepa, 'Hokianga' (doc E36), pp 33, 144–147; McBurney, 'Traditional History Overview' (doc A36), pp 54–55.
130. Nuki Aldridge (doc B10), pp 27–30; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 313–314; Patu Hohepa, transcript 4.1.1, Te Tii Marae, pp 108, 115–116, 124–125; John Klaricich (doc L1), p 14.
131. Rima Edwards, supporting papers (doc A25(a)), p 16; Tom Murray (doc B25), p 7; John Klaricich (doc C9), pp 12–14.
132. Rima Edwards, supporting papers (doc A25(a)), p 16; as cited in Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 24.
133. Rima Edwards, supporting papers (doc A25(a)), p 18.

into Ranginui and Papatūānuku and then into their children such as Tāne-mahuta and Tangaroa, and into their many descendants – trees, birds, and fish – and finally handed down to mankind. Mr Edwards explained:

> Koia tenei te mana tukuiho e korerotia nei e te Tangata ara iti noaiho o tenei mana i tukua maie ia ki te tangata ko te nuinga o te kaha o tona mana i puritia e ia kia aia ano ara kia Rangi me Papa me a raua tamariki a Tane ma.
>
> This is the supreme power that is talked about by man and only a small part of Io's mana he handed down to mankind, the greater part of his powers he retained to himself, to Rangi and Papa, and to their children Tane and the others.[134]

According to the Ngāpuhi theologian Māori Marsden, mana encompasses permission from atua to act for a particular purpose, and the power and authority to do so.[135] Among humans, that power and authority could be inherited through lines of descent, and, in particular, chiefly lines or those associated with spiritual authority. This was mana tūpuna. Mana over land (mana whenua) could be inherited through ancestral associations with particular places or resources, exercised through occupation and use (see section 3.2.6.3), and through the return of placenta and bones to those lands. Similarly, mana over other resources such as oceans and waterways (mana moana) could be inherited and maintained through ongoing use. Mana could also be acquired through direct communion with the gods (mana atua), as practised by tohunga; and through actions that served the kin group (mana tangata), such as the exercise of great skill in warfare, diplomacy, cultivation, or food gathering, or great care and generosity in the care of others and the natural world.[136] Frances Goulton of Whangaroa put it this way, mana whenua could be seen as corresponding with the economic sphere, mana tangata with the political, and mana atua with the underlying 'values and principles that guide our way of life'.[137]

3.2.5.4 *Tikanga*

A fundamental requirement of mana was that it must be exercised in ways that accorded with the gods' wishes and were therefore tika (right or correct). To act in a manner that was not tika would cause a loss of mana. In a world viewed through the lens of kinship, what was right or tika could be measured by its effect on relationships, including relationships among people, relationships with atua

134. Rima Edwards, supporting papers (doc A25(a)), pp 9–10; see also Hohepa, 'Hokianga' (doc E36), p 54.

135. Royal (ed), *The Woven Universe*, pp 4–6; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 41; Abraham Witana (doc C25), pp 6–7.

136. Abraham Witana (doc C25), pp 6–9; Buck Korewha (doc C4), pp 13–14; Pereri Mahanga (doc I2), pp [8]–[11]; Tom Murray (doc B25), p 6; Nin Tomas (doc C1), p 11; see also Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 41–42; Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), p 44.

137. Frances Goulton (doc S29), p 4.

and ancestors, and relationships between people and elements of the natural and spiritual worlds.[138]

One requirement of this kinship-based system was the principle of utu (reciprocity), under which all relationships must be maintained in balance. Just as there was balance between Ranginui and Papatūānuku, between Tāne-mahuta and Tangaroa, and between Nukutawhiti and Ruanui, so balance must be maintained in all relationships. Yet such balance did not necessarily mean an absence of conflict: just as the atua fought, so, too, might people.[139] In practical terms, utu could involve punishment and retribution for wrongdoing, but equally it underpinned concepts such as manaakitanga (hospitality and caring for others) and kaitiakitanga (stewardship of the natural world).[140] Nuki Aldridge explained utu as 'an adjustment mechanism'. It was not about revenge but about 'effecting a law and restoring balance', or seeking justice in the same manner as a father would were his son wronged.[141]

Guidance on how to manage relationships and how to maintain balance could be found in the actions of atua and other ancestors. Stories of atua defined relationships among mankind and elements of the natural world – forests, oceans, rivers, flora, and fauna – providing information on which actions were acceptable and which violated the fundamental balance among all things. Similarly, stories of ancestors told people what had happened in the past and could therefore be replicated in accordance with the wishes of atua. Just as Kupe and others left their footprints on the land, their descendants could occupy, live, travel, and harvest food in those locations.[142]

Sacred and or specialised knowledge about the nature of ancestors' deeds has been passed down orally over generations in various forms, including place names, whakapapa (genealogies), pepeha (sayings), whakataukī (proverbs), tauparapara (incantations relating to whakapapa), waiata (song), mōteatea (song-poetry), whakairo (carving), rāranga (weaving), and tā moko (tattooing).[143] Mr Klaricich, for example, spoke of Nukutawhiti's hautū (waka-paddling song) which appealed for *Ngātokimatawhaorua* to be delivered from Tangaroa's rising waves to the safety of Papatūānuku and Tāne-mahuta, thereby giving 'insight into their

138. Nin Tomas (doc C1), p 11; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 41–42; Abraham Witana (doc C25), pp 6–7; Pereri Mahanga (doc I2), p 7.

139. Rima Edwards, supporting papers (doc A25(a)), pp 12–15, 21; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 35–36.

140. Nuki Aldridge (doc B10), p 53; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 302; Waitangi Tribunal, Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuarua, Wai 262, 2 vols (Wellington: Legislation Direct, 2011), vol 1, p 37.

141. Nuki Aldridge (doc B10), pp 28–29, 53.

142. John Klaricich (doc C9), p 6; Rima Edwards, supporting papers (doc A25(a)), p 11; Manuka Henare (doc B3), p 14; Hone Sadler, transcript 4.1.1, Te Tii Marae, pp 171, 175; Nuki Aldridge (doc B10), p 14; Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuatahi*, Wai 262, vol 1, p 3.

143. Rima Edwards, supporting papers (doc A25(a)), p 11; transcript 4.1.1, pp 171, 175; Nuki Aldridge (doc B10), p 14; Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuatahi*, Wai 262, vol 1, pp 2–7, 22.

beliefs in the power of their karakia'. People of the harbour mouth could still hear their ancestor singing in the 'incessant voice of the surf and the ocean.'[144] Similarly, Erimana Taniora of Ngāti Uru told us, tā moko worn by his ancestors Te Puhi, Ngāhuruhuru, and Te Ara served as a 'record of their whakapapa and standing in their hapū.'[145] According to Te Warihi Hetaraka of Ngāti Wai, symbols used in whakairo explained tribal history, identity, and connections to atua, thereby serving as expressions of mana. 'Whakairo,' he said, 'was our written language.'[146]

The principle of whanaungatanga, together with the imperatives of tapu, mana, and utu, and the knowledge handed down from ancestors, forms the basis of a system of law and authority that was imported to Aotearoa by early Māori inhabitants and then adapted to the new land.[147] It was a system based on broad principles which could then be applied flexibly depending on circumstances. Mr Aldridge defined tikanga as 'guiding commandments', which then informed kaupapa ('the body of principles') and ritenga (the practical rules that were required to enforce these commandments and principles).[148] While matters such as land tenure, social and political structures, and religious beliefs could change, the underlying tikanga endured. 'Its authority is in the present,' he said. '[B]esides its moral and ancestral authority, it adds rationale, authority and control which is timeless. It goes deeper than custom or practice to mean the true, honest and proper cultural ways.'[149]

Although the law of tapu did not generally require enforcement action, the law of utu typically did. Where offences against mana had occurred, utu required the aggrieved party and their kin to seek some form of redress from the transgressors and their kin. Depending on the offence and the relationship between the parties, this might take the form of koha, exchange of taonga,[150] the offer of a chiefly marriage,[151] or be made in goods, resources, or land.[152] Where life had been taken, the death of a rangatira of equivalent mana was typically required.[153] Among close kin, the most common means of dispute resolution was the taua muru (plundering

144. John Klaricich (doc C9), pp 9–10; see also Hohepa, 'Hokianga' (doc E36), pp 144–145.
145. Erimana Taniora (doc G1), p 38; Te Warihi Hetaraka (doc C19), p 15.
146. Te Warihi Hetaraka (doc C19), pp 7, 9, 15.
147. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 133, 237, 302, 313–314; Nuki Aldridge (doc B10), pp 27–31; Eddie Taihakurei Durie, 'Custom Law' (Treaty Research Series, Treaty of Waitangi Research Unit), 2013 ed, pp 3–10; Royal (ed), *The Woven Universe*, pp 5, 56 ; Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuarua*, vol 1, pp 16–17; Rima Edwards (doc A25(a)), pp 9–10, 29–30; Hone Sadler transcript 4.1.1, pp 172, 176–177; Quince, 'Maori and the Criminal Justice System in New Zealand', pp 336–341 (cited in Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 25).
148. Nuki Aldridge (doc B10), pp 27–30.
149. Nuki Aldridge (doc B10), pp 27–28.
150. Nuki Aldridge (doc AA167), p 22.
151. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 230, 259, 386.
152. Grant Phillipson, 'Bay of Islands Maori and the Crown, 1793–1853' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2005) (doc A1), pp 48, 51; Nuki Aldridge (doc AA167), pp 21–23; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 315.
153. For example, see Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 252–253.

party), through which the offended party restored its mana by visiting the offenders and taking or destroying property. Often, taua muru ended in a hākari (feast). If a taua muru was resisted, force might be used to extract utu. But for the most part, taua muru was 'a ubiquitous Maori system for peaceful dispute resolution', which was commonly used in the Bay of Islands and Hokianga as well as in other parts of the country.[154]

3.2.6 Political structures and leadership

While the principles of whanaungatanga and the values of mana, tapu, and utu remained constant from the time of the early explorers from Hawaiki times down to the present, much else changed, including environmental and economic relationships, social and political structures, and leadership.

3.2.6.1 *Social organisation among early inhabitants*

In general, the earliest explorers exercised and acquired mana by serving the interests of their kin groups; by leading them from Hawaiki in times of conflict and scarcity, bringing them to a new land, and establishing spiritual authority to occupy those lands and use their resources. The captains and crews of these early waka required immense courage and were skilful seafarers, navigators, and explorers, able to 'read the waves' and calculate direction of travel from signs such as marine and bird life, and ocean colour and currents.[155] Typically, either they or members of their crew were tohunga, who possessed the spiritual authority to commune with atua and seek guidance and support for their ventures. Among their crews were people with expertise at fishing, gardening, and food gathering, all of which were vital for survival in the new land.[156]

After landfall, these new settlers faced the task of surviving and adapting to a different environment. Just the north of Aotearoa by itself was vaster than any Hawaikian homeland.[157] Though abundant in bird and sea life, the environment was also challenging – densely forested and too cool for food crops such as kūmara and taro to grow year-round as they had in their eastern Pacific homelands. Though we do not have detailed evidence from this district, these early migrants are believed to have lived in extended family groups and to have led transient lifestyles, occupying semi-permanent coastal sites while also undertaking extended seasonal journeys inland to harvest birds, berries, fern, and other foods.[158]

154. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 33; Ballara, *Taua*, pp 103–111; Durie, 'Custom Law', pp 52–54.

155. John Klaricich (doc L1), p 3.

156. Hohepa, 'Hokianga' (doc E36), p 112; Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuarua*, Wai 262, vol 1, pp 33–38, 115–116, 133–134, 238–239; John Klaricich (doc L1), p 3.

157. Hohepa, 'Hokianga' (doc E36), pp 61–62, 65, 133–134, 138.

158. Hohepa, 'Hokianga' (doc E36), pp 26–27, 37–38, 81–83, 133–134; Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuarua*, Wai 262, vol 1, p 33. For a general explanation of this early transition period, see Atholl Anderson, Judith Binney, and Aroha Harris, *Tangata Whenua: A History* (Wellington: Bridget Williams Books, 2015), pp 67–71.

3.2.6.2 *The emergence of hapū*

In the first few centuries after settlement there is very little record of significant conflict occurring between the various groups. On the contrary, neighbours from different waka generally lived peacefully alongside one another and frequently intermarried, creating new groups. Over time, a pattern of small, relatively mobile whānau groups gave way to one of larger groups comprising several extended families, who worked together to occupy and defend land on a permanent basis, and to control and make use of economic resources. These groups, known as hapū, dominated the social, political, and economic landscape from the late 1500s right through into colonial times. Population growth was one factor in the transition. Another was the decline of large fauna (such as moa and fur seals) which increased dependence on cultivated foods, fish, and shellfish, so creating a requirement for year-round control of gardens and fishing grounds.[159]

To a significant degree, even after the emergence of hapū, routine daily economic activities (such as small-scale gathering and cultivation) continued to be undertaken by whānau. Hapū formed to manage larger-scale activities such as shark-fishing expeditions, shared cultivations, and territorial defence. They commonly formed among groups who shared recent ancestors and common strategic interests, taking their names from those ancestors or from events that had led to their formation. New hapū typically emerged every few generations, and realigned as intermarriages occurred or interests changed.[160]

3.2.6.3 *Territorial and resource interests*

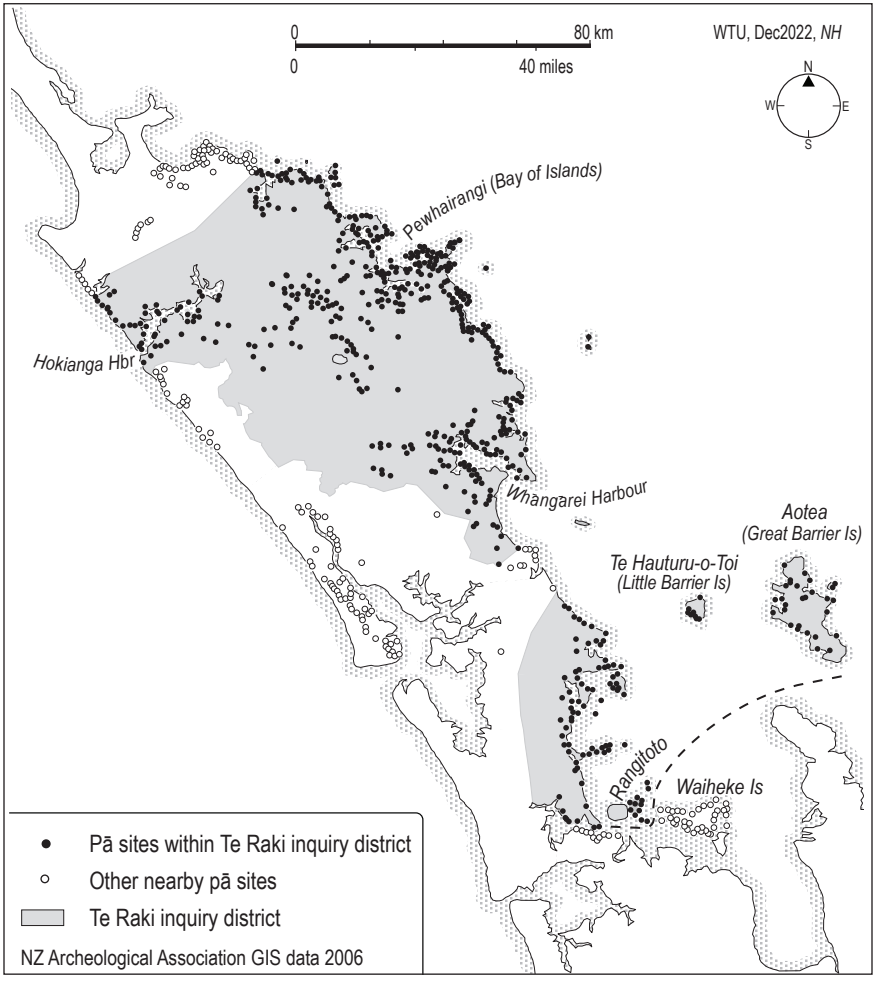
Because of their economic and defensive roles, hapū held authority over land and other significant resources, and also over significant assets such as large waka and pā (defensive fortifications) which were built with increasing regularity from about 1600 onwards.[161] Mr Edwards told us:

> [K]o te Hapu te kaipupuri i te mana kaitiaki o nga whenua me era atu taonga. Ko nga Hapu ano hoki te mana whakahaere i nga tikanga me nga mahi. Ko te whanau kei roto i te Hapu. Ka whanau mai he uri horekau i whanau mai ki roto i te whanau engari i whanau mai ki roto ki te Hapu.

159. Henare, Petrie, and Puckey, 'Oral and Traditional History on Te Waimate Taiamai Alliance' (doc E33), pp 46–47; Hohepa, 'Hokianga' (doc E36), pp 186–188; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 24, 94–95, 110–111, 154, 221–232, 324–326, 336–338, 364; see also Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuarua*, Wai 262, vol 1, pp 237–239.

160. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 135–137, 151–159; Manuka Henare, Hazel Petrie, and Adrienne Puckey, supporting papers to '"He Whenua Rangatira": Northern Tribal Landscape Overview' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2008) (doc A37(b)), p 77; Nuki Aldridge (doc B10), pp 31–32.

161. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 135–137, 151–159; Henare, Petrie, and Puckey, supporting papers to 'He Whenua Rangatira' (doc A37(b)), p 77; Nuki Aldridge (doc B10), pp 31–32.



Map 3.3: Pā sites in Te Raki.

> [T]he Hapu held the mantle of guardianship of the land and other possessions. It was also the Hapu that held the mantle of governance of the customs and things to be done. The whanau was within the Hapu. When a child is born that child was not born into the whanau but was born into the Hapu.[162]

Claimants spoke of the intimate connections between people and land. Because land possessed the mana of Papatūānuku and of other atua, it was not a possession to be owned but an ancestor to whom each individual and hapū owed obligations.

162. Rima Edwards (doc A25), p 79 (cited in Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 30).

'[N]oku tenei whenua' (I belong to this land), Mr Aldridge told us.[163] Expert witness Dr Manuka Henare said that 'through whakapapa, humanity and the whenua, the land and natural world are one, such is the intensity of this most fundamental relationship.'[164] Whakapapa 'connects us to the pito [umbilical cord] and the bones of our tupuna which have been buried in the whenua before us', and therefore 'connects us to the mana our tupuna had over the rohe during their lives', said Tapiki Korewha of Ngāti Hau-Ngāti Kaharau.[165]

In this context, claimants emphasised the mana of women (mana wāhine) with respect to land, hapū well-being, and whakapapa. '[T]he whenua is a woman', we were told. 'A mother. Papatuanuku is a woman.'[166] We were reminded that the word 'whenua' means 'land' and 'placenta', both of which nurture and provide sustenance; each child is born from one to the other, and so becomes tangata whenua.[167] '[K]o au ko Papatūānuku, ko Papatūānuku ko au,' Frances Goulton told us, 'the land is me and I am the land through Papatūānuku.'[168] For these reasons, we were told, mana whenua was particularly associated with women, and was commonly handed down by matrilineal descent.[169] In turn, women bore obligations to nurture and care for the land,[170] and also to 'maintain the whare tapu o te tangata . . . our whakapapa'.[171] Women were often therefore key decision-makers with respect to matters such as land rights and obligations, hapū alliances and intermarriage, birth and healthcare, cultivation, and restoration of relationships after warfare.[172]

Although hapū had ancestral relationships with (and kaitiaki obligations to) whenua, their rights depended on ongoing occupation and use,[173] and were typically not exclusive. Claimants explained how the earliest settlers, with their nomadic lifestyles, held resources in common and shared them freely.[174] As hapū emerged and developed permanent associations with pā, kāinga, cultivations,

163. Nuki Aldridge (doc B10), p 60.
164. Manuka Henare (doc B3), p 13.
165. Buck Korewha (doc C4), p 13; see also Abraham Witana (doc C25), pp 11–12.
166. Robyn Tauroa and Thomas Hawtin (doc AA149), p 9.
167. Frances Goulton (doc S29), pp 9, 15–16.
168. Frances Goulton, transcript 4.1.20, Te Tapui Marae, pp 422–423.
169. Awhirangi Lawrence, transcript 4.1.20, Te Tapui Marae, pp 454–455; Tom Murray (doc B25), p 6; Robyn Tauroa and Thomas Hawtin (doc AA149), p 10; Tai Tokerau District Māori Council, 'Oral History Report', 2016 (doc AA3), pp 48–55; Frances Goulton (doc S29), p 9.
170. Awhirangi Lawrence, transcript 4.1.20, Te Tapui Marae, p 454; Frances Goulton (doc S29), p 9; Tom Murray (doc B25), p 6; Robyn Tauroa and Thomas Hawtin (doc AA149), p 9.
171. Waimarie Bruce (doc C24), pp 19–20; see also Awhirangi Lawrence, transcript 4.1.20, Te Tapui Marae, p 454; Hinemoa Pourewa (doc S30), p 7; Hori Chapman and Cyril Chapman (doc V4), p 37.
172. Awhirangi Lawrence, transcript 4.1.20, Te Tapui Marae, pp 453–454; Frances Goulton (doc S29), p 7; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 258–259; Waimarie Bruce (doc C24), pp 19–20; Hori Chapman and Cyril Chapman (doc V4), p 37.
173. Tom Murray (doc B25), pp 6–7; Moka Puru (doc F21(a)), pp 6–7; Buck Korewha (doc C4), pp 13–14.
174. Danny Watson, Geoffrey Rakete, Gillard Parker, Nuki Aldridge, Coral Lucas, Kingi Taurua, Ken McAnergney, Barry Brailsford, Millan Ruka, and Tas Davis (doc Q6(a)), p 51; Tahua Murray (doc S21(b)), pp 9–10, 18–19; Reuben Porter (doc S6), p 55.

and other resources, they continued to acknowledge intersecting and overlapping rights.[175] Neighbouring hapū might, for example, occupy distinct territories while sharing fishing grounds and other resources, as well as acknowledging each other's rights of access and seasonal occupation.[176]

Hapū territories therefore cannot be understood as lines on a map; rather they were zones of influence that intersected and overlapped, and had boundaries that were precisely defined but also 'multi-levelled and fluid'.[177] These zones were defined by reference to the deeds of ancestors, the places associated with them (such as settlements, cultivations, fishing grounds, fortifications, and urupā (burial grounds)), and the placenames and stories they left.[178] Rights were subject to ongoing negotiation, and could be transferred by agreement (such as gifting of land in return for military or other assistance) or by raupatu (conquest followed by occupation).[179] Where that occurred, the victors generally married into the hapū of the defeated peoples, as a means of securing and sustaining peace. As was explained by expert witnesses Doctors Manuka Henare, Hazel Petrie, and Adrienne Puckey, 'the underlying rationale was the creation of kinship bonds, especially through the birth of children with ties to each of the contenders'.[180]

3.2.6.4 *Rangatira and rangatiratanga*

As we outlined in our stage 1 report, the emergence of hapū – and the associated competition over land and resources – required new leadership skills. Rangatira (literally, 'weavers of people') were responsible for coordinating and guiding hapū activity. Dr Bruce Gregory said they were kaitiaki (guardians) for their people.[181] Patu Hohepa said that 'rangatira' could best be translated as 'unifier', and certainly not as 'chief'.[182] They were required to be skilled warriors and experts at military strategy but equally to be diplomats, capable of negotiating peace agreements and securing alliances – either temporary or permanent – by means such as intermarriage, gift giving, their oratorical skills, and offers of mutual protection. They were also economic leaders, managing and coordinating large-scale activities such as pā and waka construction, major cultivations, and long-distance fishing expeditions.

175. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 98–99; Waimarie Bruce (doc P29), pp 3–5.

176. For examples, see Aldridge, Tauroa, Rapata, and Smith (doc E45), pp 29; Tony Walzl, 'Ngati Rehia: Overview Report' (commissioned research report, Kerikeri: Ngāti Rehia Claims Group, 2015) (doc R2), p 47; McBurney, 'Traditional History Overview' (doc A36), p 215.

177. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 98; Tahua Murray (doc S21(b)), pp 9–10, 18–19.

178. Joseph Kingi (doc X17(a)), p 10; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 83–96, 320–321.

179. Beazley, responses to questions (doc K2(b)), pp 4–5; Joseph Kingi (doc X17(a)), p 10; Ani Taniwha (doc G3), pp 14–15.

180. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 258–259. For examples of such marriages, see Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 211, 216, 219; Hone Sadler (doc B38), p 8.

181. Bruce Gregory (doc B22), p 8. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 30–31.

182. Patu Hohepa, transcript 4.1.25, Tauteihiihi Marae, p 799.

And they were mediators and guides for their people, securing decisions about important matters by consensus among whānau leaders.[183]

Rangatira were typically of senior descent, but they acquired their positions through effectiveness at serving their people and maintained their status only if the people continued to give their support. Men and women played complementary roles, which varied from place to place and people to people, and were subject to their own tikanga.[184] When hapū were determining who would lead, first-born children often gave way to younger siblings who excelled in arts such as warfare, peacemaking, alliance-building, and management of cultivations and other food sources, and could therefore best serve their people.[185] Often, roles were specialised, with one leader fulfilling diplomatic and military functions while others looked after spiritual or economic affairs or both.[186] The tohunga whakairo (master carver) Te Wihari Hetaraka of Ngāti Wai told us of the vital role played by tohunga interpreting the gods' intentions and thereby providing guidance for their people:

> In conjunction with the Rangatira, Tohunga became the protector and sole authority of the use of knowledge and from this knowledge created laws and rules. They were responsible for apportioning this knowledge according to the needs and capacity of the peoples of that time. Rangatira were responsible for enforcing these laws.[187]

Nuki Aldridge told us that tohunga – trained in whare wānanga that were established in Nukutawhiti's time[188] – typically remained 'behind the scenes', and that Europeans had not understood their importance as leaders.[189]

For those exercising a leadership role, the mana belonged not to them but to their hapū and the atua from whom they descended. A rangatira's fundamental obligation was to protect his or her people's shared mana.[190] As Pita Tipene of Ngāti Hine told us during our stage 1 hearings, 'ko te hapū te rangatira o ngā

183. Walzl, 'Ngati Rehia' (doc R2), pp 37–38; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 157; Kiharoa Parker and Hera Dear (doc H11(b)), pp 7–8, 12; Margaret Mutu (doc AA91), pp 37–39. Mr Tahere and Mr Klaricich discussed the importance of inter-hapū alliances: Pairama Tahere (doc B2), p 2; John Klaricich (doc C9), p 14. Mr Klaricich said that decisions were made by discussion and consensus: John Klaricich, responses to questions (doc C9(c)), p [2].

184. Tom Murray (doc B25), p 6; Pita Tipene (doc AA82), p 3; Margaret Mutu (doc AA91), p 30; Hori Chapman and Cyril Chapman (doc V4), p 37; see also Hana Maxwell (doc I5(a)), pp 7–8.

185. Pita Tipene (doc AA82), p 4; Bruce Gregory (doc B22), p 8.

186. Nuki Aldridge (doc B10), pp 32, 34, 51, 53.

187. Te Warihi Hetaraka (doc C19), p 11.

188. John Klaricich (doc C9), pp 11–12; Buck Korewha (doc C4), p 2; Tai Tokerau District Māori Council, 'Oral History Report' (doc AA3), p 109; see also Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 171.

189. Nuki Aldridge (doc B10), p 34.

190. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 224–232, 365–366; Erima Henare (doc A30(c)), p 7; Hīrini Henare, transcript 4.1.1, Te Tii Marae, pp 77–78; Patu Hohepa, transcript 4.1.1, Te Tii Marae, pp 108, 114, 154, 165; Erima Henare, transcript 4.1.1, Te Tii Marae, p 310; Bruce Gregory (doc B22), p 8; Buck Korewha (doc C4), p 14; Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 30–31.

rangatira' ('it's the hapū who are the chief of the chiefs').[191] In Ngāpuhi traditions, many leaders are seen as exemplars of the qualities of rangatira. Principal among them is Rāhiri – the shining day – who first united the various Hokianga descendants of Nukutawhiti and secured their lands.

3.2.7 Rāhiri's people

Stage 1 of our inquiry introduced Rāhiri, his life and significance, and we return here to this important history to assist readers unfamiliar with that report.[192] Rāhiri was born sometime in the 1600s. Tauramoko, his father, a seventh-generation descendant of Nukutawhiti, lived in southern Hokianga. His mother was Hau-angiangi, the daughter of Puhi-moana-ariki of Ngāti Awa. Rāhiri was born and grew up at Whiria Pā in Pākanae, southern Hokianga,[193] and took his name from an older Ngāti Awa relative.[194]

His lifetime spanned a period of increasing turbulence, in this district and elsewhere, centred on control of land for cultivation. Puhi-moana-ariki had left the Bay of Plenty after a dispute about kūmara gardens,[195] and the *Tainui* leader Maki had left Kāwhia about the same time for a similar reason.[196] Not long afterwards, a series of conflicts occurred in the far north, sparking a great migration by sections of Ngāti Awa, Ngāti Miru, Ngā Rīriki, Ngāi Tamatea, and others into southern Hokianga and Kaipara, where they fought with Ngāpuhi and other earlier settlers.[197] These conflicts seem to have motivated a series of strategic intermarriages between Rāhiri's family and neighbouring iwi. Rāhiri's brother Māui married into Ngāi Tamatea, who by then were occupying territories in southern Hokianga and Taiāmai.[198] His older brother Tangaroa-whakamanamana also married strategically and is recalled as a founding ancestor for Ngāti Whātua and for many Whangaroa hapū.[199]

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191. Pita Tīpene, transcript 4.1.1, Te Tii Marae, pp 77–78.

192. For further discussion of Rāhiri see Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 26–29.

193. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 24–25; Hohepa, 'Hokianga' (doc E36), p 166; Walzl, 'Mana Whenua Report' (doc E34), p 25; John Klaricich (doc C9), p 13. Some sources gave different names for Rāhiri's parents, but these were the most often cited. For example, see Brougham, 'Report on Whaingaroa Lands' (doc E2), pp [13], [14]; Abraham Witana (doc C25), p 3; Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), p 105. There are also conflicting traditions regarding Rāhiri's descent, including traditions that Puhi-moana-ariki's mother was Ngāi Tamatea and that Puhi-moana-ariki's father descended from Nukutawhiti via Moerewarewa: Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), pp 85, 105.

194. Joseph Kingi (doc W34), pp 5–7, 9.

195. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 124.

196. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 211–214; McBurney, 'Traditional History Overview' (doc A36), pp 66, 69, 74–79.

197. Hooker, 'Maori, the Crown and the Northern Wairoa District' (Wai 674 ROI, doc L2), pp 12–18, 47; Daamen, Hamer, and Rigby, 'Auckland' (doc H2), pp 24–25; Waitangi Tribunal, *Te Roroa Report*, Wai 38, pp 4–6.

198. Hooker, 'Maori, the Crown and the Northern Wairoa District' (Wai 674 ROI, doc L2), p 13.

199. Rima Edwards, transcript 4.1.1, Te Tii Marae, pp 39, 44; Joseph Kingi (doc W34), p 15; Aldridge, Tauroa, Rapata, and Smith (doc E45), p 10.

Rāhiri, too, married outside Ngāpuhi into powerful neighbouring iwi. Tribal traditions refer to him undertaking a long journey from his Pākanae home into Kaikohe and then down the Mangakāhia Valley, where he met his first wife Ahuaiti. Several places are named for this journey including Te Iringa, Tautoro, and the maunga Te Tārai o Rāhiri, where he groomed himself before beginning his courtship.[200] Ahuaiti was of Ngāti Manaia[201] and Ngāi Tāhuhu;[202] the latter were also at war with Ngāti Awa and Ngāi Tamatea.[203] Her marriage to Rāhiri did not last and she returned, pregnant, to her southern Mangakāhia home.[204] She named her son Uenuku-kūare – Uenuku for the rainbow who was her 'only friend' as she gave birth alone, and kūare (ignorant) because in one tradition 'there was no one to perform the correct ceremonial dedication rituals' to mark his birth,[205] or, in another, because 'he had no father to teach him karakia and traditional lore'.[206] Rāhiri then married Ahuaiti's cousin Whakaruru, who is said to have had Ngāti Awa heritage.[207] They, too, had a son, named Kaharau, who grew up with his father at Pākanae. Rāhiri married a third time, to Whakaruru's sister Moetonga.[208]

While Rāhiri's marriages unified many of this district's tribes, his military prowess was also important. With his cousins Te Kākā and Tōmuri, and his son Kaharau, Rāhiri engaged in a series of battles against Ngāti Awa. Whiria, his pā at Pākanae, became known as an impregnable fortress. Through these campaigns Rāhiri and his relatives defended the Ngāpuhi homelands in Hokianga and Kaikohe, and secured peace with Ngāti Awa and Ngāti Miru at Whangaroa. During Rāhiri's lifetime, a section of Ngāti Awa agreed to depart from Hokianga, some returning to their ancestral lands at Whakatāne and others moving to Taranaki where they became known as Te Āti Awa. Their departure must have been based on a tatau pounamu (peace agreement – literally, 'greenstone door'), because Rāhiri's youngest brother Māui travelled with the Taranaki contingent, and, later in his life, Rāhiri also visited Ngāti Awa at Tāmaki and Whakatāne before going to live in Taranaki.[209] Other sections of Ngāti Awa (and their Ngāti Miru relatives)

200. Ngaire Brown, 'Te Waiariki/Ngāti Korora Iwi Hapu and the Crown in the Northern Kaipara', 2000 (doc E23), pp [37]–[38]; Tai Tokerau District Māori Council, 'Oral History Report' (doc AA3), pp 114–115; Hohepa, 'Hokianga' (doc E36), pp 169–170, 200.

201. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 197–199.

202. Hohepa, 'Hokianga' (doc E36), p 161; Brougham, 'Report on Whaingaroa Lands' (doc E2), p 47; Tai Tokerau District Māori Council, 'Oral History Report' (doc AA3), pp 112, 114.

203. Herbert Rihari (doc R14), pp 4–5; Waitangi Tribunal, *Te Roroa Report*, Wai 38, pp 4–6; Te Hurihanga Rihari (doc B15(a)), pp 3–4 [te reo]; Te Hurihanga Rihari (doc B15(c)), pp 3–4 [English translation].

204. Hohepa, 'Hokianga' (doc E36), pp 169–170.

205. Hohepa, 'Hokianga' (doc E36), p 170; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 130.

206. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 25.

207. Hohepa, 'Hokianga' (doc E36), pp 41, 169–170, 200; Brown, 'Te Waiariki/Ngāti Korora' (doc E23), p [38].

208. Hohepa, 'Hokianga' (doc E36), pp 170, 200.

209. John Klaricich (doc C9), pp 12–13; Hohepa, 'Hokianga' (doc E36), pp 166–167, 174–175; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 24–25, 174–175, 370–371; Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), pp 76–77.

remained in Whangaroa, the Bay of Islands, and Waimā, intermarrying with sections of Ngāpuhi. Conflicts with these peoples would continue for many generations, as we will see later.

While there are other tūpuna such as Nukutawhiti, who might also be regarded as founding ancestors for Ngāpuhi, nearly all claimants see Rāhiri as having played the most significant role in consolidating and expanding their influence, due both to his military successes and the significance of his marriage alliances.[210] Rāhiri's descendants refer to him as 'te tumu herenga waka' ('the stake to which the canoe was tied');[211] the 'tumu whakarae' ('chief of the highest rank');[212] and 'te upoko ariki' (which Dr Hohepa defined as 'the first and ultimate ariki, supreme chief and leader').[213] The great Ngāpuhi leader Tā James Henare once wrote that Rāhiri 'brought together the scattered groups descended from Nukutawhiti' and called them 'Ngāpuhi', in so doing provided another explanation for the tribal name. This sentiment is recalled in a phrase 'ngā maramara o Rāhiri' ('the chips of Rāhiri').[214]

Rāhiri's influence is also evident in his decision to divide his territories between his sons. As Uenuku-kūare approached adulthood, he came to live with his father at Pākanae, causing his younger brother Kaharau to become jealous. Fearing conflict between them, Rāhiri sent them to plait twine that was long enough to encircle their pā. Once the twine was completed, Rāhiri attached it to a kite and set it free. It flew east, landing at Te Tuhuna, near present-day Kaikohe, and Rāhiri used this as the separation point between Uenuku's Taiāmai rohe in the east and Kaharau's Hokianga rohe in the west.[215] In this way, Rāhiri intended that the brothers would stand as equals, independent of each other but also bound together and obliged to support each other in times of threat or strife. This principle of distinct and autonomous hapū able to align and offer mutual support has come to be known as te kawa o Rāhiri (Rāhiri's law).[216]

Dr Hohepa defined the kawa as one of 'divided interlocking protection',[217] under which each section of Ngāpuhi 'could work together but also . . . work apart'.[218] 'To understand Te Kawa o Rāhiri', he said, 'requires one to understand the way that conflict holds us of Ngā Puhi together. It provides for a converging of our laws and tikanga, shaping our expressions of mana.'[219] The kawa was like an 'unwritten

210. Henare, Petrie, and Puckey, supporting papers to 'He Whenua Rangatira' (doc A37(b)), p 7; Hohepa, 'Hokianga' (doc E36), p 106; John Klaricich (doc C9), p 14.
211. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 45.
212. Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), p 60.
213. Hohepa, 'Hokianga' (doc E36), p 41.
214. Henare to McRae, 22 July 1985 (cited in Merata Kāwharu, *Tāhuhu Kōrero: The Sayings of Taitokerau* (Auckland: Auckland University Press, 2008), p 113).
215. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 25–26, 184; Hohepa, 'Hokianga' (doc E36), pp 172–173; Patu Hohepa, transcript 4.1.1, Te Tii Marae, pp 104, 110–111; Erima Henare (doc A30(c)), p 87; John Klaricich (doc C9), pp 13–14.
216. Hohepa, 'Hokianga' (doc E36), pp 166, 172; see also Patu Hohepa, transcript 4.1.25, Tauteihiihi Marae, p 798.
217. Patu Hohepa, transcript 4.1.30, Te Renga Parāoa Marae, p [791].
218. Patu Hohepa, transcript 4.1.25, Tauteihiihi Marae, p 798.
219. Patu Hohepa, transcript 4.1.25, Tauteihiihi Marae, p 797.

Hokianga and Taumārere – the springs of Ngāpuhi

Ka mimiti te puna i Hokianga
Ka totō te puna i Taumārere
Ka mimiti te puna i Taumārere
Ka totō te puna i Hokianga

When the Hokianga spring runs dry
The Bay of Islands spring flows.
When the spring of the Bay of Islands runs dry
The spring of Hokianga flows.[1]

This whakataukī, attributed to Rāhiri, has multiple meanings that have been detailed in our stage 1 report, but we summarise these again here.[2] It can refer to the ebb and flow of tidal waters in Hokianga and Bay of Islands, which are linked by underground waterways where taniwha travel from coast to coast.[3] Rāhiri is also said to have named the ancestral river Taumārere, which encompasses the network of waterways running from the slopes of Mōtatau maunga into the Bay of Islands, including the Ramarama and Tāikirau Streams.[4]

The whakataukī also refers to the division of lands between Rāhiri's sons, and the enduring bonds of kinship that required them to unite in times of trouble.[5] As Ngāti Hine kaumātua Erima Henare explained: 'When the people of Hokianga require assistance, the people of Taumārere help them. When the people of Taumārere require assistance, the people of Hokianga help them.' In this way, Ngāpuhi can be understood as distinct hapū and hapū groupings who unite in times of need.[6]

Ngāpuhi also express this relationship by referring to the west coast as Te Tai Tamatāne, and the east coast as Te Tai Tamawāhine – the male and female coasts – which were distinct but had 'fortunes [that] were intertwined'. According to Ngāti Hine claimants, 'The eastern coast was called Tai Tama Wahine because of its

1. Hohepa, 'Hokianga' (doc E36), p 172; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 26.
2. Te Rūnanga o Ngāti Hine, 'Ngati Hine Evidence for Crown Breaches of te Tiriti o Waitangi', 2014 (doc M24), p 22; Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 29; Hohepa, 'Hokianga' (doc E36), pp 172–173.
3. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 26; Hohepa, 'Hokianga' (doc E36), p 173; see also John Klaricich (doc L1), p 7.
4. Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), p 48.
5. Erima Henare (doc A30(c)), p 87; see also Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 26; Hohepa, 'Hokianga' (doc E36), p 173; Te Rūnanga o Ngāti Hine, 'Evidence for Crown Breaches of te Tiriti o Waitangi' (doc M24), p 22.
6. Erima Henare (doc A30(c)), p 87.

beautiful, tranquil harbours and bays. And although still beautiful, Tai Tama Tane was less forgiving than the east coast, more rugged and a thousand times more dangerous.'[7]

These sayings also refer to important ancestors from each coast – male warriors such as Kaharau and Tūpoto from the west coast, and wāhine rangatira such as Maikuku, Hineāmaru, and Rangiheketini from the east (see section 3.3.3.2).[8]

7. Te Rūnanga o Ngāti Hine, 'Evidence for Crown Breaches of te Tiriti o Waitangi' (doc M24), p 22.
8. Erima Henare, transcript 4.1.1, Te Tii Marae, p 223.

Magna Carta',[220] which 'dictates the way in which rangatiratanga is expressed [and exercised] within a Ngāpuhi context'.[221]

Consistent with Rāhiri's wishes, Uenuku-kūare chose to live at Pouerua, where he kept up the alliance-building tradition by marrying Kareāriki of Ngāi Tāhuhu. Their children were Uewhati, Maikuku, Hauhauā, and Ruakiwhiria. Kaharau lived at Whiria and Pākanae. His first marriage was to Kohinemataroa, who was Rāhiri's niece and also had Te Roroa heritage.[222] She bore a son, Taurapoho, who then unified Ngāpuhi lines by marrying Uenuku-kūare's daughter Ruakiwhiria. Kaharau's second and third marriages were to Houtaringa and Kaiāwhī of Te Roroa.[223] Over the next two or three generations their descendants would restore Ngāpuhi authority over their Hokianga and Kaikohe homelands, and in turn would push out to establish control of most of the district's remaining territories. Many new hapū would emerge as that expansion occurred, along with new divisions and alliances.

3.3 Te Mārohatanga o Ngāpuhi, 1750–1830 / The Unfolding of Ngāpuhi, 1750–1830

3.3.1 Introduction

This section provides a general introduction to the district's many hapū and their lands. It introduces key tūpuna and hapū; describes their deep and intimate relationships with the harbours, mountains, waterways, and other features of their territories; and traces the significant realignments that occurred from the mid-1700s through to about 1830 as Ngāpuhi of Hokianga and Kaikohe exerted their

220. Patu Hohepa, transcript 4.1.25, Tauteihiihi Marae, p 797.
221. Patu Hohepa, transcript 4.1.25, Tauteihiihi Marae, pp 797, 799.
222. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 24–25, 176, 180–181, 240; McBurney, 'Traditional History Overview' (doc A36), p 250.
223. They are variously said to be of Ngāi Tupututupuwhenua, Ngāti Awa, and Te Roroa: Hohepa, 'Hokianga' (doc E36), pp 168–169, 173–176; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 174–175, 366; Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), p 78.

influence on other parts of the district through a combination of military campaigns and strategic intermarriage – a process that Dr Hohepa called 'the unfolding of Ngāpuhi'.[224]

Warfare was not constant during this period, but it was regular. There were peaks from about 1790 to 1810, and again in the 1820s when large regional campaigns occurred under the leadership of Hongi Hika and other leaders such as Pōmare I, Te Morenga, Rewa, and Patuone. Their scale and frequency declined rapidly from the mid-1820s, and the realignment of tribal interests in this district was, with limited exceptions, complete by 1830.

We will consider each region in turn, beginning with Ngāpuhi homelands in Hokianga, then will turn to other regions in the order in which northern or southern alliance forces arrived and, by exerting their authority, caused significant realignment in the tribal landscape. After Hokianga, we consider Ngāpuhi settlement of Whāngārei and Mangakāhia during the 1700s; the expanding influence of northern and southern alliance hapū in Taiāmai and Waimate during the late 1700s; and the major intertribal wars of the 1820s and their effects on Mahurangi and other territories. After these regional wars had ended, the final stage in the 'unfolding of Ngāpuhi' was completed in the pre-treaty period with a realignment of Whangaroa hapū after Hongi's return there in the late 1820s.

Our depictions of hapū relationships with land and other geographical features rely on claimant evidence, as presented to us either directly or through traditional histories. We acknowledge – as claimants did – that hapū territories intersect and overlap, are often contested, and are subject to change over time. The following sections are intended to provide context for our consideration of claims; they are not intended as definitive statements of resource rights.

3.3.2 Hokianga: te pito o Ngāpuhi

Hokianga is known as 'te pito o Ngāpuhi' (the navel of Ngāpuhi)[225] because Kupe, Nukutawhiti, and Ruanui landed and made homes there, and because Rāhiri was based there as he defended the tribe's territories and paved the way for the later Ngāpuhi expansion.[226] Kupe provided both 'foundation and substance', said John Klaricich, for the deep spiritual and ancestral connections between Hokianga people and their environment. He 'began the human process of naming the hills, lakes, streams, trees, birds, creatures and other things, all beginning points for himself and for us'.[227] Pākanae, Te Pouahi, and Porokī were coastal settlements Kupe named.[228] So, too, were the maunga surrounding the harbour entrance:

224. Hohepa, 'Hokianga' (doc E36), p 166.
225. Hohepa, 'Hokianga' (doc E36), p 12. Hokianga has also been called 'te kohanga o Ngāpuhi' (the nest of Ngāpuhi): Hinerangi Cooper-Puru (doc C37), p 5, and 'Te Kohanga o Te Tai Tokerau' (the nest of Te Tai Tokerau): Rosemary Daamen, 'Exploratory Report on Wai-128 filed by Dame Whina Cooper on behalf of Te Rarawa ki Hokianga' (commissioned research report, Wellington: Waitangi Tribunal, 1993) (doc E11), p 10.
226. Patu Hohepa (doc A32), p 4; Hohepa, 'Hokianga' (doc E36), p 12.
227. John Klaricich (doc C9), pp 5, 6.
228. John Klaricich (doc C9), p 7.

> From the sandspit where he landed he saw for the first time, the mountain on the south side of the harbour, whose glow had guided him into Hokianga. Kupe gave the name Te Ramaroa to the peak. Later he named the group of nearby hills in a way that gave body to the land. He placed Te Ramaroa as tupuna, his children Puketi and Paeroa are the two peaks west, their daughter Tamaka stands at the foot of Te Ramaroa. One twin son Paoro stands at the foot of Paeroa. The other Mahena was banished to the bay in Koutu . . . At the foot of Puketi, is Tangihia, their still born child. This is the family of Ramaroa.[229]

Kupe also left the taniwha Ārai-te-uru and Niua to guard the harbour entrance, their 'immutable presence' embodying the mana of Hokianga and Ngāpuhi,[230] and enduring as 'a source of power and inspiration':[231]

> Kotahi ki reira ki Arai-te-uru kotahi ki reira kotahi ki Niua, a homai he toa, he kaha e aua taniwha ki Ngāpuhi.
>
> One there is Arai-te-uru, another there is Niua; may those taniwha bring courage and strength to Ngāpuhi.[232]

Others told us of the underground pathway linking Ārai-te-uru to the maunga Puhanga Tohorā,[233] and of her many children, who explored the harbour, digging channels where they live on as awa (streams, rivers): Whirinaki, Ōmanaia, Waimā, Waihou, Mangamuka, Tapuwae, and Motutī.[234]

Rāhiri, too, left his footprints on the landscape as he consolidatated authority in Hokianga.[235] The maunga Whiria is named for the plaited rope on the kite that he released to determine the territories of his sons.[236] The maunga Whakatere ('migrate') refers either to Ahuaiti's migration north to be with Rāhiri,[237] or to a later migration by Torongare and Hauhauā and their children including Hineāmaru, who became the founding tupuna of Ngāti Hine.[238] On the north side of the harbour, Tarakeha, Pukepoto, Te Reinga, Moumoukai, Wharerimu, Panguru, and Papata maunga are regarded as rangatira who sheltered Ngāti Manawa and related hapū 'in tumultuous times'. According to Hinerangi Cooper-Puru of Te Waiariki, Ngāti Manawa, and Ngāti Kaitutae:

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229. John Klaricich (doc C9), pp 6–7.
230. Hohepa, 'Hokianga' (doc E36), p 33; John Klaricich (doc C9), p 8.
231. John Klaricich (doc C9), p 8.
232. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 78–79; see also Hohepa, 'Hokianga' (doc E36), p 33.
233. Hohepa, 'Hokianga' (doc E36), p 40; see also Anania Wikaira (doc L18(a)), p 5.
234. Hohepa, 'Hokianga' (doc E36), p 150; Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), p 45.
235. John Klaricich (doc C9), pp 5, 12–13.
236. Hohepa, 'Hokianga' (doc E36), p 40.
237. Hohepa, 'Hokianga' (doc E36), pp 40–41.
238. Erima Henare (doc A30(c)), pp 24–25; Erima Henare, transcript 4.1.1, Te Tii Marae, pp 217, 223; Te Rūnanga o Ngāti Hine, 'Evidence for Crown Breaches of te Tiriti o Waitangi' (doc M24), p 23.

> Within those mountains are the bones of our Tupuna, those great leaders who have passed. In this way we are not only bound to the land, we are a part of it. . . . Our Mana is in our links to our lands because our lands connect us to ourselves.[239]

Hokianga, Mr Klaricich said, was 'a damp place of forests and hills, of fog that rolls down the harbour out to sea, a place of heavy dews, a place always with the sound of the ocean'.[240] Its people regarded the ocean as a source of sustenance and of spiritual connection to Hawaiki:

> Our old people viewed the sea with its ever changing surface, its depths and its edges; as the body that separates yet binds land with land, people to people, people to land; with power over life, the sustenance of life; its voice of lament, to the drawing and receding spiritual currents and tides, to spiritual Hawaiki. Pouahi the landing place; Pakanae the papakainga; Maraeroa the gathering place; Te Wahapu, the beginning place of the expanse of ocean that separates, yet takes us back to Hawaiki in body, mind and in spirit to the beginning and ending place of the ancestor Kupe. Maraeroa, the beginning place of the sea pathway that separates Hokianga from Hawaiki, yet inseparably binds one to the other, land to land, the living to the living and those of the spirit as one. Maraeroa, the place where we stand, the expanse, the sea pathway that led Kupe to Hokianga, that Nukutawhiti and Ruanui retraced.[241]

3.3.2.1 *Tūpoto's people*

In the generations after Rāhiri, his children and grandchildren continued to defend Hokianga against Ngāti Awa and Ngāti Miru invaders, while intermarrying with allies to the south (Ngāi Tamatea and Ngāti Rangi) and north (Ngāti Ruanui). Most sources agree that Taurapoho's sons, Tūpoto and Māhiapōake (or Māhia), ended the battles and secured control of Hokianga and Kaikohe,[242] though some fighting continued for a generation or two afterwards.[243]

Tūpoto married three times. His first two wives were descendants of Uenukukūare, and his third was of Ngāi Tamatea.[244] According to Dr Hohepa, each of

239. Hinerangi Puru-Cooper (doc C37), p 9; see also Abraham Witana (doc C25), pp 11–12.
240. John Klaricich (doc C9), pp 7–8.
241. John Klaricich (doc L1), p 3.
242. Hohepa, 'Hokianga' (doc E36), pp 174–179, 247–248.
243. Murray Painting (doc V12), pp 4–6; Anania Wikaira (doc L18(a)), pp 16–18, 22, 29; Hooker, 'Maori, the Crown and the Northern Wairoa District' (Wai 674 ROI, doc L2), pp 24–25, 29, 47; Hohepa, 'Hokianga' (doc E36), p 247.
244. Hohepa, 'Hokianga' (doc E36), pp 175–177; Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), p 79; Waitangi Tribunal, *Te Roroa Report*, Wai 38, p 366. Reitū is associated with the *Tainui* iwi Ngāti Hauā and Ngāti Apakura: Ipu Absolum (doc X46), pp 2–3; Moepātu Borell and Robert Joseph, 'Ngāti Apakura te Iwi Ngāti Apakura Mana Motuhake' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2012) (Wai 898 ROI, doc A97), pp 37–38. In the Tribunal's *Te Roroa Report*, Reitū is listed as Ngāti Pou. However, other sources say Ngāti Pou emerged some generations later in Te Tai Tokerau: Waitangi Tribunal, *Te Roroa Report*, Wai 38, p 366; Hohepa, 'Hokianga' (doc E36), pp 187, 248. Tutaerua descends from the Ngāi Tamatea ope who settled in southern Hokianga, becoming ancestors for Te Roroa and Ngāti Whātua: Hooker, 'Maori, the Crown and the Northern Wairoa District' (Wai 674 ROI, doc L2), pp 13–14.

Tūpoto's children were given responsibility for defending and protecting their mana in one or more of the Hokianga river valleys.[245] Over generations their hapū grew and developed, sharing the harbour's fisheries and developing large gardens in river headlands, which were also shared, and storing the produce in caves, pā, and forest hideouts. The overlapping and intersecting rights of neighbouring hapū led to 'intricate agreements on waterways, trails, forests and forest products, ocean access, and shellfish and fishing grounds', and to strong trade and ceremonial relationships within and beyond Hokianga.[246]

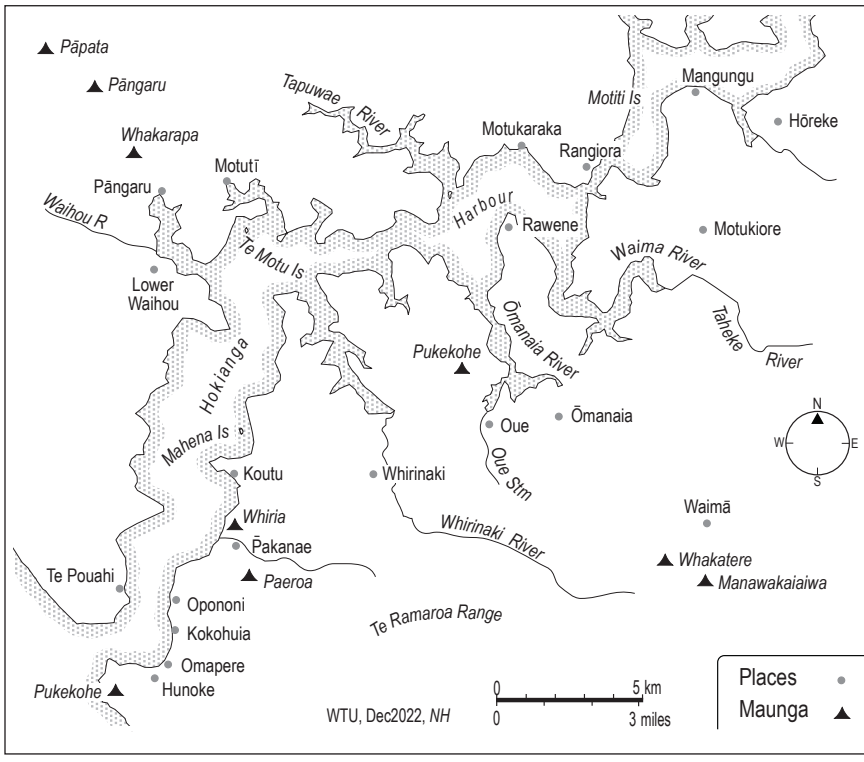
3.3.2.2 *Coastal Hokianga*

The descendants of Tūpoto's first marriage occupied territories on either side of the harbour entrance, and became known as Ngāti Korokoro, Ngāti Wharārā, and Te Poukā. During the 1800s, other groups would join them and settle at Waiwhatawhata.[247] Tūpoto's second marriage produced one son, Kairewa, who married Waimirirangi of Ngāpuhi and Ngāi Tamatea.[248] They settled in the Whirinaki river valley, where their descendants became known as Te Hikutū.[249]

On the opposite side of the harbour in the Whakarapa, Motutī, and Tapuwae river valleys, several other hapū also descend from Kairewa and Waimirirangi. These include Ngāti Manawa, Ngāti Kaitutae, and Te Waiariki, who are particularly associated with settlements at Panguru and Whakarapa; Ngāi Tūpoto, who are associated with Te Huahua and the Tapuwae Valley;[250] and Ngāti Te Reinga, who are particularly associated with the maunga of that name and the lower Waihou Valley, while also having interests in the Motutī and Tapuwae Valleys.[251] These hapū now affiliate to Te Rarawa as well as Ngāpuhi;[252] indeed, some regard Te Rarawa as originating with Ngāi Tūpoto.[253]

Among this district's hapū, Te Waiariki have a significant place. There are many traditions about their origins. One is that they descend from Waitaha, who arrived in Aotearoa on the waka *Uru-ao* and intermarried with Ngāti Ruanui.[254] Rākaihautū, captain of that waka, is said to have had the power of flight.[255] Another tradition is that they travelled on *Huruhurumanu*, sometimes described

245. Hohepa, 'Hokianga' (doc E36), p 179.
246. Hohepa, 'Hokianga' (doc E36), pp 188–189.
247. John Klaricich (doc C9), pp 2, 14; John Klaricich (doc L1), pp 4, 7, 9–12; Hohepa, 'Hokianga' (doc E36), pp 179, 200; Piripi Moore (doc AA144), pp 6, 14; Garry Hooker (doc X22), p 9.
248. Waimirirangi descended from Rāhiri's brother Māui and Ngāi Tamatea: Hooker, 'Maori, the Crown and the Northern Wairoa District' (Wai 674 ROI, doc L2), p 13.
249. Hohepa, 'Hokianga' (doc E36), pp 172, 177.
250. Hohepa, 'Hokianga' (doc E36), pp 178, 181–182; Abraham Witana (doc C25), p 2; Buck Korewha (doc C4), p 8; Hinerangi Cooper-Puru (doc C37), pp 2–3.
251. Wayne Te Tai (doc C26), pp 2, 5.
252. Hinerangi Puru-Cooper (doc C37), pp 2, 5; Wayne Te Tai (doc C26), p 2; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 366–367.
253. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 366–367.
254. Waitaha Grandmother Council (doc AA45), pp 3–4; Te Porahau Te Korakora (doc Q7(a)), p 10; Hohepa, 'Hokianga' (doc E36), p 140.
255. Pereri Mahanga (doc I2), p [12]; Ngaire Henare (doc U38), p 4; Brown, 'Te Waiariki/Ngāti Korora' (doc E23), p 4.



Map 3.4: Hokianga.

as a gleaming, feathered waka that skimmed above the waves without ever touching them.[256] They are variously said to have originated from Hawaiki, Tibet, and a location known as Patu-nui-o-Āio where sea and sky meet.[257] Other traditions refer to waka *Te Rereti*, *Rapahoe*, and *Tamarere Tī*,[258] and to tūpuna Tūkete and Te Operurangi.[259] Te Waiariki tradition is that the hapū had settlements throughout Hokianga before they were overrun by other iwi.[260] Many Te Waiariki migrated to Kaipara and then to Ngunguru, near Whāngārei, where they remain.[261] But they also retain their connections to Hokianga, and in particular to Motuiti Marae at Panguru.[262]

256. Pereri Mahanga (doc I2), p [11]; Ngaire Henare (doc U38), p 4; Brown, 'Te Waiariki/Ngāti Korora' (doc E23), p 5.
257. Pereri Mahanga (doc I2), p [11]; Ngaire Henare (doc U38), pp 3–4.
258. Ngaire Henare (doc U38), p 4; Mitai Paraone-Kawiti (doc C23), p 5.
259. Pereri Mahanga (doc I2), p [11].
260. Brown, 'Te Waiariki/Ngāti Korora' (doc E23), p 4; Pereri Mahanga (doc I2), p [12]; Ngaire Henare (doc U38), p 4.
261. Pereri Mahanga (doc I2), pp [11]–[12].
262. Pereri Mahanga (doc I2), pp [12], [16].

The people of Te Waiariki are renowned for their expertise in spiritual matters and in natural sciences ranging from astronomy to agriculture, which were important for navigation and economic well-being. According to Te Waiariki traditional historian Ngaire Brown, the hapū maintained whare wānanga at Panguru, and also at Waimā, Ngunguru (Huitau Pā), and in Ngāti Hine territories.[263]

Inland from Whirinaki, the Ōmanaia and Ōue river valleys were home to Ngāti Hau, which Kaharau founded and named after his Ngāti Awa grandmother Te Haungaiangi.[264] Ngāti Hau therefore predates Tūpoto and – like Te Waiariki – are regarded as a very old hapū. They are said to be known more for spiritual expertise than fighting prowess, and are particularly associated with Te Whare Wānanga o te Ngākahi o Ngāpuhi, through which many Ngāpuhi leaders have passed.[265] Several generations after Kaharau, a new hapū was formed under his name,[266] and a section of Ngāti Hau left Ōmanaia seeking good gardening lands, settling in the territories of Ruapekapeka and Puhipuhi, where over time they became aligned with other Ngāpuhi hapū. By the late eighteenth and early nineteenth centuries, there were increased hapū movements and hostilities in the region of Whangarei .[267]

3.3.2.3 *Inland Hokianga*

Inland Hokianga, according to Dr Hohepa, was the province of Tūpoto's son Tūiti, who married Marohawea of *Tainui*.[268] From this union emerged several closely related hapū.[269] Their child, Rangihaua (or Rangihana), married Kuiawai, the daughter of Tūpoto's youngest son, Tūteauru. Te Māhurehure of the Waimā Valley descended from them, as did related hapū Ngāti Pākau (of Tāheke Valley) and Ngāi Tū (of the Ōtāua and Mangatawa Valleys).[270] Tūteauru, who also descended from Te Waiariki,[271] is also an important ancestor for Te Hikutū.[272] Rangihaua is further recalled as the founding ancestor of Ngāti Pou,[273] who shared territories

263. Brown, 'Te Waiariki/Ngāti Korora' (doc E23), pp 7–8; see also Pereri Mahanga (doc I2), p [16]; Ngaire Henare (doc U38), pp 2, 5.

264. Buck Korewha (doc C4), p 7; Hohepa, 'Hokianga' (doc E36), pp 154, 163.

265. Buck Korewha (doc C4), pp 2, 8–11; Rima Edwards (doc A25), pp 3–4, 6; Rima Edwards, supporting papers (doc A25(a)), pp 1–87; see also Hana Maxwell (doc AA118), p 2.

266. Te Raa Nehua (doc P6), p 8.

267. McBurney, 'Traditional History Overview' (doc A36), pp 312–313. For specific locations of Ngāti Hau settlements north of Whāngārei, see section 3.3.4.

268. Hohepa, 'Hokianga' (doc E36), pp 177, 179, 187.

269. Hohepa, 'Hokianga' (doc E36), p 179.

270. Hohepa, 'Hokianga' (doc E36), pp 177, 182–183; Whakatau Kopa (doc D6), p 4; Anania Wikaira (doc L18(a)), pp 16–17. These valleys were previously occupied by Ngāti Ue, Ngāti Tipa, and Ngāti Te Rā, all of whom descended from Rāhiri and Uewhati. They were absorbed into Te Māhurehure, Ngāi Tū, and Ngāti Pākau after Tūpoto's time: Whakatau Kopa (doc D6), p 4. Dr Hohepa named several hapū as emerging from Te Māhurehure, including Te Urikaiwhare, Ngāti Hurihanga, Te Whānau Whero, Ngāti Pou, Te Uri o te Aho, Te Māhurehure ki Porotī, Ngāti Whātua ki Moehau, and Te Rouwawe: Patu Hohepa (doc Q10), p 23; see also Pairama Tahere (doc G17(b)), p 7.

271. Waitaha Grandmother Council (doc AA45), pp 3–4.

272. Anania Wikaira (doc L18(a)), pp 16–17.

273. Hohepa, 'Hokianga' (doc E36), pp 181–182; Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), p 79.

in the Waihou, Mangamuka, and Waimā Valleys,[274] and later (by the late 1700s) expanded into Waimate and Ōhaeawai.[275]

Rangihaua's sister Tutahua married Tauratumaru, who descended from Rāhiri's brother Mokonui-ā-rangi.[276] Their descendants became known as Te Pōpoto, who are associated with territories throughout the Mangamuka, Waihou, Ōrira, and lower Utakura Valleys and their environs, including the Maungataniwha and Puketī forests.[277] During the 1700s and 1800s, other hapū emerged from Te Pōpoto including Ngāti Hao, Ngāti Ngahengahe, and Ngāti Toro of Waihou, Hōreke, Utakura, Rāhiri, Motukiore, and Ōkaihau.[278] Also associated with the lower Waihou Valley were Ngāti Kairewa, who descend from Kairewa and Waimirirangi.[279] The Waihou and Mangamuka Valleys end only a few kilometres from Whangaroa and the Bay of Islands. By descent and intermarriage, Te Pōpoto formed close connections with many hapū of those districts including Ngāti Uru, Ngāi Tūpango, Ngāti Tautahi, Ngāti Rāhiri, and Ngāti Rangi, all of whom will be discussed later.[280]

The Ōrira, Mangamuka, Te Karae, and Tapuwae Valleys and surrounding lands, such as Omahuta and Maungataniwha, are associated with Te Ihutai and Ngāti Tama, both of whom descend from Tauratumaru's brother Tamatea. Te Ihutai are also closely related to Ngāi Tūpoto and Ngāti Here, who share the Tapuwae Valley, and identify as Te Rarawa as well as Ngāpuhi.[281] Pairama Tahere (Te Ihutai, Te Uri o Te Aho) said Te Ihutai ('to sniff the smell on the sea breezes') referred to the hapū role in providing other Hokianga hapū with early warning of attack from the north.[282] Mr Tahere also told us of the great importance of Maungataniwha to his people. Though Whangaroa hapū have other traditions, he told us that Nukutawhiti named the maunga to commemorate its discovery by Ārai-te-uru and Nuia while they were chasing kanae (mullet) up the Mangamuka River.[283] Claimants also identified Te Uri Māhoe, Te Uri Kōpura, Kohatutaka, Te Uri o Te Aho, Ngāti Kiore, Raho Whakairi, Tahāwai of Whangaroa, and others as having interests in the Mangamuka Valley.[284]

274. Hohepa, 'Hokianga' (doc E36), pp 181–182; Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), p 79.

275. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 182, 399. Dr Hohepa named Ngāti Pou as a hapū of Te Māhurehure: Patu Hohepa (doc Q10), p 23.

276. Murray Painting (doc V12), pp 3, 6.

277. Murray Painting (doc V12), pp 4–5, 7.

278. Murray Painting (doc V12), p 6; Hohepa, 'Hokianga' (doc E36), p 181. For Ngāti Toro locations, see Moetu Eruera (doc V22), pp 5, 11–12.

279. Hohepa, 'Hokianga' (doc E36), pp 178, 181.

280. Murray Painting (doc V12), pp 3–6; Hohepa, 'Hokianga' (doc E36), p 248; Waitaha Grandmother Council (doc AA45), pp 3–4.

281. Murray Painting (doc V12), pp 3–6; Pairama Tahere (doc B2), p 2; Pairama Tahere (doc X42(a)), p 2; Ellen Toki (doc C30), pp 2–3. For Te Ihutai origins, see Ellen Toki (doc X4(a)), app B.

282. Pairama Tahere (doc B2), p 2.

283. Pairama Tahere (doc V19(b)), p 4.

284. Te Enga Harris (doc V2), p 2; Oneroa Pihema (doc V13), pp 4–10.

Many of Tūpoto's children and grandchildren were involved in the final Hokianga battles against Ngāti Awa, Ngāti Miru, and related hapū. Kairewa and Tūiti were both killed in southern Hokianga battles against the Ngāti Awa hapū Ngā Rīriki.[285] Tauratumaru and Tamatea joined Kairewa's Te Hikutū hapū in a series of battles at Waihou, Wairere, and Whirinaki, before inflicting the decisive defeat at the Bay of Islands. Hokianga hapū then established permanent settlements along the east coast – Te Hikutū at the mouth of Te Puna Inlet, and descendants of Tauratumaru between Matauri and Te Ngāere.[286]

3.3.3 The emergence of the northern and southern 'alliances'

Twentieth-century authors looking back on Ngāpuhi history have concluded that three distinct sections had emerged by the mid-to-late 1700s. The Hokianga people were one of those sections. A second section was based around Kaikohe and is now commonly known as the 'northern alliance', while a third occupied southern Taiāmai and is known as the 'southern alliance'.[287] Ngāti Rāhiri of Waitangi and Pouerua shared lines of descent with the southern alliance but also formed close associations with northern alliance and Hokianga hapū.[288]

The northern and southern alliances were not permanent political groupings under unified leadership; rather, they comprised autonomous hapū who were closely related by descent and intermarriage, shared common lands and strategic interests, and – during times of conflict – often acted together. From the late 1700s, the northern and southern alliances (and some Hokianga hapū) pushed out independently into other parts of this inquiry district, asserting their authority and reshaping the tribal landscape in fundamental ways. Here, we briefly introduce the main hapū of these alliances.

3.3.3.1 *The 'northern alliance': Māhia's people*

The 'northern alliance' – Ngāti Tautahi, Ngāi Tāwake, Te Uri o Hua, Ngāti Rēhia, and related hapū – descend from Tūpoto's brother Māhia. In the mid-to-late 1700s, these hapū occupied territories around Kaikohe, extending south-west into the Ōtaua and Punakitere Valleys and Matarāua. In the north, these territories bordered the fertile Taiāmai plains and the eeling grounds at Ōmāpere, as well as the headlands of several river valleys. Maunga and 'deep forest' lay to the south.[289]

285. Anania Wikaira (doc L18(a)), pp 18, 21, 29; Hooker, 'Maori, the Crown and the Northern Wairoa District' (Wai 674 ROI, doc L2), p 29.

286. Murray Painting (doc V12), pp 4–6; Anania Wikaira (doc L18(a)), pp 16–18; Hooker, 'Maori, the Crown and the Northern Wairoa District' (Wai 674 ROI, doc L2), pp 24–25, 33, 47; Hohepa, 'Hokianga' (doc E36), pp 253, 257.

287. Sissons et al, *Ngā Pūriri o Taiamai*, p 36; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 369–371.

288. The leaders of Te Pōpoto and Ngāti Rāhiri descended from Te Wairua, as did the leaders of all northern alliance hapū: Maryanne Baker (doc C28), p 7; Murray Painting (doc V12), p 3; Arapeta Hamilton (doc F12(a)), pp 3–5 (doc W7), p 3; Philippa Wyatt, 'The Old Land Claims and the Concept of "Sale": A Case Study' (MA thesis, University of Auckland, 1991) (doc E15), p 32.

289. Te Huranga Hohaia (doc D8), pp 3, 17–18; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 175; Hohepa, 'Hokianga' (doc E36), pp 167–168, 247.

Neighbouring hapū included Ngāi Tū, Ngāti Pākau, and Te Māhurehure to the west; Te Pōpoto and Ngāti Pou to the north; and 'southern alliance' hapū such as Ngāti Rangi and Ngāti Hine to the south and east.[290]

Just as Ngāpuhi remember Tūpoto as securing Hokianga, they celebrate Māhia for consolidating tribal influence around Kaikohe.[291] His pā, known as Pākinga, was an important centre where warriors were trained and rangatira met for councils of war.[292] Wiremu Reihana of Ngāti Tautahi said it was 'the control centre of Ngāpuhi',[293] from which Māhia's descendants would extend their influence into Waimate and the northern Bay of Islands.[294]

Ngāti Tautahi descended from Māhia's daughter Ngahue and her husband, Tautahi, whom claimants said was 'a giant', of ancient lineage, whose mother was Whakaeke, eponymous tupuna of the Kaikohe hapū Ngāti Whakaeke.[295] Prior to the Ngāpuhi expansion into the Bay of Islands, Ngāti Tautahi lived in a territory bounded by Kaikohe, Ōtāua, Maungakawakawa, and Tautoro, encompassing the headlands of the Punakitere River and its tributaries, as well as Te Iringa and Pākinga. Tautahi lived at Kirioke, one of many peaks on Maungakawakawa.[296]

Tautahi and Ngahue's son was Te Wairua, who grew up and lived at Pākinga. He was father to Auha, Whakaaria, Te Perenga, Te Muranga, Kawhi, Kuta (eponymous ancestor of Ngāti Kuta), and others. Through their marriages, these children united the lines of Ngāti Tautahi with the other principal hapū of the northern alliance,[297] as well as creating important connections to Ngāti Rāhiri (discussed later) and Te Pōpoto.[298] Auha's mother was from a Kaikohe hapū, Te Uri o Hua, who descend from Maikuku through her daughter Ruakino (see the following section).[299] Auha and Whakaaria also became the leaders of the Ngāpuhi push into Waimate and the Bay of Islands late in the 1700s.[300] Many other Bay of Islands leaders of the early 1800s descended from Te Muranga.[301]

Ngāi Tāwake are named for Tāwakehaunga.[302] Their lands lay inland from those of Ngāti Tautahi, between Ōtaua and Matarāua.[303] Auha married Pehirangi, the granddaughter of Tāwakehaunga. The early nineteenth-century military leader

290. Wiremu Reihana (doc T10(b)), p 11; Karena Rameka (doc T7), pp 2–3, 11.
291. Hohepa, 'Hokianga' (doc E36), p 175.
292. Hohepa, 'Hokianga' (doc E36), p 175; Karena Rameka (doc T7), p 17; Wiremu Reihana (doc T10(b)), p 5.
293. Reihana (doc T10(b)), p 5; see also Te Huranga Hohaia (doc D8), p 17.
294. Hohepa, 'Hokianga' (doc E36), pp 167, 175, 247.
295. Wiremu Reihana (doc T10(b)), pp 5–7; Terrance Lomax (doc O2(b)), p [25].
296. Wiremu Reihana (doc T10(b)), pp 6, 9, 11.
297. Te Huranga Hohaia (doc R3), pp 7–9.
298. Tai Tokerau District Māori Council, 'Oral History Report' (doc AA3), pp 161–162; Sissons et al, *Ngā Pūriri o Taiamai*, p 93.
299. Shona Morgan (doc W51), p 8.
300. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 145, 181, 184.
301. Henare, Petrie, and Puckey, 'Oral and Traditional History on Te Waimate Taiamai Alliance' (doc E33), pp 67, 71; Te Huranga Hohaia (doc R3), p 8.
302. Kyle Hoani (doc D10), p 2.
303. Adrianne Taungapeau and Atareiria Heihei (doc W33), pp [3]–[4]; Te Huranga Hohaia (doc R3), p 6.

Hongi Hika descends from this line, which united Ngāti Tautahi, Ngāi Tāwake, and Te Uri o Hua.[304] Ngāti Tautahi and Ngāi Tāwake were also joined by the marriage of Auha's half-brother Whakaaria to Pehirangi's sister Te Aniwa.[305]

Prior to the expansion of the northern alliance into Waimate and the Bay of Islands, Ngāti Rēhia homelands were 'on the swamp lands' of Ōrauta, east of Kaikohe.[306] The hapū's eponymous ancestor Rēhia was the great-grandson of Uewhati. Rēhia's grandson Tuaka married Te Perenga, the sister of Auha and Whakaaria, and because of this connection Ngāti Rēhia joined them in fighting campaigns (discussed later).[307]

3.3.3.2 *The southern alliance and Ngāti Rāhiri: Maikuku's people*

By the mid-1700s, the 'southern alliance' section of what would become Ngāpuhi – comprising Ngāti Hine, Ngāti Rangi, Ngāre Hauata, and others – occupied territories in the southern Taiāmai plains (broadly from Tautoro to Kawakawa) extending as far as Matawaia and Mōtatau.[308] A closely related hapū, Ngāti Rāhiri, occupied territories from Pouerua to Waitangi, encompassing Kaipātiki (Hāruru), Otao, Puketona, Oromāhoe, Ngahikunga and Kaungarapa (Pākaraka), the Waiaruhe River valley, and the Werowero and Kaipatiki Streams.[309] The Taiāmai plains were highly prized for their warm climate and fertile volcanic soils, which were 'well guarded by surrounding pā on hill peaks'.[310]

Both Ngāti Rāhiri and the hapū of the 'southern alliance' traced common descent from Uenuku's daughter Maikuku. As a young woman she was regarded as highly tapu and for that reason was sent to live alone in a cave, Te Ana o Maikuku, on the coast at Waitangi. The Whangaroa leader Huatakaroa and eponymous ancestor of Te Uri o Hua (variously said to be Ngāti Kahu, and Ngāti Miru), hearing of her great beauty, found her there and followed a taniwha into the cave, where he 'broke Maikuku's tapu' and married her.[311] He and Maikuku initially lived at Ruaorangi Pā, which was situated where the flagpole now stands at the Waitangi Treaty Grounds. Their first son, Te Rā, was born there. He founded Ngāti Rāhiri,[312] who in later generations intermarried with neighbouring hapū from both north-

304. Henare, Petrie, and Puckey, 'Oral and Traditional History on Te Waimate Taiamai Alliance' (doc E33), pp 67, 71, 361.

305. Adrianne Taungapeau and Atareiria Heihei (doc W33), pp [3]–[4].

306. Te Huranga Hohaia (doc D8), pp 17–18.

307. Walzl, 'Ngati Rehia' (doc R2), pp 19–20; Te Huranga Hohaia (doc R3), p 9.

308. Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), pp 71, 89, 106–107; Sissons et al, *Ngā Pūriri o Taiamai*, p 127; Hone Sadler (doc B38), pp 2–4.

309. Joyce Baker (doc F16(b)), pp 7–9; Shona Morgan (doc W51), p 10.

310. Henare, Petrie, and Puckey, 'Oral and Traditional History on Te Waimate Taiamai Alliance' (doc E33), pp 14, 46–49, 51–52.

311. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 244–245. For Huatakaroa's hapū affiliations, see Waimarie Bruce (doc C24), p 5; Renata Tane (doc W38), p 4; Waitangi Tribunal, *Te Roroa Report*, Wai 38, p 366.

312. Brougham, 'Report on Whaingaroa Lands' (doc E2), pp 13–14; Paeata Brougham-Clark (doc W41), pp 3–4; Maryanne Baker (doc C32), p 8; Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), p 71.

ern and southern alliances.[313] Ngāti Kawa descended from marriage between Te Rā's granddaughter and a Ngāre Raumati rangatira,[314] and continue to be closely associated with Ngāti Rāhiri.[315] Ngāti Manu (discussed later) trace descent from Te Rā's daughter Te Rukenga.[316]

After Te Rā was born, Maikuku and Huatakaroa moved inland, occupying Oromāhoe and Pouerua.[317] The latter was once a major pā and garden site for Ngāi Tāhuhu, and had also been Uenuku's home.[318] Maikuku had six other children, of whom two – Rangiheketini and Torongare – became founding ancestors for the Bay of Islands southern alliance, and important ancestors for Ngāpuhi of Whāngārei.[319] Rangiheketini's immediate descendants lived at Tautoro and in the forests of Matarāua and Mōtatau,[320] moving late in the 1700s to lands east of Ōmāpere.[321] Like Pouerua, Tautoro is recalled as a highly prized pā and garden site occupied by Ngāi Tāhuhu and other hapū including Ngāti Rangi, Ngāti Moerewa, and Ngāti Manu.[322]

Rangiheketini's people took the name Ngāti Rangi,[323] in so doing giving a new lineage to a much older name (as previously discussed, Ngāti Rangi is also known as a section of Ngāi Tāhuhu or Ngāi Tamatea who occupied Taiāmai and intermarried with Ngāpuhi).[324] Several other hapū emerged from Rangiheketini's lineage,

313. Maryanne Baker (doc C28), p 7. For Ngāti Rāhiri connections to Ngāti Manu, see Arapeta Hamilton (doc F12), pp [4]–[5]; Arapeta Hamilton (doc W7), p 4.

314. Shona Morgan (doc W51), p 9; Shona Morgan (doc B40), p [7].

315. Joyce Baker (doc W37), p 4; Merata Kawharu (doc E50), pp [2], [4]–[5].

316. Arapeta Hamilton (doc B29(a)), p 4.

317. Maryanne Baker (doc C32), p 8; Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), p 71.

318. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 174, 180, 221–223; Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), pp 77–78. Nukutawhiti is associated with Pouerua, as are Rāhiri and Uenuku. It is now known as one of the sacred maunga of Ngāpuhi: Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), pp 52, 65, 77–78; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 24.

319. Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), p 71; see also Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 176, 183; Sissons et al, *Ngā Pūriri o Taiamai*, p 27.

320. Hone Sadler (doc B38), pp 3–4; Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), pp 106–107; Sissons et al, *Ngā Pūriri o Taiamai*, pp 82–83, 127.

321. Henare, Petrie, and Puckey, 'Oral and Traditional History on Te Waimate Taiamai Alliance' (doc E33), pp 38–39; Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), p 69.

322. Hone Sadler (doc B38), p 4; Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), p 53.

323. Hone Sadler (doc B38), p 3; Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), p 71; Sissons et al, *Ngā Pūriri o Taiamai*, p 114.

324. Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), p 88; Paeata Brougham-Clark and Hone Mihaka (doc W42), pp 10–12; Waitangi Tribunal, *Te Roroa Report*, Wai 38, pp 4–6; Hooker, 'Maori, the Crown and the Northern Wairoa District' (Wai 674 ROI, doc L2), pp 9–10.

including Ngāti Hineira,[325] Ngāti Moerewa,[326] Ngāti Manu,[327] and Ngāti Ruangāio, from whom several Whāngārei hapū emerged.[328]

All of these hapū can also claim descent from Rangiheketini's brother Torongare, an important ancestor of Ngāti Hine[329] who travelled extensively with his wife Hauhauā and their children throughout southern Hokianga, Mangakāhia, Whāngārei, and southern Taiāmai.[330] According to Pita Tipene of Ngāti Hine, this journey took at least seven years. Hauhauā died before it was completed, and Torongare was unwell. Their eldest daughter Hineāmaru, 'through strength of character', led her whānau through the final stages of the journey, settling them at Waiōmio where she established famous kūmara gardens.[331]

> All of the stories about Hineamaru growing kumara at Paparata . . . and how she took the kumara to her father for sustenance, are etched into the psyche of Ngati Hine and they sit there as symbols of our progenitor and eponymous ancestor who is a woman.[332]

An ailing Torongare settled nearby at Mohinui.[333] Pita Tipene told us of Hineāmaru's journeys to visit her father, carrying kūmara – an act that symbolised her role in providing sustenance for her people, which matched the resilience she had shown in guiding them through their difficult crossing.[334] Hineāmaru married Koperu, a leader of Ngāi Tū.[335] Their descendants, known as Ngāti Hine, occupied extensive territories from Waiōmio and Ōrauta in southern Taiāmai to Matawaia and Pipiwai in the south. They also became associated with Tautoro, which they

325. Esther Horton and Ian Mitchell (doc AA140), pp 3–4; Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), p 81; Sissons et al, *Ngā Pūriri o Taiamai*, p 94.

326. Hone Sadler (doc B38), pp 2–3; Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), pp 89, 104–105.

327. Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), p 81; Henare, Petrie, and Puckey, 'Oral and Traditional History on Te Waimate Taiamai Alliance' (doc E33), pp 42, 72.

328. Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), pp 74, 89, 108; Tai Tokerau District Māori Council, 'Oral History Report' (doc AA3), pp 92, 99, 118.

329. Maryanne Baker, transcript 4.1.1, Te Tii Marae, p 13; Te Rūnanga o Ngāti Hine, 'Evidence for Crown Breaches of te Tiriti o Waitangi' (doc M24), p 23; Henare, Petrie, and Puckey, 'Oral and Traditional History on Te Waimate Taiamai Alliance' (doc E33), pp 18, 42, 72, Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), p 71; see also Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 176, 183; Sissons et al, *Ngā Pūriri o Taiamai*, p 27.

330. Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), pp 70–73; Erima Henare (doc D14), pp [23]–[25]; Erima Henare, transcript 4.1.1, Te Tii Marae, pp 223–224; Te Rūnanga o Ngāti Hine, 'Evidence for Crown Breaches of te Tiriti o Waitangi' (doc M24), p 26.

331. Pita Tipene (doc AA82), p 3; Erima Henare, transcript 4.1.1, Te Tii Marae, pp 223–224.

332. Pita Tipene (doc AA82), p 3.

333. Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), pp 68–69, 75.

334. Pita Tipene (doc AA82), p 3.

335. Erima Henare (doc D14), p [24] Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), pp 68, 74, 87.

shared with their Ngāti Rangi kin.[336] Many other hapū emerged from Ngāti Hine, including Ngāre Hauata, and later Te Uri Taniwha, Te Whānau Whero, and Te Urikapana of Taiāmai;[337] Ngāti Kopaki and Ngāti Te Ara of Mōtatau,[338] and Te Orewai of Pipiwai and Kaikou.[339]

Whereas Hokianga and Kaikohe hapū see themselves as the original occupants of their lands, Ngāti Rangi and Ngāti Hine acknowledge earlier occupation by descendants of Tāhuhunuiorangi and Tamatea. Indeed, according to Erima Henare, during Hineāmaru's lifetime her people were known either as Ngāti Rangi or Ngāi Tamatea.[340] Paeata Brougham-Clark (Ngāti Rangi, Ngāti Hineira) emphasised these older lines of descent, telling us that Ngāti Hineira, Ngāti Manu, Ngāti Rangi, and also their neighbours Ngāre Raumati and Te Roroa should not be understood as an inter-hapū coalition but as 'a single large kin group'.[341]

3.3.4 Whāngārei ki Mangakāhia: te Nohonga o Torongare

South of Taiāmai and Hokianga for a distance of about 50 kilometres the terrain is hilly from coast to coast. A network of rivers and streams – Mangakāhia, Hikurangi, Wairua, Wairoa, and others – provided vital transport connections which were used by Ngāi Tāhuhu, Ngāpuhi, and others in north-south migrations. Of these rivers, the Mangakāhia is of particular importance; Millan Ruka (Te Māhurehure, Te Urirorοi) described it as a 'highway of war (and peace)'.[342]

In southern Mangakāhia and around Whāngārei the landscape opens up into fertile plains which, like Taiāmai, are ringed with volcanic cones. These territories lie on the border between several iwi, and have been heavily contested, their fertile land, abundant fishing grounds, and strategic transport routes making them highly attractive for settlement.[343]

3.3.4.1 *Early settlement*

Claimants told us of the ancestor Manaia landing at Rākaumangamanga and setting out on an epic voyage of exploration spanning the whole of Te Tai Tamāhine and much else besides.[344] Manaia's descendants remain on the lands between

336. Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), pp 75, 106, 109–110; Erima Henare (doc D14), pp [24]–[26]. Specific settlements associated with Hineāmaru's grandchildren are Ōrauta, Pokapu, Matawaia, Mōtatau, Papatahora, and Pipiwai.

337. Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), pp 81, 107, 232, 397; Sissons et al, *Ngā Pūriri o Taiamai*, pp 27, 43–45, 114; Henare, Petrie, and Puckey, 'Oral and Traditional History on Te Waimate Taiamai Alliance' (doc E33), p 406; Paeata Brougham-Clark and Hone Mihaka (doc W42), p 12.

338. Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), pp 92, 94. Dr Hohepa named Te Whānau Whero as a hapū of Te Māhurehure: Patu Hohepa (doc Q10), p 23.

339. Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), pp 92–93.

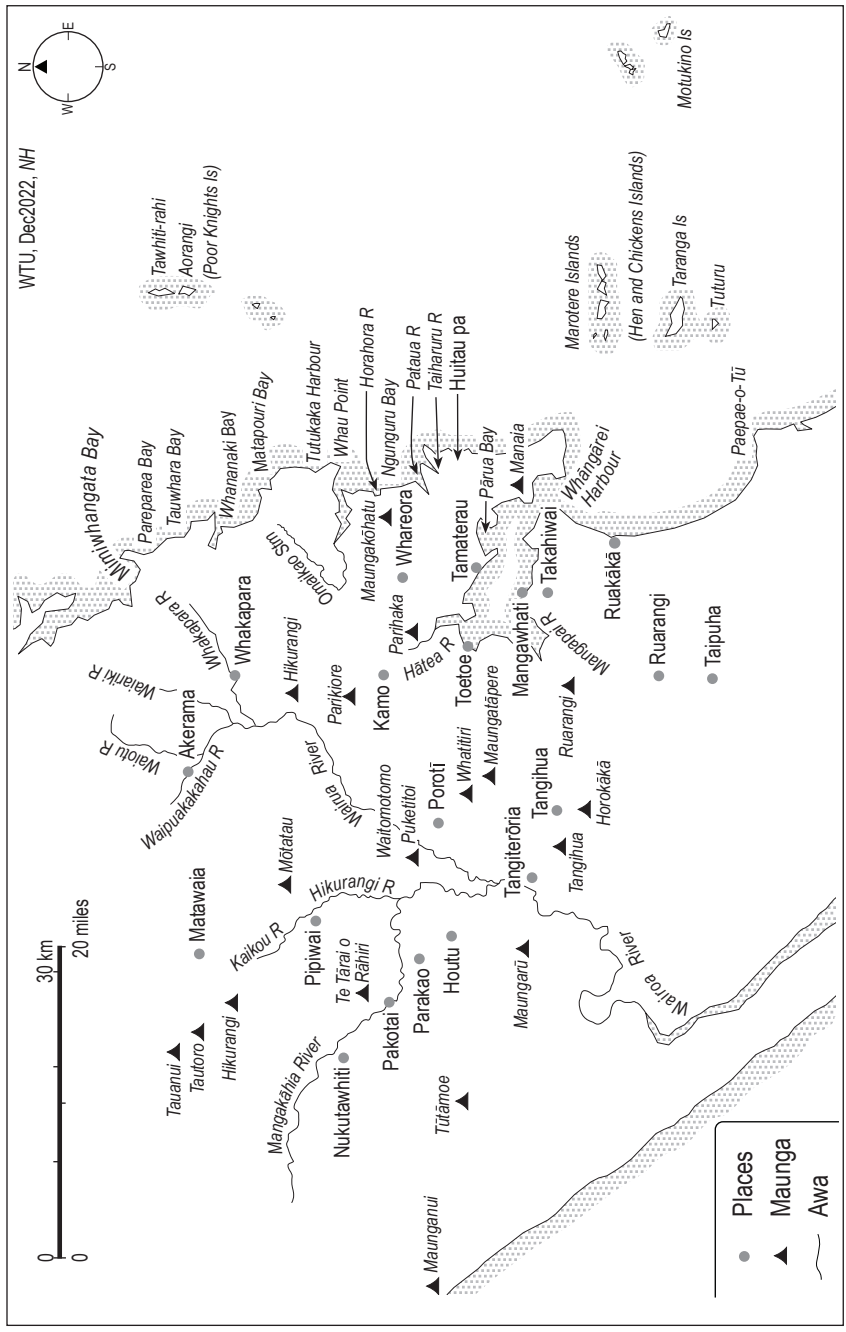
340. Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), p 88; see also Paeata Brougham-Clark and Hone Mihaka (doc W42), p 11.

341. Paeata Brougham-Clark and Hone Mihaka (doc W42), p 10.

342. Millan Ruka (doc U34(b)), p 10.

343. Taipari Munro, 'Whangarei Taiwhenua Opening Statements' (doc E46), pp 2–3. For settlements, see Walzl, 'Mana Whenua Report' (doc E34), p 278; Nolan, mapbook (doc B10(b)), pl 9.

344. Te Warihi Hetaraka (doc C19), p 4.



Map 3.5: Whāngārei and Mangakāhia.

Whangaruru and Mangawhai, and in many other parts of northern Aotearoa.[345] His story is etched into Whāngārei's landscape; Mount Manaia stands guard over the inner harbour, while smaller peaks represent his wife and children, and nearby rocks his pononga (servant) and dog.[346]

Claimants also spoke of Tāhuhunuiorangi, whose people migrated from Tāmaki to Mangawhai before spreading north.[347] Over many generations Manaia's people and Tāhuhunuiorangi's intermarried, and their descendants were early settlers of much of the territory north of Whāngārei and Kaipara. Tāhuhunuiorangi's people adopted new hapū names including Ngāti Rangi and Ngāi Tū.[348] Hapū of Whāngārei and Mangakāhia typically trace descent from both Ngāi Tāhuhu and Ngāti Manaia, and indeed often regard them as a single group.[349]

In turn, sections of Ngāpuhi also made their way into these districts. Nukutawhiti is said to have lived for a time in the Mangakāhia Valley,[350] and Moerewarewa is recalled as an early ancestor for one of the valley's hapū, Ngāti Pongia.[351] Rāhiri's journey through the Mangakāhia Valley is evoked in various placenames, including Te Iringa, Tautoro, and (most notably) Te Tārai o Rāhiri where he is said to have stopped to rest.[352] In Whāngārei traditions, Rāhiri met his wives – Ahuaiti, Whakaruru, and Moetonga – at Maungatāpere. All were descendants of Tāhuhunuiorangi and Manaia.[353] After Kaharau had grown to adulthood, Rāhiri is said to have returned to Whāngārei, living out his days there.[354]

Another wave of migration around 1700 brought a section of Te Waiariki to Ngunguru from Kaipara, where they had settled after leaving Hokianga a century or so earlier to escape the escalating conflict.[355] Likewise, about four generations after Rāhiri a section of Ngāti Hau left Hokianga and settled in territories from

345. Te Warihi Hetaraka (doc C19), pp 4–5.

346. Taipari Munro, 'Whangarei Taiwhenua Opening Statements' (doc E46), pp 3–4; Waimarie Bruce-Kingi (doc I25), p 6.

347. Waimarie Bruce (doc E47), pp 6–8; Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), pp 69–70, 77–78.

348. Terence Lomax (doc O2), p 10.

349. Taipari Munro (doc I26), pp 3–5; Hori Parata (doc C22), p 9; Hori Moanaroa Parata (doc K4), p 4.

350. Te Ringakaha Tia-Ward (doc J7), p 3; Tai Tokerau District Māori Council, 'Oral History Report' (doc AA3), p 109.

351. Walzl, 'Mana Whenua Report' (doc E34), pp 21, 177.

352. Brown, 'Te Waiariki/Ngāti Korora' (doc E23), pp [37]–[38]; Tai Tokerau District Māori Council, 'Oral History Report' (doc AA3), pp 114–115. The full names are Te Iringa-o-te-kakahu-o-Rāhiri ('the hanging of the cloak of Rāhiri'), Tautoro ('stretched string' – another reference to his cloak), Te Whitinga-o-Rāhiri ('the crossing of Rāhiri', at Awarua), and Te Tārai o Rāhiri ('the dressing of Rāhiri').

353. Tai Tokerau District Māori Council, 'Oral History Report' (doc AA3), pp 114–115; Brown, 'Te Waiariki/Ngāti Korora' (doc E23), pp [37]–[38].

354. Brown, 'Te Waiariki/Ngāti Korora' (doc E23), p [38].

355. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 192.

Ruapekapeka and Puhipuhi districts in the north to Towai, and Te Reponui a Hikurangi (Hikurangi Swamp) in the south.[356]

3.3.4.2 *The defeat of Ngāi Tāhuhu*

In Whāngārei, as elsewhere in the district, the 1700s was a period of increased migration and intensifying conflict as hapū increasingly competed over lands and resources. The key players were descendants of the southern alliance (Torongare-Rangiheketini). Before settling in Taiāmai, Torongare and members of his whānau had lived for a time in the Mangakāhia Valley, and later at Tangihua and Whatitiri to the west of Whāngārei. When they departed for Waiōmio, Torongare's grandson Ruangāio stayed behind, marrying into Ngāi Tāhuhu and founding the hapū Ngāti Ruangāio (sometimes shortened to Ngāti Rua).[357] Sections of Ngāti Hine, Ngāti Kahu ki Torongare, and Ngāti Hau (mentioned earlier) had meanwhile established themselves in territories north of Whāngārei, broadly from Hikurangi and Pipiwai to the coast.[358]

There are different traditions explaining how these hapū asserted control over Whāngārei and southern Mangakāhia, but the essence is that a dispute occurred over control of Terenga-parāoa ('the swimming place of the whales', a prized fishing and whale-hunting ground in Whāngārei Harbour).[359] Ngāti Ruangāio, with assistance from their relatives, responded by attacking and defeating Ngāi Tāhuhu hosts. During these hostilities the rangatira Te Kahore (Ngāti Ruangāio and Ngāti Kahu) saved many of his wife's Ngāi Tāhuhu people by gathering them under his protection at Toetoe and at Takahiwai and Ruakākā on the coast. Peacemaking and intermarriage followed, in which Ngāpuhi leaders acquired authority over lands from Whāngārei to the Wairua and Wairoa Rivers.[360] Te Kahore claimed Whatitiri; Te Waikeri took the Pukenui Forest and northern Whāngārei; Hautakere took Maungatāpere and lands to the south of there; while Tawhiro and Te Tirarau I took Aotahi (Tangiterōria).[361] Among the lands seized was the maunga Ruarangi,

356. McBurney, 'Traditional History Overview' (doc A36), pp 312–313; Other locations associated with Ngāti Hau include Akerama, Puhipuhi, Waiotu, Opuawhanga, Whananaki, Māruata, Pehiaweri (Glenbervie), and Ruatangata: Hana Maxwell (doc P13), p 7; Rowan Tautari (doc U17), p 66; Millan Ruka (doc U34(b)), p 34; Ngāti Hine, 'Te Whanga Tuarua: Whenua' (doc M25), pp 86, 89; Benjamin Pittman (doc P38), pp 19–20; Allan Halliday (doc P2), pp 2–3; David Armstrong, 'Ngati Hau "Gap Filling" Research' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2015) (doc P1), pp 5–8, 13; Neale Hudson (doc U20), p 2.

357. Tai Tokerau District Māori Council, 'Oral History Report' (doc AA3), pp 92, 124–126.

358. Tai Tokerau District Māori Council, 'Oral History Report' (doc AA3), pp 88, 104; Erima Henare (doc D14), p 26; McBurney, 'Traditional History Overview' (doc A36), pp 312–314.

359. Taipari Munro, 'Whangarei Taiwhenua Opening Statements' (doc E46), p 6; Te Ihi Tito (doc C35), pp 2–3.

360. Taipari Munro (doc I26), pp 7–8; Taipari Munro, transcript 4.1.10, Forum North, p 10; Walzl, 'Mana Whenua Report' (doc E34), pp 210–213; Ngaire Brown, 'Te Waiariki/Ngāti Korora' (doc E23), pp [35]–[36].

361. Taipari Munro (doc I26), p 8; Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), pp 145–146.

site of Te Nohonga o Torongare (the seat of Torongare), where Ruangāio's father is said to have lived during his temporary stay in the region.[362]

3.3.4.3 *Whāngārei ki Mangakāhia*

Because of these arrangements, several new hapū emerged with mixed Ngāpuhi and Ngāi Tāhuhu bloodlines including Te Parawhau, Te Uriroroi, Te Patuharakeke, and Ngāti Taka. One account is that Te Waiariki defended their Ngunguru lands through one-on-one combat between their leader Rangitukiwaho and Te Tirarau I of Ngāti Ruangāio. Both were killed, and from this time, Rangitukiwaho's descendants became known as Ngāti Taka, while those of Te Tirarau I became known as Te Parawhau in memory of the whau leaves that cloaked his body.[363] Other accounts name Rangitukiwaho as a Ngāti Wai rangatira whom Te Tirarau challenged to seek utu for the deaths of his relatives in an earlier battle.[364]

With Te Tirarau I's death, leadership responsibilities fell to his nephew Kūkupa, who consolidated the influence of Te Parawhau and Te Uriroroi over the territories south and west of Whāngārei.[365] Another new hapū was Te Patuharakeke, who occupied the coastal lands south of Whāngārei Harbour – specifically encompassing Toetoe and Tamaterau in the north, and Taipuha and Bream Tail in the south, as well as Taranga, the Marotere and Mokohinau Islands, and interests in Aotea and Hauturu.[366] Torongare's hapū, Ngāti Kahu, occupied lands north of the inner harbour including Kamo, Whareora, Parihaka, Tamaterau, and Pārua.[367] Ngāti Hau and Ngāti Kaharau occupied lands north of present-day Whāngārei.[368] Sections of Te Māhurehure and Ngāti Pākau occupied lands in the Wairua and lower Mangakāhia Valleys, intermarrying with Te Uriroroi and Te Parawhau.[369] Typically, all of these hapū acknowledged Ngāi Tāhuhu (or its offshoots such as Ngāi Tū) as original occupants of their lands, and many Whāngārei hapū regarded themselves as having Ngāi Tāhuhu and Ngāpuhi origins (some later came to consider themselves part of Ngāti Whātua or Ngāti Wai or both as well).[370]

It is not clear how the conflicts of the late 1700s affected the central and upper Mangakāhia valley. Claimants and traditional historians told us that several hapū occupied lands around Nukutawhiti and Parakao, including Ngāti Toki, Ngāti Horahia, Te Kumutu, Ngāti Te Rino, and Ngāti Whakamau. As in the lower valley, these hapū appear to have emerged from intermarriage between sections of Ngāi

362. Walzl, 'Mana Whenua Report' (doc E34), p 200.
363. Ngaire Henare (doc U38), p 7; Ngaire Brown, 'Te Waiariki/Ngāti Korora' (doc E23), p 17.
364. Tai Tokerau District Māori Council, 'Oral History Report' (doc AA3), pp 99–100; Taipari Munro (doc I26), pp 9–10.
365. Taipari Munro (doc I26), pp 9–10; see also Walzl, 'Mana Whenua Report' (doc E34), pp 228–229.
366. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 195, 201–202; Paraire Pirihi and Harry Midwood (doc I29(a)), pp 2–4, 6.
367. Taipari Munro (doc I26), p 14; Waimarie Bruce (doc E47), p 8.
368. Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), pp 70, 380.
369. Millan Ruka (doc U34(b)), p 5.
370. For example, see Waimarie Bruce (doc E47), pp 5, 8; Taipari Munro (doc I26), pp 8–9.

Tāhuhu and the southern alliance.[371] Later, in the 1800s, Ngāti Hine would claim Whāngārei and lower Mangakāhia as part of their wider territory, on the basis of conquest and the seniority of Ruangāio's older sister Hineāmaru, who inherited the mantle of leadership from her father.[372]

3.3.4.4 *Coastal hapū and iwi*

As noted, Te Waiariki and associated hapū Ngāti Taka and Ngāti Kororā retained their coastal lands at Ngunguru (sometimes said to encompass the Ngunguru, Horahora, Pataua, and Taiharuru Rivers). Like others in the vicinity of Whāngārei, Te Waiariki acknowledged Ngāi Tāhuhu as original occupants of the land, with whom they intermarried after their migration from Kaipara.[373] Claimants also told us that there was extensive intermarriage between Te Waiariki and Ngāti Kahu and Ngāti Hau.[374] Nonetheless, they retain distinct identities, and their territorial interests are sometimes contested. Most Whāngārei hapū, for example, claimed interests in the lands that became Glenbervie State Forest.[375] Te Waiariki later became important allies for Ngāpuhi during the 1820s and 1830s.[376]

After Rangitukiwaho's death, leadership of Te Waiariki at Ngunguru fell to Te Mawe, an acclaimed mystic and tohunga. He is said to have transformed into a comet for overnight flights between Whāngārei and Hokianga, where his wife's Te Māhurehure hapū lived. He is also said to have had the power to summon and control taniwha to aid his people in times of conflict.[377] He uttered the whakataukī, 'He iwi mana, he iwi wairua', to describe Te Waiariki.[378] In turn, Te Mawe's mana passed to his descendants, including his grandson Wharetohunga, who assisted Hongi in his southern wars and, according to Te Waiariki tradition, on one occasion 'saved his troops from an ambush and certain death' by using his gift of flight to transport them to safety.[379]

Ngāti Wai claimants told us their principal line of descent was from Manaia, whose people had been known as Ngāti Manaia.[380] They had initially settled

371. Te Hapae Ashby (doc J5), p 2; Tai Tokerau District Māori Council, 'Oral History Report' (doc AA3), pp 96–97; Walzl, 'Mana Whenua Report' (doc E34), pp 176, 183–187, 191, 195, 233–237; Paeata Brougham-Clark and Hone Mihaka (doc W42), p 12.

372. Erima Henare (doc D14), p [26]; Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), pp 52–53, 74–75; Tai Tokerau District Māori Council, 'Oral History Report' (doc AA3), pp 125–126.

373. Mitai Paraone-Kawiti (doc E24), pp 5, 11; Ngaire Brown, 'Te Waiariki/Ngāti Korora' (doc E23), pp 10–12; Pereri Mahanga (doc U21), p [8]; (doc I2), pp [11], [12], [20].

374. Ngaire Henare (doc U38), p 8; Hana Maxwell (doc P13), pp 7, 37–38.

375. Te Ra Nehua, 'Whangarei Taiwhenua Opening Statements' (doc E46), pp 76–77. For specific hapū interests, see (among others) Mitai Paraone-Kawiti (doc U37), pp 4–6; Te Raa Nehua (doc P6), pp 5–6, 43; Ngaire Henare (doc U38), pp 9–10; Ngāti Hine, 'Te Whanga Tuarua: Whenua' (doc M25), p 203.

376. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 192.

377. Ngaire Henare (doc U38), pp 5, 8; Ngaire Brown, 'Te Waiariki/Ngāti Korora' (doc E23), pp 6–7; see also Pereri Mahanga (doc I2), pp 19–20; Te Maawe Mahanga (doc U46(b)), p 4.

378. Ngaire Henare (doc U38), p 2.

379. Ngaire Henare (doc U38), p 5; see also Pereri Mahanga (doc I2), p 15.

380. Te Warihi Hetaraka (doc C19), p 4.

the coast south of the Bay of Islands, gradually moving into Whāngārei and Mahurangi where they intermarried with other groups such as Ngāi Tāhuhu and Ngāti Rehua.[381] We were told that the name Ngāti Wai was adopted after they were defeated by Te Kapotai of Waikare in a battle over control of fishing grounds at Mimiwhangata. Many Ngāti Manaia fled to offshore islands or to coastal areas from Whāngārei south, and '[f]rom that time [they] became Ngati Wai, the children of the water'.[382] Despite this and other migrations, Ngāti Wai continued to occupy territories along the coast from Whangaruru to Ngunguru – including Mōkau, Paremata, Huruiki, Mimiwhangata, Pareparea, Whananaki, Matapōuri, and Tutukaka – as well as the islands Hauturu and Aotea where they intermarried with Ngāti Rēhua.[383]

Both Ngāti Wai and Te Waiariki told us of their special relationships with water. They said their tohunga could predict the future by gazing into underground springs (such as those at Taharuru, Marotiti, and Mōkau) or sacred waters in the cave Manawahuna at Motukokako.[384] Te Warihi Hetaraka of Ngāti Wai told us: 'Ko nga mana katoa o Ngatiwai kei te wai, i nga taniwha me o ratou manawa. All of the power of Ngatiwai comes from the water, from the taniwha and their spirits . . . We became known as Ngāti Wai as a result of our connection to the sea, our ability to manage and hold the Islands, and to use the water as provider and protector of our people'.[385] Likewise, Pereri Mahanga of Te Waiariki told us that water was regarded as 'ariki, a taonga': 'We strongly believe that the spiritual and physical well-being of our people cannot be be achieved without our wai.'[386]

While Ngāti Wai and Te Waiariki are the principal hapū associated with the coast between the Bay of Islands and Whāngārei, successive waves of migration, conflict, and intermarriage have led other groups to claim interests too. We were told, for example, of Ngāti Kahu o Torongare and Te Whānau Whero occupation of Whangaruru,[387] and of Te Kapotai interests at Horahora in Ngunguru Bay.[388] During the 1820s, sections of Ngāti Rēhua, Ngāti Wai ki te Moana, and Ngāti Taka would move from Aotea and Hauturu to Whangaruru, Whananaki, Matapōuri, Whakapara, Tutukaka, and other mainland settlements.[389] Claimants told us that all along the coast there was extensive intermarriage between Ngāti Wai, Te Kapotai, Ngāre Raumati, Te Waiariki, and others.[390] As an illustration of the

381. Michael Beazley (doc K8), pp 5–6; Te Warihi Hetaraka (doc C19), pp 3–4; Taparoto George, Hori Parata, 'Whangarei Taiwhenua Opening Statements' doc E46, pp 10, 17.
382. Te Warihi Hetaraka (doc C19), p 6; Ngaire Brown, 'Te Waiariki/Ngāti Korora' (doc E23), pp 15–18.
383. Rowan Tautari (doc I32), p 17; Beazley, 'Te Uri o Maki' (doc K2), pp 162, 173, 200, 282; Mike Leuluai (doc U45), pp 7–10.
384. Te Warihi Hetaraka (doc C19), pp 4–5; Mylie George (doc U44(b)), pp [2]–[3].
385. Te Warihi Hetaraka (doc C19), pp 4–5.
386. Pereri Mahanga (doc I2), p 18.
387. Ngaire Henare (doc U38), p 8; Arnold Maunsell (doc T19), p 2.
388. Te Maawe Mahanga (doc U46), p [6].
389. Michael Beazley (doc K8), pp 5–7.
390. Rowan Tautari (doc U17), p 66; see also Te Maawe Mahanga (doc U46), p [6].

complexity that resulted, by 1840, claimants told us, Whananaki was occupied by Ngāti Manaia, Ngāti Kahu, Te Whānau Whero, Ngāre Raumati, and other hapū such as Te Whakapiko, Ngāti Rēhua, and Te Ākitai.[391]

3.3.5 Waimate–Taiāmai and the Bay of Islands

As discussed earlier, Waimate and Taiāmai were highly prized over many centuries as sites for cultivation and settlement. Their volcanic plains provided ideal conditions for growing kūmara and other crops; rivers, lakes, and wetlands including Ōmāpere and Ōwhareiti provided abundant sources of tuna (eels); and the district's volcanic cones such as Tautoro, Pouerua, and Maungatūroto offered pā sites that were easily defended and had great visibility for many miles around. By the late 1700s, many thousands of people are believed to have lived and gardened in these lands.[392] Taiāmai is known as Te Tino a Taiāmai ('the delectable land of Taiamai'), due to this capacity to act as a garden for Ngāpuhi.[393] In turn, the river mouths, bays, and islands offered abundant access to a wide range of kaimoana including shark, kahawai, flounder, snapper, eagle ray, and many other species, further adding to the area's attractiveness as a site for settlement.[394]

Claimants spoke of Te Awa Tapu o Taumārere flowing from Mōtatau to Ōpua, via the Ramarama and Tāikirau Streams and the Kawakawa River. The Taumārere, they told us, possesses its own mauri and derives its power from Ranginui. It is known as Te Awa o Ngā Rangatira (the river of chiefs) because rangatira held meetings there. From Taumārere, the river flows into Te Moana o Pikopiko i Whiti, the stretch of water from Ōpua to Te Haumi, which is regarded as tapu because warriors stopped there to prepare themselves for long-distance waka journeys and the warfare that awaited them.[395] Claimants also told us of the river's practical importance, describing its varieties of tuna and their capture in nets attached to weirs during their annual downstream migration. Before the environmental changes that had occurred since colonisation, the river 'was our pataka or food house . . . and a highway for trading'.[396]

391. Rowan Tautari (doc U17), pp 59–71; see also David Peters (doc U18), p 5; Marie Tautari (doc U48), p 1.

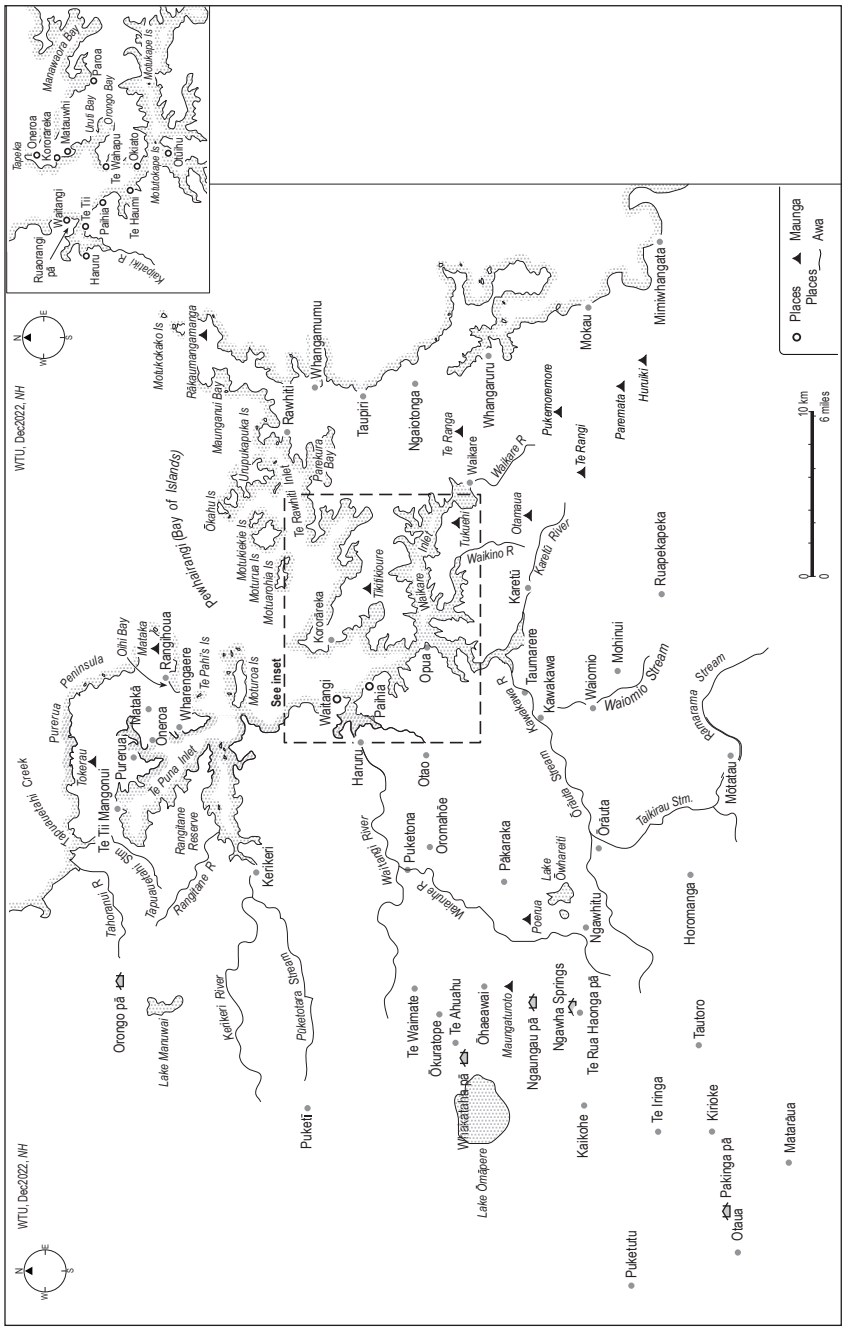
392. Henare, Petrie, and Puckey, 'Oral and Traditional History on Te Waimate Taiamai Alliance' (doc E33), pp 46–54; Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), pp 54–55; Henare, punaPetrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 295.

393. Henare, Petrie, and Puckey, 'Oral and Traditional History on Te Waimate Taiamai Alliance' (doc E33), p 48.

394. Wai 49 claimants, 'Evidence for Crown Breaches of te Tiriti o Waitangi in regards to the Ownership and Management of Te Awa Tapu o Taumarere and Te Moana o Pikopiko i Whiti', 2014 (doc M30(a)), pp 22–23; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 364, 396–397, Te Awa Tapu o Taumārere claimants used the name Ipipiri for the Bay of Islands, Pēwhairangi being a transliteration: Wai 49 claimants, 'Evidence for Crown Breaches' (doc M30(a)), p 11. Another name for the Bay of Islands was Marangai: Paeata Brougham-Clark and Hone Mihaka (doc W42), pp 19–20.

395. Wai 49 claimants, 'Evidence for Crown Breaches' (doc M30(a)), p 11.

396. Wai 49 claimants, 'Evidence for Crown Breaches' (doc M30(a)), p 22.



Map 3.6: Waimate–Taiamai and the Bay of Islands.

3.3.5.1 *Settlement to the mid-1700s*

While sections of the people who would come to be known as Ngāpuhi occupied Kaikohe, Taiāmai, Waitangi, and Te Puna in the mid-to-late 1700s, various other tribal groups occupied Waimate and other parts of the Bay of Islands. Ngāre Raumati occupied the south-eastern Bay of Islands coast and islands, from Tāpeka to Motukokako to Taupiri Bay.[397] Their immediate neighbours were Te Kapotai, whose territories surrounded the Waikare Inlet. Their lands extended from Orongo and Tikitikikioure on the north side of the inlet to Ngaiotonga, Te Ranga, and Pukemoremore in the east, to the Karetū, Waikino, and Kaurinui Valleys in the west. This included the islands Motukokape (Pine Island) and Motukura (Marriott Island). The latter had a major pā, as did Waikare and Karetū.[398] Te Kapotai speakers told us they were a branch of Ngāi Tū (of Ngāi Tāhuhu). They said the name Te Kapotai emerged during the 1700s and referred to incidents that occurred during conflict with Ngāre Raumati.[399] The Waimate plains, along with Kerikeri and Tākou, remained in possession of Ngāti Miru and Te Wahineiti, *Mātaatua* hapū who had remained behind after the departure of Ngāti Awa.[400] Ngāti Miru had taken part in battles against Ngāti Awa,[401] and had intermarried with Te Uri o Hua.[402] The various sections of the hapū groups that would ultimately come to be known as Ngāpuhi bordered these lands at Taiāmai, Kaikohe, Hokianga, and in the Ngāti Rāhiri territories from Pouerua to Waitangi. To the north lay the various hapū of Whangaroa (discussed later).

3.3.5.2 *The northern alliance defeats Ngāti Miru and occupies Waimate and Tākou*

During the late 1700s, through a series of conflicts, a number northern alliance hapū asserted their authority over neighbouring peoples, in turn occupying the Taiāmai and Waimate plains, the northern Bay of Islands from Kerikeri to Tākou, and a small section of the southern Bay of Islands from Ōkiato to Tāpeka. We have covered some of these events in our stage 1 report, but recount them here because of their influence on Māori–Crown relationships in the years before and after te Tiriti was signed.

397. These are the territories claimed by Te Patukeha after the defeat of Ngāre Raumati in the 1820s: Matutaera Clendon (doc F19), p 8; see also Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 182–183.

398. Te Kapotai claimants, 'Te Kapotai Hapu Korero for Crown Breaches of te Tiriti o Waitangi: Mana, Rangatiratanga' (doc F25(b)), pp 16, 19; Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), pp 96–97; Te Kapotai claimants, 'Te Kapotai Hapu Korero for Crown Breaches of te Tiriti o Waitangi: Mana i te Moana' (doc F27(d)), p 13. Te Kapotai share common ancestors with Ngāti Pare of Waihaha, and the two hapū have intermarried to such a degree that they are regarded as one: Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), pp 101–102.

399. Te Kapotai claimants, 'Te Kapotai Hapu Korero' (doc D5), pp 7–8.

400. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 287, 290, 295.

401. Sissons et al, *Ngā Pūriri o Taiamai*, p 60.

402. Te Uri o Hua had been founded through intermarriage between Maikuku's grandson Te Taniwha and Kuraimaraewhiti of Ngāti Miru: Ronald Wihongi, transcript 4.1.6, Waitangi Marae, pp 249–250; Sissons et al, *Ngā Pūriri o Taiamai*, p 91.

The first of these conflicts occurred during the 1770s (or thereabouts) between Te Wairua's sons Auha and Whakaaria (Ngāti Tautahi, Te Uri o Hua) and Ngāti Miru, Te Wahineiti. The main Ngāpuhi protagonists were Te Wairua's sons Auha and Whakaaria (Ngāti Tautahi, Te Uri o Hua). Although the immediate cause of the conflict was the murder of their sister Whakarongo by her Ngāti Miru husband, according to some accounts, an underlying factor was the husband's suspicion that Whakarongo encouraged Auha and Whakaaria to seize control of Waimate's kūmara gardens.[403]

While there are slightly varying accounts of what occurred, the essence is that Auha and Whakaaria sought an alliance with the Ngāti Rāhiri leader Kauteāwhā and his brother Topi.[404] Ngāti Rāhiri land interests bordered those of Ngāti Tautahi at Kaikohe and Pouerua, and the two hapū had common strategic interests as well as connections through intermarriage.[405] Together, these allies attacked several Ngāti Miru pā at Waimate, driving Ngāti Miru back to Matakā and Te Tii Mangonui. The victors then occupied Waimate while also maintaining their traditional lands around Kaikohe. Auha and Whakaaria established a pā at Ōkuratope and occupied both Ōkuratope and Whakataha, inviting their nephew Toko (Ngāti Rēhia of Ōrauta) to occupy the latter and maintain the Waimate kūmara gardens.[406] Some of the defeated Te Wahineiti people were allowed to return to territories between Kerikeri and Puketī Forest (including Puketōtara) and in southern Whangaroa, where they intermarried with Ngāi Tāwake, Ngāti Rēhia, and Ngāti Uru. Thereafter, they took the name Te Whiu.[407]

After a few years had passed and Ngāti Miru were regathering their strength, Auha, Whakaaria, and their allies launched attacks from inland and the coast, the decisive battles occurring at Kerikeri and Tapuaetahi. Following this campaign Ngāti Rēhia lands were extended from Waimate to Tākou (including settlements at Te Tii Mangonui and Tapuaetahi), though other northern alliance hapū acquired resource rights in those areas as well. Auha also brought a section of Ngāti Tautahi to occupy lands north of Matauri. The few surviving Ngāti Miru either retreated to Tākou and intermarried with others, or escaped to Mangonui.[408] Te Hikutū had not taken part in the battles – Auha and Whakaaria allowed them to leave

403. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 288–290, 295–296; Te Huranga Hohaia (doc D8), p 17.

404. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 290.

405. Sissons et al, *Ngā Pūriri o Taiamai*, pp 40–41; Te Huranga Hohaia (doc D8), pp 17–18; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 290.

406. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 290–291, 296–297; Walzl, 'Ngati Rehia' (doc R2), pp 22–23.

407. Rowan Tautari, 'Report on Land Previously Owned by Te Whiu Hapu, Puketotara/Pukeiti (inland Bay of Islands)' (commissioned research report, Wellington: Waitangi Tribunal, 1999) (doc E6), pp 2, 7; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 396; Te Uira Associates, Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 36 Te Whiu are sometimes known as Ngāti Te Whiu or Ngāi Te Whiu.

408. Tai Tokerau District Māori Council, 'Oral History Report' (doc AA3), pp 165–166, 174–178; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 297–298; Walzl, 'Ngati Rehia' (doc R2), pp 8, 22–23, 25–26, 31.

before hostilities started – but from then they became associated with the northern alliance.[409]

3.3.5.3 *The southern alliance defeats Ngāti Pou and occupies Ōhaeawai*

A decade or two after the defeat of Ngāti Miru, another conflict erupted, this time pitting southern alliance hapū against Ngāti Pou of Hokianga. Though Ngāti Pou descended from Tūpoto, they also had significant *Tainui* connections and were generally seen as a distinct people.[410] By the 1790s, they had extended their interests from the Waihou Valley east to Waimate and Ōhaeawai, where they occupied Maungatūroto and three other pā.[411] Also near Ōhaeawai were the southern alliance hapū Ngāti Rangi, Ngāti Hineira, and Ngāre Hauata. Ngāti Rangi occupied Te Rua Haonga pā at Ōhaeawai, and Ngāti Hineira occupied Ngaungau pā very close by. Ngāre Hauata occupied Ngāwhitu, a little to the south near Ōwhareiti.[412] Ngāti Rangi and Ngāti Hineira appear to have moved from Tautoro to Ōhaeawai after the conquest of Waimate, in which Ngāti Hineira supported the northern alliance and captured Ngaungau.[413]

The conflict with Ngāti Pou arose after members of that iwi killed several senior Ngāti Hineira people. One tradition is that these killings occurred during a dispute over fishing rights at the Kerikeri Inlet, where Ngāti Pou had rights on the northern banks, and Ngāti Hineira, Ngāti Rangi, and other southern alliance hapū had rights on the southern banks. Another explanation is that Ngāti Hineira became caught up in a prior conflict between Ngāti Pou and Te Pōpoto.[414] Whatever the original cause, Ngāti Hineira and their allies responded to the killings by attacking and capturing the three Ngāti Pou pā at Ōhaeawai. Before a follow-up attack could be made on Maungatūroto, a peace agreement was reached under which Ngāti Pou departed from Taiāmai. Some returned to Waihou, but most left for Pūpuke (inland Whangaroa) or Waimamaku (Hokianga) where they had relatives. Their former lands between Ōmāpere and Ōhaeawai were divided among the victorious hapū, with Ngāti Rangi occupying Maungatūroto and Ōhaeawai and lands to the west of there; Ngāti Hineira occupying the lands immediately north towards Te Waimate; and Ngāre Hauata also extending their lands north towards Pākaraka. Two new hapū, Te Whānau Whero and Te Uri Taniwha, emerged from

409. Tai Tokerau District Māori Council, 'Oral History Report' (doc AA3), pp 175–176; Walzl, 'Mana Whenua Report' (doc E34), p 57.

410. Hohepa, 'Hokianga' (doc E36), pp 187, 248; Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), p 79.

411. Hohepa, 'Hokianga' (doc E36), p 182; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 295. The three pā were known as Tapahuarau, Takapororuku, and Pukepango (also known as Ngā Ruapango): Sissons et al, *Ngā Pūriri o Taiamai*, pp 31, 87, 112.

412. Sissons et al, *Ngā Pūriri o Taiamai*, p 112.

413. Sissons et al, *Ngā Pūriri o Taiamai*, pp 89, 112; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 296–297.

414. Sissons et al, *Ngā Pūriri o Taiamai*, pp 28–29, 112, 119, 124; Terence Lomax (doc O2), p 5; Hone Mihaka (doc O8), p 5.

Ngāti Hineira as a result of their participation in these hostilities.[415] Later, probably during the 1820s or 1830s, Te Uri o Hawato would emerge and occupy lands at Ōhaeawai.[416]

3.3.5.4 *The emergence of Ngāti Manu*

As Ngāti Hineira, Ngāti Rangi, and Ngāre Hauata were occupying the Taiāmai lands, a new hapū emerged from intermarriage between the latter two. Ngāti Manu, as they were called, traced their name to the early Muriwhenua ancestor Ngā Manu, whose descendant Te Rawheao had settled at Tautoro and married Te Rukenga of Ngāti Rāhiri.[417] For several generations, the descendants from this marriage lived at Tautoro as part of Ngāti Rangi, but around 1800 a section broke away, settling lands between Ruapekapeka and Taumārere.[418] Ngāti Manu were headed by the wahine rangatira Hautai, her husband Te Huru, her brother Pehi (or Puhi), and Pehi's wife Tūwhāngai.[419] Together, they could claim ancestral connections not only to Muriwhenua and Ngāti Rāhiri, but to many other hapū. Hautai and Pehi were of Ngāti Rangi and Ngāi Tū,[420] and also had ancestors in Mangakāhia and northern Kaipara.[421] Te Huru was of Ngāti Hine and Ngāre Raumati,[422] and Tūwhāngai was of Ngāti Rongo, a hapū of Te Kawerau of Mahurangi (discussed later).[423] The establishment of this branch of Ngāti Manu

415. Sissons et al, *Ngā Pūriri o Taiamai*, pp 34, 115, 119–125; Paeata Brougham-Clark and Hone Mihaka (doc W42), pp 10–11.

416. Henare, Petrie, and Puckey, 'Oral and Traditional History on Te Waimate Taiamai Alliance' (doc E33), pp 68, 170; Terence Lomax (doc O2), pp 5, 8–9.

417. Hamilton (doc W7), p 4; Arapeta Hamilton (doc AA67), p 3; Arapeta Hamilton (doc B29(a)), pp 4–5. Ngā Manu was of Ngāi Tupututupuwhenua and was the father of Te Kura who married Tamatea-mai-i-tawhiti: Hohepa, 'Hokianga' (doc E36), p 159; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 117.

418. Ngāti Manu established settlements at Manurewa (now Taumārere township) and Kāretu, and occupied Ōtuihu pā: Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), pp 103, 134.

419. Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), pp 81, 103, 134; Emma McIntyre (doc F13), p 1; Hamilton (doc W7), pp 3, 10. Henare, Middleton, and Puckey, in their traditional history for Te Aho Claims Alliance, recorded that Ngāti Manu split off from other Tautoro hapū after a conflict with Ngāti Toki: Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), p 134.

420. For Ngāti Rangi and Ngāi Tū whakapapa of Hautai and Pehi, and their tūpuna Kohinetau, Te Kohuru, Te Inumanga, and Peketahi, see Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67)), p 81; Arnold Maunsell (doc T19), p 2; Parehuia Tangira (doc F35), p 1; Sissons et al, *Ngā Pūriri o Taiamai*, pp 43–44.

421. Ngā Manu's descendant Raninikura had migrated to Kaipara in the early 1600s with her Ngāi Tamatea husband. Some of their descendants had moved into the Mangakāhia Valley and then Tautoro: Arapeta Hamilton (doc F12(a)), pp 3–6; Henare, Middleton, and Puckey, 'Oral and Traditional (doc E67)), p 103; Hooker, 'Maori, the Crown and the Northern Wairoa District' (Wai 674 ROI, doc L2), pp 12–13.

422. Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), p 81.

423. Tūwhāngai's parents were Te Raraku and Mawae, both grandchildren of Ngāti Rongo founders Moerangaranga and Ngāwhetu: Arapeta Hamilton (doc K7(b)), pp 4–6.

consolidated the authority of southern alliance hapū from Taiāmai to the coast.[424] Inter-hapū connections were further cemented through ongoing intermarriage.[425]

Sometime in the 1790s, two senior Ngāti Manu women were killed by a section of Ngāre Raumati under the chief Tūpare. As utu, Tūpare gave up his lands on the peninsula between Tāpeka and Ōkiato, and Ngāti Manu established several kāinga along the coast including one at Kororāreka, which had formerly been occupied only seasonally as a fishing village.[426] At some stage, Ngāti Manu also acquired fishing rights from Taupiri Bay into the southern Bay of Islands.[427] Later, probably during the 1820s or 1830s, Te Uri o Ngongo would emerge from Ngāti Manu, occupying lands at Kawakawa.[428] Other associated hapū include Te Uri o Raewera at Ruapekapeka, and Te Uri Karaka.[429]

Like other southern alliance hapū, Ngāti Manu have a strong tradition of women holding crucial leadership and decision-making roles, while men provided the military strength to defend the mana of the hapū. The hapū was founded by Hautai on the instruction of her mother, Hinepapa.[430] Later, Hautai's son Whareumu would assume a leadership role, as would Pehi's daughter Haki, and her son Whētoi, who took the name Pōmare I.[431] When Pōmare I died in battle in the 1820s, it was Haki who determined that her son Whiria would assume the mantle of leadership. He took the name Pōmare II in honour of his uncle.[432]

Ngāre Raumati remained in occupation of Pāroa and Te Rāwhiti.[433] Very soon afterwards, however, they became embroiled in a series of conflicts with the 'northern alliance' section of Ngāpuhi. Hostilities began either with a Ngāre Raumati attack on a Ngāpuhi pā at Te Waimate, or with an argument over a woman.[434] Whatever the cause, the matter soon escalated, with Ngāre Raumati killing a young Ngāti Rēhia man and the mother and sister of Ngāi Tāwake leaders Rewa, Moka, and Wharerahi.[435] These killings required utu. Auha's son Te Hōtete led one

424. Glenn Strongman (doc T23(b)), pp 4–5.

425. Wyatt, 'The Old Land Claims and the Concept of "Sale"' (doc E15), fol 36.

426. Arapeta Hamilton, appendices (doc W6(a)), p 26; Joyce Baker (doc F16(b)), pp 5–6; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 183; Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), p 134; Wyatt, 'The Old Land Claims and the Concept of "Sale"' (doc E15), fol 36; Arapeta Hamilton (doc F12(a)), pp 6–7. The Ngāti Manu settlements were at Tāpeka, Kororāreka, Matauwhi, Te Uruti, Te Wahapū, Omata, Ōtuihu, and Ōkiato.

427. Arapeta Hamilton (doc W6(a)), pp 25–26.

428. Walzl, 'Ngati Rehia' (doc R2), p 62; Wyatt, 'The Old Land Claims and the Concept of "Sale"' (doc E15), fol 170; Principal rangatira associated with Te Uri o Ngongo were Pukututu and Te Hiamoe: Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), pp 232–233.

429. Arapeta Hamilton (doc F12), pp [2], [9]; Arapeta Hamilton (doc F22), p [6].

430. Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), p 103.

431. Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), pp 134–135; Meretini Ryder (doc F15), p 1.

432. Meretini Ryder (doc F15), pp 1–2.

433. Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), pp 80, 134; Wyatt, 'The Old Land Claims and the Concept of "Sale"' (doc E15), p 36.

434. Walzl, 'Ngati Rehia' (doc R2), p 33.

435. Moka Puru (doc F21(a)), p 11. These events are also discussed by Walzl and McBurney: Walzl, 'Ngati Rehia' (doc R2), p 33; McBurney, 'Traditional History Overview' (doc A36), pp 257–260.

party, and another comprised leaders from the Ngāpuhi northern section and from related hapū in Hokianga and Whangaroa. Engagements occurred at various places along Te Rāwhiti inlet, including Tāpeka, Whiorau, and Ōkahu Island, resulting in heavy defeats for Ngāre Raumati. At this stage they were not forced off their lands. Another quarter of a century would pass before Rewa, Moka, and Wharerahi would seek final utu for the deaths of their mother and sister.[436]

3.3.5.5 *The battles of Waiwhāriki and Moremonui*

While sections of Ngāpuhi were asserting their authority in and around the Bay of Islands, they were also becoming embroiled in larger regional conflicts. Sometime in the 1790s or thereabouts, an invading party of Ngāti Maru, Ngāti Paoa, Ngāi Tai, and others attacked Ngāpuhi at Waimate. Two battles then occurred, one near Pouerua and another at Puketona, which the invaders took with heavy loss of life in a battle known as Waiwhāriki. A Ngāti Rāhiri party from Pouerua then confronted and chased the invading party back to the coast. They returned to Hauraki, leaving behind a major cause for utu which would not be satisfied for some years to come. Most sources refer to Ngāti Rangi as the defeated hapū at Waiwhāriki, but the invading party landed at Waitangi and the attacks took place on Ngāti Rāhiri territories. It was northern alliance hapū who would respond, with a reprisal raid, led by Te Hōtete, which we will discuss later.[437]

Soon afterwards, in the early 1800s, the northern alliance also became embroiled in a series of conflicts against Te Uri o Hau and hapū of Te Roroa.[438] Ngāpuhi tradition is that the conflicts arose from a dispute over an adulterous relationship or failed marriage alliance involving various Te Roroa and Kaipara hapū. When the dispute escalated and a young Ngāti Tautahi rangatira was killed, his father Pōkaia sought utu.[439]

Pōkaia was of senior birth – his grandfather was Whakaaria who had led the conquest of Waimate. Pōkaia led a successful raid against Te Uri o Hau at Maunganui Bluff,[440] but this heralded reprisals and further escalation, ultimately drawing in the various Ngāpuhi alliances and many hapū of Te Roroa and Kaipara.[441] Pōkaia

436. Moka Puru (doc F21(a)), p 11; Walzl, 'Ngati Rehia' (doc R2), p 33; McBurney, 'Traditional History Overview' (doc A36), pp 258–259. Regarding Hokianga involvement, see Walzl, 'Mana Whenua Report' (doc E34), p 58; Murray Painting (doc V12), pp 3–4.

437. McBurney, 'Traditional History Overview' (doc A36), pp 235–239; Walzl, 'Ngati Rehia' (doc R2), p 34; Rihari Dargaville (doc K16), p [6]; Anthony Packington-Hall (doc K15(b), pp [3]–[4]; see also Pei Te Hurinui Jones and Bruce Biggs, *Nga Iwi o Tainui: The Traditional History of the Tainui People/Nga Koorero Tuku Iho a Nga Tuupuna* (Auckland: Auckland University Press, 1995), pp 328–331.

438. For accounts of these conflicts, see McBurney, 'Traditional History Overview' (doc A36), pp 262–270; Walzl, 'Mana Whenua Report' (doc E34), p 61; Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), p 117; Moka Puru (doc F21(a)), p 11.

439. McBurney, 'Traditional History Overview' (doc A36), pp 262–267.

440. Moka Puru (doc F21(a)), p 11, McBurney, 'Traditional History Overview' (doc A36), pp 262–267.

441. Southern Ngāpuhi hapū taking part included Ngāti Manu, Ngāti Hine, and Ngāti Rangi: McBurney, 'Traditional History Overview' (doc A36), pp 264, 270; McBurney, 'Traditional History

and the northern alliance won a major victory at the Battle of Ripiro, but Pōkaia was not satisfied and attacked again at Moremonui, just south of Maunganui Bluff, this time suffering a major defeat.[442] The number killed was so large that the battle became known as Te Kai a te Karoro ('the feast of the seagulls').[443] One of the leaders at this battle was Pōkaia's young nephew Hongi Hika, whose brother and sister were killed, and who succeeded as the chief of Te Uri o Hua.[444] This defeat, following quickly after Waiwhāriki, left the northern alliance vulnerable and created a cause for utu that would come to have devastating consequences for their foes in years to come.[445]

3.3.6 From early contact to musket wars

The first, brief contacts between Māori and Pākehā in the far north occurred during Captain James Cook's visits on the *Endeavour* in 1769. Cook stopped twice, in Bream Bay and the Bay of Islands. After initial misunderstandings, Cook's crew traded with Māori for food and water.[446] Cook was followed by the French explorers Jean-François-Marie De Surville, who landed in Tokerau (Doubtless Bay) in 1769, and Marion du Fresne, who landed in the Bay of Islands in 1772. As discussed in our stage 1 report, during both of these visits there were cultural misunderstandings – disputes over resource use, and transgressions against tapu and mana – which led to significant violence.[447] These initial, fleeting encounters left two lasting impressions on Māori communities: first, they saw the technology that Europeans possessed, including the destructive effects of their weapons; and secondly, they were left with an enduring mistrust of the French.[448]

The next significant contact occurred in 1793, when the Royal Navy, while looking for flax-weaving technology for use in the Norfolk Island penal colony, kidnapped two Māori men from the Cavalli Islands. They lived as guests of the islands' Governor, Philip Gidley King, for several months before he returned them to Aotearoa with gifts including iron tools, wheat, and potatoes.[449] The latter rapidly became a staple crop throughout the north, supplementing and to some extent

Overview' (doc A36), pp 264; Harris, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), p 117.

442. McBurney, 'Traditional History Overview' (doc A36), pp 262–267; Ballara, *Taua*, pp 181–186.

443. Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), p 130.

444. Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), p 118.

445. Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 117–118.

446. Kathleen Shawcross, 'Maoris of the Bay of Islands, 1769–1840: A Study in Changing Maori Responses to European Contact' (MA thesis, University of Auckland, 1966), fols 15–19; Anne Salmond, *Two Worlds: First Meetings Between Maori and Europeans, 1642–1772* (Auckland: Viking, 1991), pp 213, 216–219, 221.

447. Salmond, *Two Worlds*, pp 299, 311–317, 359–372, 376–379, 386–388, 393–402; Shawcross, 'Maoris of the Bay of Islands', fols 45, 53–54, 91–99, 103–107, 110–111, 115–118, 123; Nuki Aldridge (doc B10), p 41; Hori Parata (doc C22), p 4.

448. Vincent O'Malley, 'The Nature and Extent of Contact and Adaptation in Northland, c1769–1840(commissioned research report, Wellington: Crown Forestry Rental Trust, 2007) (doc A11), pp 55, 57–58; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 52, 225–226.

449. Shawcross, 'Maoris of the Bay of Islands', fols 131–138.

substituting for kūmara. By 1800, whaling ships were beginning to stop at the Bay of Islands to replenish their supplies, and were able to buy potatoes by the tonne.[450]

3.3.6.1 *Growing trade and the* Boyd *affair*

In the early 1800s, the Rangihoua rangatira Te Pahi took the lead in what appears to have been a deliberate northern alliance strategy of escalating trading relationships. Te Pahi descended from northern alliance leader Auha, and was of Te Hikutū, Ngāti Rēhia, Ngāti Torehina, and Ngāti Ruamahue hapū.[451] Nuki Aldridge told us that Europeans had come to see Te Pahi and others such as Ruatara and Hongi as 'high chiefs' because they managed early diplomatic and trading relationships. But those who really 'gave the orders', including tohunga, remained behind the scenes during this early contact period.[452]

In 1804, Te Pahi sent his son Maatara to Port Jackson, where he stayed with King, who by then was Governor of New South Wales. Maatara returned with pigs and other gifts, allowing Bay of Islands Māori to provision visiting ships with pork as well as potatoes. Soon afterwards, Te Pahi and his sons visited King, remaining for several months, observing European technology and culture, and returning laden with gifts including materials for a brick house, which was erected at Te Puna.[453] Te Pahi sent Maatara on another diplomatic mission in 1806, this time to London where he met members of the royal family and sought axes, muskets, and other goods.[454] His close relative Ruatara also travelled to London, apparently for similar purposes.[455]

Whereas King's hospitality and gifts to Māori left a lasting positive impression,[456] contact between Māori and visiting traders was often fraught with tension. Visiting ships sometimes took on Māori crew or travellers, and frequently mistreated them, on occasion seriously.[457] Visiting whalers and traders also mistreated their hosts. One visiting crew departed with Te Pahi's daughter and her British

450. Anne Salmond, *Between Worlds: Early Exchanges Between Maori and Europeans, 1773–1815* (Auckland: Penguin, 1997), pp 322–323, 326–327; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 362, 611–613.

451. Te Hurihanga Rihari, doc B15(a), p 5 [te reo]; Te Hurihanga Rihari, doc B15(c), p 5 [English translation]; Kyle Hoani (doc D10), pp 2–3; O'Malley, 'The Nature and Extent of Contact and Adaptation in Northland' (doc A11), pp 75–76, 79–80; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 147, 252; Tahua Murray (doc S21), pp 9–10.

452. Nuki Aldridge (doc B10), pp 34, 51–52.

453. O'Malley, 'The Nature and Extent of Contact and Adaptation in Northland' (doc A11), pp 76, 78–80; Salmond, *Between Worlds*, pp 329–330, 351–354, 356; Shawcross, 'Maoris of the Bay of Islands', fols 139–140, 155.

454. Salmond, *Between Worlds*, pp 360, 373.

455. John R Elder, ed, *The Letters and Journals of Samuel Marsden, 1765–1838* (Dunedin: Coulls Somerville Wilkie, 1932), pp 64–65.

456. Salmond, *Between Worlds*, pp 232–233; Shawcross, 'Maoris of the Bay of Islands', fols 136–137; O'Malley, 'The Nature and Extent of Contact and Adaptation in Northland' (doc A11), p 74; see also Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 210; Nuki Aldridge (doc B10), p 41.

457. Salmond, *Between Worlds*, pp 322–325, 408–410; Ormond Wilson, *Kororareka and Other Essays* (Dunedin: John McIndoe, 1990), pp 30–32.

husband, who had settled at Te Puna and acted as a translator in trading missions. Both died overseas.[458] Another crew abducted several Bay of Islands women, including a close relative of Hongi, and two relations of the Ngāre Hauata leader Te Morenga. They were later delivered to the Bay of Plenty and East Cape, where they were killed and eaten, creating a cause for utu against those peoples.[459]

Te Pahi was himself beaten and tied to a ship's rigging during disputes with traders, while other Bay of Islands hapū experienced crop thefts and beatings. One crew refused to pay for its supply of pork, fish, and potatoes, and when their hosts demanded they do so, several were shot. A storm then blew the ship ashore, where its crew was killed.[460] Te Pahi appealed to the New South Wales administration for assistance, and successive Governors made orders aimed at preventing mistreatment of Māori and other Polynesian crews, but they were not enforced and proved ineffective.[461] He returned to Port Jackson in 1808, but King had departed, and the colonial administration was in turmoil. Te Pahi was given no assistance.[462]

In 1809, a young Ngāti Uru rangatira returned to Whangaroa with stories of his mistreatment on the transport ship *Boyd*.[463] His hapū sought utu for this and earlier transgressions, killing and eating the *Boyd*'s crew. Though Te Pahi had tried to stop the killings, he was subsequently blamed by whalers and by other Māori who resented his success as a trader.[464] He took his children to Taupō Bay, leaving them with his Ngāti Kahu brother-in-law Patara, and then returned to Rangihoua to plead his innocence.[465] Soon afterwards, the crews of several whaling ships attacked Rangihoua, burning the village and killing most of its residents. Te Pahi was wounded, and died soon afterwards in a fight with a Whangaroa rival.[466] Te Pahi's descendants were gifted land at Taupō, and became known as Ngāti Rua. The attack on Rangihoua had long-term consequences. Kuia Moana Nui a Kiwa Wood said they kept their identities secret for many generations to protect themselves from further reprisals from Te Pahi's rivals.[467]

458. O'Malley, 'The Nature and Extent of Contact and Adaptation in Northland' (doc A11), pp 88–89; Salmond, *Between Worlds*, pp 364–366.

459. McBurney, 'Traditional History Overview' (doc A36), pp 260–261; Salmond, *Between Worlds*, p 362.

460. Salmond, *Between Worlds*, pp 368, 371.

461. Salmond, *Between Worlds*, pp 327–328, 408–409, 432, 446; O'Malley, 'The Nature and Extent of Contact and Adaptation in Northland' (doc A11), pp 79, 92, 100–101.

462. Salmond, *Between Worlds*, pp 369–372.

463. Sissons et al, *Ngā Pūriri o Taiamai*, p 18.

464. O'Malley, 'The Nature and Extent of Contact and Adaptation in Northland' (doc A11), pp 92–95; Salmond, *Between Worlds*, pp 383–388, 391–393, 457; Moana Nui A Kiwa Wood (doc S11), p 5; Nuki Aldridge (doc B10), pp 53–54; Anania Wikaira (doc L18(a)), p 17.

465. Moana Nui A Kiwa Wood (doc S11), p 5.

466. Salmond, *Between Worlds*, pp 387–388, 391–392; Moana Nui A Kiwa Wood (doc S11), pp 5–6. Some accounts say the attack was on Te Puna, very close to Rangihoua: Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), p 151.

467. Moana Nui A Kiwa Wood (doc S11), pp 4–5; Moana Wood, transcript 4.1.20, Te Tapui Marae, pp 366–367.

3.3.6.2 *The regional wars begin*

Disastrous as these events were, they did not put an end to Ngāpuhi pursuit of European goods and technology. After Te Pahi's death, Te Hikutū leadership responsibilities were assumed by Ruatara,[468] who was a great-grandson of Whakaaria and therefore a relative of Hongi and other northern alliance leaders.[469] Ruatara had spent time in Sydney with the missionary Samuel Marsden, where he had learned much about English farming techniques.[470] On his return to the Bay of Islands, he, Hongi, and other leaders cultivated Marsden, seeing him as the key to advancing their economic prosperity, and in turn, their military security.[471] In particular, Ruatara's goal was to grow wheat for supply to Sydney.[472]

A related goal was to encourage the return of shipping, which had dried up after the *Boyd* incident. Ruatara, Hongi, and other leaders reasoned that a missionary presence under their protection would reassure ships' captains and thus encourage a resumption of trade.[473] Marsden was therefore invited to establish a mission at Ōihi (near Rangihoua), on the understanding that it would remain under Ruatara's control,[474] and that missionaries would bring crops, livestock, a flour mill, and training in agriculture and technical skills.[475] Another mission was established in 1819 under Hongi's authority at Kerikeri, causing considerable jealousy among southern alliance leaders such as Te Morenga.[476]

Since Moremonui, Ngāpuhi leaders had largely abstained from fighting either within the Bay of Islands or in regional campaigns, instead focusing on recovering from earlier defeats and securing access to European agricultural technology.[477] But Waiwhāriki and Moremonui had not been forgotten. On Ruatara's death in 1815, Hongi assumed control of northern alliance trading relationships, placing a high priority on the acquisition of muskets. Missionaries and missionary workers were pressured to involve themselves in the trade – and some complied – while for

468. Salmond, *Between Worlds*, p 424.

469. Tai Tokerau District Māori Council, 'Oral History Report' (doc AA3), p 161. Ruatara was also a great-grandson of Whakaaria's sister Te Pehenga: Hohepa, 'Hokianga' (doc E36), p 251.

470. Salmond, *Between Worlds*, pp 415, 417–419.

471. Salmond, *Between Worlds*, pp 433, 436–440, 442–443.

472. Salmond, *Between Worlds*, pp 442–443.

473. Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 124–125; Henare, Petrie, and Puckey, 'Oral and Traditional History on Te Waimate Taiamai Alliance' (doc E33), p 116.

474. Salmond, *Between Worlds*, pp 446–447, 450, 455, 466; Henare, Petrie, and Puckey, 'Oral and Traditional History on Te Waimate Taiamai Alliance' (doc E33), p 130; O'Malley, 'The Nature and Extent of Contact and Adaptation in Northland' (doc A11), p 102; Shawcross, 'Maoris of the Bay of Islands', fols 297–298; Binney, *The Legacy of Guilt*, pp 49–50.

475. Salmond, *Between Worlds*, pp 452–461.

476. Walzl, 'Ngati Rehia' (doc R2), pp 48–50; Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 124–125.

477. Michael Beazley (doc K8), p 23; O'Malley, 'The Nature and Extent of Contact and Adaptation in Northland' (doc A11), p 150.

visiting whaling vessels, muskets, in exchange for potatoes, became the main Bay of Islands currency.[478]

Hostilities among Māori resumed in 1818, when Hongi and Te Morenga led separate war parties south to the Bay of Plenty and East Cape, seeking utu for the earlier deaths of their relatives. They returned – after inflicting a series of rapid defeats – with many hundreds of captives.[479] The same year, sections of Ngāpuhi also became caught up in hostilities between Ngāti Wai and Ngāti Manuhiri of Mahurangi.[480] These were the first major campaigns in which Hongi used muskets.[481]

Two years later, in 1820, Hongi sought to advance his people's economic and military security decisively by establishing his relationship with the British monarchy. He and his advisor Waikato travelled to London, where they stayed for several months, meeting King George IV, visiting the House of Lords, and acquiring a number of gifts including a suit of armour and helmet (which Hongi would often wear into battle) and a small number of guns.[482] On their way home, Hongi and Waikato stopped in Sydney, where they acquired a large cargo of muskets, numbering at least several hundred.[483]

On their return in 1821, Hongi and other Bay of Islands and Hokianga rangatira began a series of campaigns against their enemies in Mahurangi, Kaipara, Hauraki, Waikato, Hawke's Bay, and the Bay of Plenty. At various times, the leaders involved included Patuone and Nene of Ngāti Hao, Pōmare I and Te Whareumu of Ngāti Manu, Rewa of Ngāi Tāwake, Tītore of Ngāi Tāwake and Ngāti Rēhia, Te Morenga of Te Ngāre Hauata, and Rāwiri Taiwhanga, Moetara, and Tuhi of Te Ngāre Raumati.[484] Each campaign was intended to extract utu for an earlier Ngāpuhi defeat (such as Moremonui) or for the deaths of senior Ngāpuhi people.

478. Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 123–124, 133–134; Rihari Takuira (doc C7), p 15; Shawcross, 'Maoris of the Bay of Islands', fols 255–256.

479. McBurney, 'Traditional History Overview' (doc A36), pp 275–276; Michael Beazley (doc K8), p 23. Te Haupa of Ngāti Paoa also took part in Hongi's campaign, seeking utu for the capture of his daughter: McBurney, 'Traditional History Overview' (doc A36), pp 275–276.

480. Ngāti Wai suffered a major defeat to Ngāti Manuhiri on Waiheke Island in 1818 in a battle known as Whakanewhanewha. Two years later, Te Kapotai and a section of Ngāpuhi aided Ngāti Wai's quest for utu, in a battle at Te Kohuroa (Mathesons Bay, Ōmaha). This resulted in another defeat, creating a Ngāpuhi demand for utu: McBurney, 'Traditional History Overview' (doc A36), pp 200–201; Beazley, 'Te Uri o Maki' (doc K2), pp 30, 192.

481. McBurney, 'Traditional History Overview' (doc A36), p 276.

482. Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 128–129; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 213–214, 216; Binney, *The Legacy of Guilt*, pp 68, 73–74; Dorothy Urlich Cloher, *Hongi Hika: Warrior Chief* (Auckland: Viking, 2003), pp 125, 129–131.

483. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 214; James Belich, *Making Peoples: A History of the New Zealanders: From Polynesian Settlement to the End of the Nineteenth Century* (Auckland: Allen Lane, 1996), p 160; Manuka Arnold Henare, 'The Changing Images of Nineteenth Century Māori Society, From Tribes to Nation' (doctoral thesis, Victoria University, 2003) (doc A16), pp 168–169.

484. McBurney, 'Traditional History Overview' (doc A36), pp 285–286, 293, 295, 307.

The main battles occurred during a four-year period, from 1821 to 1825.[485] While other battles occurred in the later 1820s and early 1830s, they were generally more restrained and had lesser consequences.[486]

Many of these conflicts had little or no direct impact on this district's tribal landscape. However, some did. Mahurangi was depopulated, along with neighbouring areas such as Tāmaki and Kaipara. The effects were also felt in Whāngārei, which bore the brunt of several reprisal raids.[487] The Bay of Islands population was inflated by war captives,[488] and by several hundred Ngāti Kahungunu under their leader Te Mauparāoa, who had formed an alliance with Ngāti Manu during the campaigns.[489] As the wars drew to a close, further realignments occurred in the Bay of Islands and Whangaroa as Hongi and his relatives became increasingly concerned with control of trading relationships. We discuss these events later.

3.3.7 Mahurangi and the Gulf Islands

The Mahurangi section of this inquiry district extends along the coast from Te Ārai to Devonport, and inland to the territories between Wayby and Riverhead. Much of this is hilly and would have been heavily forested in pre-European times, though there were river valleys and areas of flat land. The southern part of this district also encompasses several islands including Tiritiri Matangi, Motuora, Kawau, Hauturu (Little Barrier) and Aotea (Great Barrier), and smaller islands in their vicinity. Islands and coastal territories were prized for their fisheries, and in particular for the shark fishery between Kawau and Whangaparāoa which was shared and sometimes contested among many Hauraki, Tāmaki, and Mahurangi tribes.[490]

3.3.7.1 *Maki's people*

Mahurangi was first settled by Tāmaki peoples of *Tainui* descent, including descendants of Taihua.[491] During the 1700s, another *Tainui* group under the leadership of Kāwhia rangatira Maki occupied Tāmaki before moving into southern Kaipara, conflicting and intermarrying with other *Tainui* groups (such as Ngāoho and Ngāiwi) and with Te Roroa groups who were gradually migrating south.[492] In

485. Michael Beazley (doc K8), pp 24–25; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 381–384; McBurney, 'Traditional History Overview' (doc A36), pp 278–312.

486. Michael Beazley (doc K8), pp 24–25; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 384–389; Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 136–138.

487. Michael Beazley (doc K8), pp 24–25; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 377–378, 381–384; McBurney, 'Traditional History Overview' (doc A36), pp 308–311, 314, 318, 329–330.

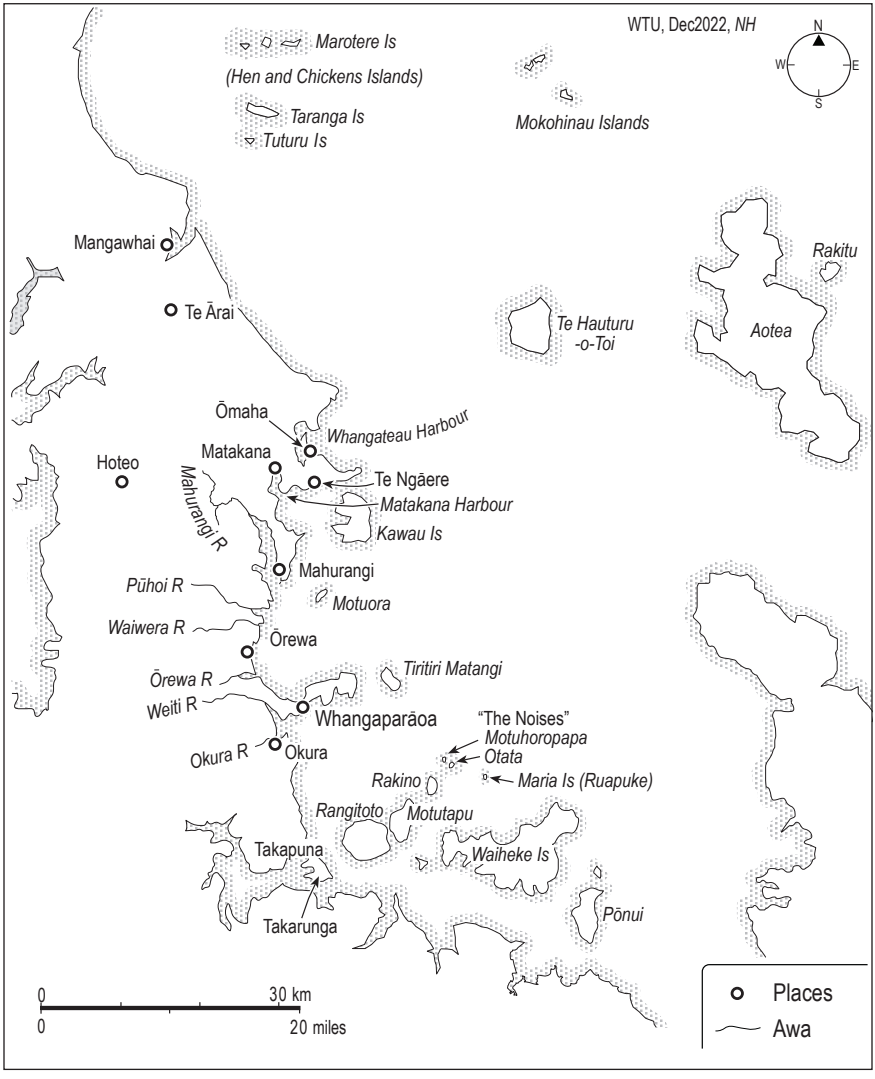
488. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 62, 64.

489. Arapeta Hamilton (doc K7(b)), p 8; Arapeta Hamilton (doc F12(a)), p 8. As part of this alliance, Pōmare I married Ihumamao of Ngāti Kahungunu. On Pōmare I's death, she married his successor Pōmare II: Meretini Ryder (doc F15), p 1.

490. McBurney, 'Traditional History Overview' (doc A36), p 215.

491. McBurney, 'Traditional History Overview' (doc A36), pp 56–58; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 203, 211–213.

492. McBurney, 'Traditional History Overview' (doc A36), pp 68–71.



Map 3.7: Mahurangi and the Gulf Islands.

turn, Maki and his siblings and children launched a series of attacks against Ngāti Taihaua and related hapū Ngāti Taimanawaiti, claiming many of their territories along the Mahurangi coast.[493]

Maki's children formed several new hapū. Ngāti Manuhiri occupied lands from Mahurangi to Mangawhai, inland to Hoteo. One section intermarried with

493. McBurney, 'Traditional History Overview' (doc A36), pp 78, 87, 160–161.

Ngāi Tāhuhu of Te Ārai.[494] Ngāti Rongo (sometimes known as Ngāti Rango[495]) formed through intermarriage between Maki's son Ngāwhetu and Moerangaranga of Ngā Rīriki (a section of Ngāti Awa). Moerangaranga was the granddaughter of Haumoewhārangi, who was also the progenitor of Te Uri o Hau and several other Ngāti Whātua hapū.[496] Some sources say that Ngāti Rongo is named after Moerangaranga's father, and others that it commemorated peace between Te Kawerau and Ngāti Whātua.[497] Ngāti Rongo occupied territories from Araparera in southern Kaipara to the Mahurangi Harbour, as well as Hauturu (Little Barrier Island) which they shared with Ngāti Manuhiri.[498] Claimants emphasised that, notwithstanding their Ngā Rīriki heritage, their rights in Mahurangi were from Maki.[499]

Ngāti Maraeariki occupied lands between Whangaparāoa and Ōmaha, but particularly became associated with Orewa.[500] Ngāti Poataniwha and Ngāti Kahu emerged through intermarriage with descendants of Taihaua, and occupied lands from Whangaparāoa to the North Shore. Ngāti Kahu is associated with the islands at Ōtata, Motuhoropapa and Ōruapuke (The Noises) east of Rangitoto, and Ngāti Poataniwha with Tiritiri Matangi.[501] Te Kawerau ā Maki occupied lands south of the Kaipara Harbour, before conflicts with Te Taoū and other northern Kaipara hapū limited their territories into the Waitākere Ranges.[502] Several other hapū also emerged from these groups, including Ngāti Raupo and Ngāti Te Awa.[503] The

494. McBurney, 'Traditional History Overview' (doc A36), pp 32, 80–82, 84–86.

495. McBurney, 'Traditional History Overview' (doc A36), p 91; see also Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 203; Beazley, 'Te Uri o Maki' (doc K2), p [1].

496. Beazley, 'Te Uri o Maki' (doc K2), pp 5, 7–8, 13, 17; Arapeta Hamilton (doc K7(b)), pp 2–4; Hooker, 'Maori, the Crown and the Northern Wairoa District' (Wai 674 R01, doc L2), pp 39, 42; McBurney, 'Traditional History Overview' (doc A36), pp 91–93. Regarding Ngā Rīriki and Te Uri o Hau origins, see Hooker, 'Maori, the Crown and the Northern Wairoa District' (Wai 674 R01, doc L2), pp 32, 47–50; Daamen, Hamer, and Rigby, 'Auckland' (doc H2), p 32.

497. Arapeta Hamilton (doc K7(b)), p 2; Beazley, 'Te Uri o Maki' (doc K2), pp 7–8; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 203, 216; McBurney, 'Traditional History Overview' (doc A36), pp 91–92. Some sources named Moerangaranga's father as 'Rongo' and others as 'Rango'.

498. McBurney, 'Traditional History Overview' (doc A36), pp 91–92, 94; see also pp 86–87.

499. Beazley, 'Te Uri o Maki' (doc K2), pp 20, 39–40; Arapeta Hamilton (doc K7(b)), pp 2–3.

500. McBurney, 'Traditional History Overview' (doc A36), pp 100–102.

501. McBurney, 'Traditional History Overview' (doc A36), pp 101–102, 104–106; Peter McBurney, transcript 4.1.12, North Harbour Stadium, p 52; Jasmine Cotter-Williams (doc K5), pp 11–12, 14, 16; A J Packington-Hall, 'Suggested Sites for Tribunal Visits', 2014 (doc K15(c)), pp [6]–[7].

502. Michael Beazley (doc K8), pp 12–13, 51–52; McBurney, 'Traditional History Overview' (doc A36), pp 109–115, 119–125.

503. McBurney, 'Traditional History Overview' (doc A36), pp 88–90, 202, 291. Other Ngāti Manuhiri hapū included Te Uri o Katia (who later intermarried with Te Uri o Hau) at Hoteo; Ngāti Ruangakau who occupied lands from Te Ārai to Pākiri; Ngāti Te Awa who occupied lands from Pākiri to Whangateau; and Ngāti Marohiro who occupied the Tāwharanui Peninsula: McBurney, 'Traditional History Overview' (doc A36), pp 84–86, 88–90.

descendants of Maki and Mataahu are known collectively as Te Kawerau,[504] and claimants in this inquiry used the collective name Te Uri o Maki.[505]

Maki's brother Mataahu led the conquest of Hauturu (Little Barrier Island). His son Rēhua then married into Ngāti Wai and led a combined force in the conquest of Aotea (Great Barrier) and Rakitu Islands. Ngāti Rehua is named for him.[506] Ngāti Wai strengthened their connections with these islands and the Mahurangi coast through successive generations of intermarriage, in particular with Ngāti Rēhua, Ngāti Manuhiri, and Ngāti Kahu.[507] Maki's inland and Kaipara descendants meanwhile continued to intermarry with Te Uri o Hau, Ngā Rīriki, and others to produce Te Taoū and Ngāti Whātua who later came to occupy Tāmaki.[508]

3.3.7.2 *Conflict with Hauraki peoples*

While Te Kawerau hapū were occupying the Mahurangi coast, Ngāti Maru were emerging on the Hunua seaboard. During the 1700s, Ngāti Maru and associated tribe Ngāti Paoa occupied much of the Hauraki region,[509] and conducted a series of raids into Tāmaki and Mahurangi. In turn, Ngāti Manuhiri, Ngāti Rongo, and related hapū mounted a series of retaliatory raids into Hunua, Tāmaki, and Waiheke, often aligning with Te Taoū and other Tāmaki hapū.[510]

Most sources suggest that these conflicts left Kawerau hapū and Hauraki tribes with shared rights along the coast. Whereas Kawerau hapū ultimately retained or regained possession of much of their land, the Hauraki tribes acquired rights to marine and coastal resources, as well as some land rights. Specifically, these included a right to share in the highly valued Mahurangi coastal shark fishery and rights to establish associated summer camps in the harbours and river mouths

504. Beazley, 'Te Uri o Maki' (doc K2), p 5.
505. Beazley, 'Te Uri o Maki' (doc K2), p [1].
506. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 214–215; McBurney, 'Traditional History Overview' (doc A36), pp 193–195, 196–199.
507. McBurney, 'Traditional History Overview' (doc A36), pp 168, 172.
508. Hooker, 'Maori, the Crown and the Northern Wairoa District' (Wai 674 ROI, doc L2), pp 48–50; McBurney, 'Traditional History Overview' (doc A36), pp 123–125.
509. McBurney, 'Traditional History Overview' (doc A36), pp 204–208, 213, 216.
510. These conflicts are listed in Michael Beazley (doc K8), pp 21–22, and described in detail by Belgrave, Young, and Deason and McBurney: Belgrave, Young, and Deason: 'Tikapa Moana' (Wai 1362 ROI, doc A6), pp 505–525; McBurney, 'Traditional History Overview' (doc A36), pp 217–241. Belgrave et al referred to one tradition in which Ngāti Paoa is said to have claimed all of the land from Mahurangi to Waitematā, and another in which they are said to have claimed Mahurangi and Whangaparāoa only: Belgrave, Young, and Deason, 'Tikapa Moana' (Wai 1362 ROI, doc A6), p 524. However, other sources suggested that Kawerau hapū regrouped and reclaimed much or all of their land at Mahurangi and elsewhere: McBurney, 'Traditional History Overview' (doc A36), pp 221–224; Barry Rigby, 'The Crown, Maori, and Mahurangi, 1840–1881' (commissioned research report, Wellington: Waitangi Tribunal, 1998) (doc E18), pp 18–19.

including those at Whangaparāoa, Matakana, Mangawhai, and Mahurangi.[511] According to *The Hauraki Report* (2006), the fishery was also managed from Coromandel settlements such as Umangawhā (Colville Bay).[512] The catch was typically returned to Coromandel and Hunua homelands.[513] Ngāti Maru obtained similar rights on Rakitu,[514] and Hauraki tribes also exercised resource rights in inner Gulf Islands including Tiritiri Matangi.[515] More generally, Hauraki tribes came to see themselves from the mid-to-late 1700s onwards as having resource rights throughout the marine and coastal area as far north as Matakana.[516] The saying 'Mai Matakana ki Matakana' refers to the settlements of that name in Mahurangi and Coromandel, and is commonly used among Hauraki peoples to explain their territorial interests.[517]

By the 1790s, other hapū had been drawn into the conflicts between Hauraki and Te Kawerau. These included Te Parawhau of Whāngārei, and Ngāti Wai, both of whom had intermarried with Ngāti Manuhiri.[518] Some sources refer to 'Ngāpuhi' undertaking raids into Ngāti Paoa territories, but this appears to be a broad use of the term.[519] As discussed earlier, Te Parawhau were affiliated to the southern section of Ngāpuhi, and mainly comprised descendants of Tāhuhu and Manaia (Te Parawhau were also associated with Ngāti Wai and Ngāti Whātua as well as Ngāpuhi).[520] Maeaea, one of the main protagonists in these battles,[521] was a leader of Ngāti Manuhiri,[522] but was nonetheless sometimes described as 'Ngāpuhi'.[523] Another protagonist was Te Raraku, who had a Ngāti Rongo mother and a Ngāi Tū father. Te Raraku grew up at Ōtuihu and is an important ancestor for Ngāti Manu (Tūwhāngai was his daughter), but as an adult he mainly lived at Mangawhai

511. Belgrave, Young, and Deason, 'Tikapa Moana' (Wai 1362 ROI, doc A6), p 524; McBurney, 'Traditional History Overview' (doc A36), pp 223–225; Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), pp 12–13.

512. Waitangi Tribunal, *The Hauraki Report*, Wai 686, 3 vols (Wellington: Legislation Direct, 2006), vol 3, pp 1022, 1024; see also McBurney, 'Traditional History Overview' (doc A36), pp 27, 213–215, 224–225, 242–243; Beazley, 'Te Uri o Maki' (doc K2), p 95.

513. McBurney, 'Traditional History Overview' (doc A36), p 224.

514. McBurney, 'Traditional History Overview' (doc A36), pp 193–195, 243; Beazley, 'Te Uri o Maki' (doc K2), p 95.

515. McBurney, 'Traditional History Overview' (doc A36), p 498.

516. Wai 686 ROI, doc A6, pp 4–5; Paul Monin, *This is My Place: Hauraki Contested 1769–1875* (Wellington: Bridget Williams Books, 2001), p 8.

517. Memorandum of counsel for Wai 100 (#3.1.1), p 1.

518. McBurney, 'Traditional History Overview' (doc A36), pp 87–88, 198–199, 355.

519. As Dr Angela Ballara has noted, Hauraki traditions tend to use the term 'Ngāpuhi' for all aggressors from the north, irrespective of hapū affiliation: McBurney, 'Traditional History Overview' (doc A36), pp 221–222.

520. Taipari Munro, Taparoto George, Huhana Seve, Hori Parata, Eru Lyndon, 'Whangarei Taiwhenua Opening Statements' (doc E46), pp 3–5, 10, 12, 17, 33; see also Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 194–196.

521. McBurney, 'Traditional History Overview' (doc A36), pp 219–224, 231, 233–235.

522. McBurney, 'Traditional History Overview' (doc A36), pp 86, 219; Beazley, 'Te Uri o Maki' (doc K2), pp 18, 28, 151.

523. McBurney, 'Traditional History Overview' (doc A36), p 222.

and fought for Ngāti Rongo.[524] His provocations against Ngāti Paoa seem to have become the justification for the Hauraki attack on the Bay of Islands.[525]

The northern alliance leader Te Hōtete led the retaliatory raid, defeating Ngāti Paoa at Takapuna Beach, North Head, and Waiheke, and occupying Takapuna for a time before peace was made and the Ngāpuhi warriors returned home.[526] The archaeologist Anthony Packington-Hall said a pounamu pendant, 'Hina o te Ata', was given to Te Hōtete as a peacemaking gift.[527]

3.3.7.3 *The impact of warfare in Mahurangi*

The final battle between Ngāti Paoa and Te Kawerau occurred in about 1800.[528] Among sections of Ngāpuhi, however, the defeat at Puketona continued to rankle, as did a number of more recent causes.[529] On Hongi's return from England, he and the leaders of other Ngāpuhi hapū from throughout the Bay of Islands and Hokianga gathered their warriors and moved south,[530] attacking settlements along the Mahurangi coast as utu for the deaths of two Ngāti Manu rangatira in recent conflicts.[531]

The party then continued onwards, attacking Ngāti Paoa settlements on Waiheke and other islands before moving into Tāmaki, claiming the major Ngāti Paoa-Ngāi Tai pā complex Mokoia-Mauinaina at the head of the Tāmaki River. Ngāpuhi forces next attacked Ngāti Maru at Te Tōtara, and (in 1822) invaded Waikato where they remained in occupation for some time before negotiating a peace agreement, secured through intermarriage.[532] In almost all of these battles, the Ngāpuhi forces inflicted heavy losses of life. They also returned to the Bay of Islands with many captives who were put to work in the district's potato gardens.[533]

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524. Arapeta Hamilton (doc K7(b)), pp 3–5; transcript 4.1.12, North Harbour Stadium, p 720; McBurney, 'Traditional History Overview' (doc A36), pp 144, 428.

525. McBurney, 'Traditional History Overview' (doc A36), pp 233–234, 237–238. For conflicts over the waka see pp 225, 230–231, 239.

526. McBurney, 'Traditional History Overview' (doc A36), p 239; Anthony Packington-Hall, appendices (doc AA10(a)), app 2, p 6. For a *Tainui* perspective, see Jones and Biggs, *Nga Iwi o Tainui*, pp 328–331; see also Packington-Hall (doc K15(b), pp [3]–[4].

527. Packington-Hall (doc AA10(a)), app 2, p 6.

528. Michael Beazley (doc K8), p 22.

529. Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), p 132; McBurney, 'Traditional History Overview' (doc A36), p 280.

530. Leaders included Patuone and Nene (Ngāti Hao, Te Pōpoto of Hokianga); Pōmare I, Te Whareumu, and Te Morenga (Ngāti Manu); Tītore and Moka (Ngāi Tāwake); Te Kēmara (Ngāti Rāhiri); Tuhi (Ngāre Raumati); Te Tirarau (Te Parawhau); and Moetara (Ngāti Korokoro): McBurney, 'Traditional History Overview' (doc A36), pp 286–287; Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), p 132.

531. The rangatira were Koriwhai and Taurawhero of Ngāti Wai, Ngāti Manu, and Ngāti Hine: McBurney, 'Traditional History Overview' (doc A36), pp 188–192, 200; Arapeta Hamilton (doc K7), p 3; Rowan Tautari, 'Attachment and Belonging: Nineteenth Century Whananaki' (MA thesis, Massey University, 2009) (doc I32(d)), p 19; Hooker, 'Maori, the Crown and the Northern Wairoa District' (Wai 674 ROI, doc L2), pp 55, 56, 110, 182.

532. McBurney, 'Traditional History Overview' (doc A36), pp 287, 292, 294–299.

533. These events are described in detail by McBurney: McBurney, 'Traditional History Overview' (doc A36), pp 284, 287–296.

Ngāti Paoa mounted a series of retaliatory raids against Te Parawhau (twice) and against Ngāti Wai and Ngāre Raumati, which provoked another Ngāpuhi push into Waikato. Te Taoū and other Tāmaki and Kaipara groups also attacked Te Parawhau.[534] The Ngāpuhi campaign culminated in the famous battle Te Ika a Ranganui near the Kaipara settlement of Kaiwaka in 1825, where Hongi finally achieved utu for the defeat at Moremonui almost two decades earlier.[535] Following this battle, Te Parawhau were able to expand their territorial interests south as far as Mangawhai and west into Kaipara and Te Roroa territories.[536]

In Mahurangi (and also in Kaipara and Tāmaki), those who survived the Ngāpuhi onslaught were pushed out of their homelands.[537] Ngāti Rehua and Ngāti Wai continued to occupy Aotea.[538] Michael Beazley (Te Uri o Maki) told us that small numbers of Te Kawerau warriors remained in their former territories.[539] But, otherwise, according to the nineteenth-century Ngāti Rongo rangatira Te Hēmara Tauhia: 'None were left at Hauturu, nor on the mainlands opposite [at Mahurangi], nor at Kaipara, nor at Tamaki.'[540]

Later in the 1820s, some Mahurangi and Kaipara hapū began to return from the Waikato for temporary fishing and food-gathering expeditions, but did not settle permanently. Many defeated Kaipara and Mahurangi hapū were sheltered across the region. Ngāti Manuhiri were sheltered in the Hokianga with Ngāti Hao as well as in Whāngārei with Te Parawhau;[541] Ngāi Te Whiu and Ngāti Kawa at Utakura with Te Pōpoto; Te Waiaruhe at Pākanae with Ngāti Korokoro; and Ngāti Whātua at Mangakāhia with Ngāti Toki.[542] Sections of Ngāti Rehua and Ngāti Wai left the Gulf Islands and moved to Whangaruru and other coastal settlements under the protection of mainland Ngāti Wai communities.[543] Ngāti Rongo, numbering about 100, went to live with Ngāti Manu under the protection of their rangatira Pōmare II and Te Whareumu.[544] This occurred because Pōmare II, as a descendant of Tūwhāngai, Ngāwhetu's great-granddaughter, had Ngāti Rongo ancestry.[545] Due

534. McBurney, 'Traditional History Overview' (doc A36), pp 305–306, 308; Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 132–133.

535. McBurney, 'Traditional History Overview' (doc A36), pp 304–312.

536. Mangakahia Taiwhenua claimants, opening statement (doc E54), p 9; Patrick Hilton (doc I1), p 3.

537. McBurney, 'Traditional History Overview' (doc A36), pp 308–311, 314, 329–330.

538. McBurney, 'Traditional History Overview' (doc A36), p 325.

539. Beazley, responses to questions (doc K2(b)), pp 3–4; Beazley, 'Te Uri o Maki' (doc K2), p 21.

540. *Hauturu* (1886) 5 Kaipara MB 125–126 (McBurney, 'Traditional History Overview' (doc A36), p 318).

541. McBurney, 'Traditional History Overview' (doc A36), pp 317–318, 381–383, 395.

542. Hooker, 'Maori, the Crown and the Northern Wairoa District' (Wai 674 ROI, doc L2), p 60; McBurney, 'Traditional History Overview' (doc A36), p 381.

543. Beazley, 'Te Uri o Maki' (doc K2), p 21; Michael Beazley (doc K8), pp 5–7.

544. McBurney, 'Traditional History Overview' (doc A36), pp 381–382.

545. Arapeta Hamilton (doc K7(b)), pp 4–5; McBurney, 'Traditional History Overview' (doc A36), p 315; see also Beazley, 'Te Uri o Maki' (doc K2), pp 82–83. Tūwhāngai descended from two of Ngāwhetu's children, Pare and Tauhia.

to this connection, Ngāti Manu had rights at Mahurangi and had not joined other Ngāpuhi leaders in their attacks against Te Kawerau.[546]

During the 1830s, Hauraki, Te Kawerau, and Ngāpuhi peoples all asserted rights along the Mahurangi coast. Peacemaking between Ngāti Paoa and Ngāpuhi began in about 1830 and was cemented in 1833 through the marriage of Ngāti Hao rangatira Patuone to a senior Ngāti Paoa woman.[547] This peacemaking gave Ngāti Paoa confidence to occupy Tāmaki and Mahurangi lands when others, such as Te Kawerau and Te Taoū, continued to fear Ngāpuhi or Waikato attack.[548] From 1833 to about 1836, Patuone mainly lived among his wife's Ngāti Paoa iwi at Waiheke and Whakatiwai in Hauraki,[549] but is also recorded as living for a time at Ōmaha.[550] Later in the decade, he and his whānau had kāinga at Takapuna and Takarunga (Mt Victoria), while also maintaining a presence at Hokianga.[551] Patuone exercised significant influence in Ngāti Paoa affairs, representing them in discussions with Waikato,[552] and making decisions about land allocation on the North Shore.[553] Also occupying Takapuna, Awataha, and other North Shore lands by the late 1830s were the Kawerau hapū Ngāti Kahu and Ngāti Poataniwha under the leadership of Hetaraka Takapuna. These hapū had close associations with Ngāti Taimanawaiti and Ngāti Paoa.[554]

Between 1832 and 1834, a section of Ngāti Paoa travelled into the abandoned Mahurangi territories to cut kauri for a Pākehā timber merchant. Patuone was involved in this arrangement and visited the timber station regularly.[555] In 1833 and 1834, he and the Bay of Islands leader Tītore (Ngāti Rēhia, Ngāi Tāwake) brokered a deal to supply Mahurangi spars to the Royal Navy.[556] While Ngāti Paoa and Ngāpuhi both supplied labour for this arrangement, neither sought to cultivate the land or settle it permanently.[557] Later in the 1830s, however, a section of Ngāti Hao took up land at Te Ngaere where they remained into post-treaty times. According

546. Arapeta Hamilton (doc K7(b)), pp 3, 5.
547. McBurney, 'Traditional History Overview' (doc A36), pp 340–341.
548. McBurney, 'Traditional History Overview' (doc A36), pp 340–341, 346–347; Belgrave, Young, and Deason, 'Tikapa Moana' (Wai 1362 ROI, doc A6), pp 527–528.
549. Anthony Packington-Hall, 'Suggested Sites for Tribunal Visits' (doc K15(c)), p [16].
550. Joseph Kingi (doc X17(a)), p 5; McBurney, 'Traditional History Overview' (doc A36), p 341.
551. Packington-Hall, 'Suggested Sites for Tribunal Visits' (doc K15(c)), pp [3]–[4], [16]–[17]; Packington-Hall (doc K15(b), p [4].
552. McBurney, 'Traditional History Overview' (doc A36), p 347.
553. Packington-Hall, 'Suggested Sites for Tribunal Visits' (doc K15(c)), p [3].
554. Although Hetaraka was associated with all four peoples, he told the Native Land Court that his rights north of the Waitematā were from Ngāti Kahu and Ngāti Poataniwha: Beazley, 'Te Uri o Maki' (doc K2), pp 125–127, 149; Beazley, responses to questions (doc K2(b)), pp 2–5, 28–30, 41; McBurney, 'Traditional History Overview' (doc A36), pp 372–373; Jasmine Cotter-Williams (doc K5), pp 11–12, 14–18. Regarding Awataha, see Morehu McDonald, 'Hato Petera College Research Report' (commissioned research report, Auckland: Ngā Tauira Tawhito o Hato Petera, 2012) (doc K1), pp 26–28. For Hetaraka's Ngāti Paoa links, see Belgrave, Young, and Deason, 'Tikapa Moana' (Wai 1362 ROI, doc A6), pp 522–528.
555. McBurney, 'Traditional History Overview' (doc A36), pp 352–356.
556. McBurney, 'Traditional History Overview' (doc A36), pp 354, 356–365.
557. McBurney, 'Traditional History Overview' (doc A36), pp 355–356, 413.

to Michael Beazley, this land was gifted by a section of Ngāti Rongo, but the gifting was later contested by others of that hapū.[558]

While the surviving Te Kawerau hapū remained in exile, their leaders nonetheless continued to assert their rights in Mahurangi. The Ngāti Paoa timber operation was subjected to muru in 1832 by Pōmare II, who appears to have been defending the interests he had inherited through his Ngāti Rongo ancestry.[559] Other raids occurred in 1835, by Whāngārei hapū, who may have been asserting rights acquired through intermarriage with Ngāti Wai and Ngāti Manuhiri.[560] Later in the 1830s, Te Hēmara objected to proposed land transactions affecting Ngāti Rongo territories.[561]

According to Mr Beazley, a small number of Ngāti Kahu, Ngāti Rongo, and Ngāti Raupo whānau returned to their Mahurangi lands in the late 1830s, and by 1840 Ngāti Kahu were occupying Whangaparāoa, including Okura and Orewa. Ngāti Rongo and Ngāti Raupo were also occupying Okura and Te Waihe, while Ngāti Raupo had lands at Te Kapa and Mangawhai as well.[562] Other sources suggest that Ngāti Rongo leader Te Hēmara did not return to Mahurangi until after 1840, though they acknowledge that he travelled between the Bay of Islands and Tāmaki during 1839.[563] Ngāti Manuhiri also returned, and though the date for their re-establishment at Mahurangi is unknown, it was likely after 1841.[564] By that time, many of these remnant Te Kawerau hapū had become associated with Ngāti Whātua.[565] Also by that time, the Hauraki tribes had asserted their rights by entering into land arrangements with settlers and the Crown, covering Aotea, Takapuna, and the entire Mahurangi coast.[566] We will discuss those transactions in chapter 6.

3.3.8 Whangaroa

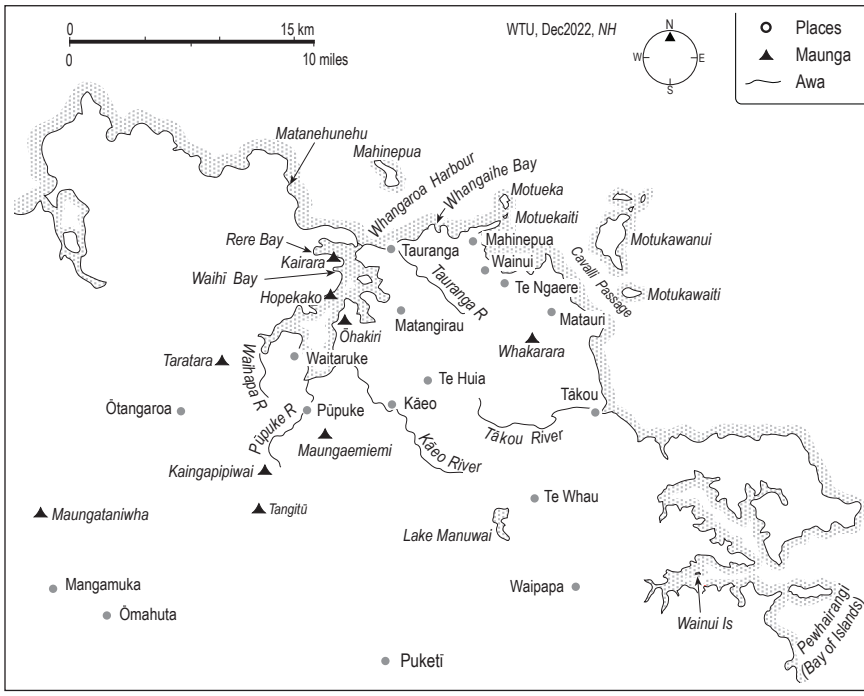
Whangaroa, like Hokianga, is a place of Ngāpuhi origins. Kupe lived there for a time, and Puhi-moana-ariki settled at Tākou before his daughter married into Nukutawhiti's people. Whangaroa also became Hongi's final home, and it is because of his late influence on evolving hapū relationships there – in the 1820s – that we consider this district last.

558. Michael Beazley (doc K8), pp 46–47.
559. McBurney, 'Traditional History Overview' (doc A36), pp 352–353.
560. McBurney, 'Traditional History Overview' (doc A36), pp 354–355.
561. McBurney, 'Traditional History Overview' (doc A36), pp 387–388.
562. Beazley, 'Te Uri o Maki' (doc K2), p 33; see also McBurney, 'Traditional History Overview' (doc A36), p 381.
563. Arapeta Hamilton (doc K7(b)), p 6; McBurney, 'Traditional History Overview' (doc A36), pp 383–389.
564. McBurney, 'Traditional History Overview' (doc A36), p 381.
565. McBurney, 'Traditional History Overview' (doc A36), pp 396–398; Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), pp 14–16.
566. McBurney, 'Traditional History Overview' (doc A36), pp 327–328, 380; Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), pp 20–25; Belgrave, Young, and Deason, 'Tikapa Moana' (Wai 1362 ROI, doc A6), pp 526–528, 536–537.

Whangaroa is a former river valley, submerged by rising sea levels 'to create a long deep harbour with several large internal bays'.[567] The harbour 'is known for its diverse environments, its many maunga, and its many wai systems'.[568] In Whangaroa traditions, this landscape was created by fighting among 'lesser' taniwha as they 'tried to grab land for themselves', thereby gouging out harbour inlets and other waterways. Of particular significance was a fight between Maungataniwha (the dominant peak, who had travelled from Hawaiki ahead of humans) and his beautiful companion Taratara, of whom he was very jealous. Finding she had been unfaithful, he kicked her, leaving her with a broken back, while her head became the island Horoiwi. Her lover Hotou was kicked beyond Kaikohe, where he is a maunga.[569] There is another version of this kōrero, in which Taratara was instead a handsome, popular, and benevolent man. Maungataniwha, his jealousy roused – and his anger, too, after Taratara laughed at him – kicked and beat him savagely, so that his body parts were left scattered about Whangaroa. Maungataniwha took up his final location in the Mangamuka ranges.[570] Also highly significant in Whangaroa tradition is Tangitū, at the head of the harbour. Below Tangitū sits Kaingapipiwai, source of the four springs that flow down the valley into Whangaroa, Hokianga, Mangonui, and Bay of Islands harbours, 'establishing the basis of whanaungatanga that unites the people of these areas', and providing both spiritual and physical sustenance.[571]

Claimants told us that the harbour was correctly known as Whaingaroa ('the long wait'), in reference to the ancestor Rauru-iti who kept vigil after the departure of her husband Kaimohi for war. She is said to still be visible at Waihi Bay.[572] We were told that Whangaroa is an abode of the atua who traversed the land before human occupation. On one of the cliff faces at the eastern harbour entrance is Te Pokopoko o Hinenuitepō, and the harbour 'is the womb of Hinenuitepō . . . a place of peace, where the winds don't seem to be as severe as outside the harbour, or the sea so rough'. Below the cliff face is Te Urenui o Māui, where Māui attempted to enter into his mother to acquire immortality.[573] Taupō Bay is where he stood as he slowed the course of the sun.[574] Maui lost the mortality battle, and therefore 'parts of him lie at the entry to the Whangaroa harbour'.[575] Outside the western

567. Brougham, 'Report on Whaingaroa Lands' (doc E2), p 4.
568. Frances Goulton (doc AA124), p 9.
569. Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 18–19.
570. Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 18–19.
571. Frances Goulton (doc AA124), pp 10–11; see also Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), p 20; Aldridge, Tauroa, Rapata, and Smith (doc E45), pp 24–25; Robyn Tauroa (doc S28(b)), p 6.
572. Aldridge, Tauroa, Rapata, and Smith (doc E45), p 20; Frances Goulton, transcript 4.1.20, Te Tapui Marae, pp 418–419; Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), p 17.
573. Frances Goulton (doc S29), pp 13–14.
574. Frances Goulton (doc AA124), p 10.
575. Frances Goulton (doc AA124), p 10.



Map 3.8: Whangaroa.

harbour entrance is Matanehunehu (Pā Island), where the atua Tāwhaki is said to have begun his ascent into the heavens.[576] According to claimant Rāwiri Timoti,

> A wera wahi e honoana e honoana ki te ao wairua. E mohio o tatou matua o tatou tupuna i tera wa, i tera wahi.
>
> Those sites are our connection to the spiritual realm. Their significance was well known to our ancestors, and they passed on the stories to the generations of today.[577]

Whangaroa is also associated with early human occupation. Kupe is said to have lived there for a time, cultivating the land and creating an enormous hākari (feast) at Whakarara, near Matauri.[578] The waka *Mātaatua* is also said to have stopped in the harbour and at several places around the coast before reaching its final resting

576. Aldridge, Tauroa, Rapata, and Smith (doc E45), p 26; Robyn Tauroa and Thomas Hawtin (doc AA149), pp 6–7; see also Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 37; Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), p 17.

577. Robyn Tauroa and Thomas Hawtin (doc AA149), pp 6, 8; translation in original.

578. Aldridge, Tauroa, Rapata, and Smith (doc E45), p 29; see also Hohepa, 'Hokianga' (doc E36), p 124.

place in the Tākou River.[579] Frances Goulton of Whangaroa told us of the significance of these atua and tūpuna:

> [I] konei a Māui, i konei a Hine-nui-te-po, i konei a Tawhaki, i konei a Kupe rātou katoa, wā mātou nei whakapai e mara, ko ia ko te tīmatanga o te ao ko Whangaroa.
>
> Māui was here in the beginning, Hine-nui-te-pō was here, Tāwhaki was here, Kupe was here, all these significant ancestors and we assert that the commencement of the world began right here in Whangaroa.[580]

Tradition, supported by archaeological evidence, suggests that settlement was concentrated along the coastline, both inside and outside the harbour. In particular, there were significant settlements at river mouths (Pūpuke, Kāeo, Wairākau, Tauranga, and Tākou) which offered fertile land for cultivation, as well as access to kai ngāhere (bush food) and kaimoana (seafood). Also significant were coastal settlements from Mahinepua to Matauri.[581] Whangaroa claimants told us that their territories were 'part Tangaroa and part Papatūānuku', and their tūpuna 'developed ways to live in both domains',[582] with 'one leg . . . on the land' and 'one leg . . . on the sea'.[583] Claimants also explained how their tikanga provided for sharing, use, and preservation of food sources. Mana moana, especially, was shared, with many hapū having rights to occupy seasonal fishing settlements on islands such as Motueka-nui and Motueka-iti.[584]

3.3.8.1 *Initial waves of settlement*

Like other parts of this district, Whangaroa was peopled in many waves. Ngāti Awa are acknowledged as the territory's first long-term settlers.[585] After *Mātaatua* made its final landfall, its people spread out to occupy, at one time, the northern Bay of Islands and much of the territory north of Hokianga, before conflicts with other Muriwhenua groups began to reduce their territories.[586] In turn, Ngāi Tamatea and Ngāti Kahu reached Whangaroa from the north, along with associated hapū such

579. Aldridge, Tauroa, Rapata, and Smith (doc E45), p 28; Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 23–24.

580. Frances Goulton, transcript 4.1.20, Te Tapui Marae, p 420.

581. Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 25–27; see also Ruiha Collier (doc G13), p 18.

582. Frances Goulton (doc S29), p 12.

583. Frances Goulton, transcript 4.1.20, Te Tapui Marae, p 421.

584. Sailor Morgan (doc S13), p 10; Moana Woods and Harry Brown (doc N8), p 2; Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 25–27; see also Ruiha Collier (doc G13), p 18.

585. Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 23–24; Brougham, 'Report on Whaingaroa Lands' (doc E2), p 44.

586. Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 23–24; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 173–174, 177–178, 180, 212, 216.

as Te Paatu.[587] Throughout much of their histories, Whangaroa hapū shared the harbour, moving from place to place in accordance with seasonal food-gathering requirements.[588] Ngāti Torehina were also related to these groups and occupied the coast from Mahinepua to the Bay of Islands.[589] They intermarried with Te Hikutū and became established in various places on the Purerua Peninsula; they are now particularly associated with Wharengaere.[590]

The Bay of Islands and Hokianga conflicts discussed in previous sections led to new migrations and layers of intermarriage. During Rāhiri's lifetime, Te Kākā and Tōmuri won a series of battles in northern Whangaroa before they and their relatives settled in the district and intermarried.[591] Tōmuri's brother Tīpoki and Rāhiri's brother Tangaroa-whakamanamana are also recalled as important Whangaroa ancestors.[592]

During later conflicts with Ngāti Awa (in the early 1700s or thereabouts), various Hokianga groups including Te Hikutū are said to have settled along the coast between Mahinepua and Matauri, also intermarrying with existing populations.[593] We have already discussed migrations of Ngāti Rēhia, and sections of Ngāti Tautahi and Ngāi Tāwake in the 1780s (or thereabouts). At about the same time, a section of Ngāre Raumati was also migrating north, possibly in concert with some of Rāhiri's descendants. This group also established itself along the coast at Wainui and Mahinepua, before moving inland to Kāeo and Kaingapipiwai.[594] Whereas Ngāti Awa and Ngāti Miru are often said to have been forced out of Hokianga and Waimate, sections of these hapū as well as Ngāti Torehina remained in Whangaroa and intermarried with successive waves of new settlers. Through this process many new hapū were established, which we describe later. The last significant migration was that of Ngāti Pou, who settled at Pūpuke and Waihapa (in the inner harbour) after they were ejected from Taiāmai in the 1790s.[595]

587. Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 17, 28, 36–37, 233.

588. Aldridge, Tauroa, Rapata, and Smith (doc E45), p 25.

589. Herbert Rihari (doc R14), p 4; John Pikari (doc AA65), p 4; Hugh Rihari (doc R7), p [2].

590. Herbert Rihari (doc R14(a)), p 1; Te Hurihanga Rihari (doc B15(c)), pp 3, 5.

591. Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 190–198, 200. Ngāti Uru and Te Whānaupani are both said to descend from Te Kākā through intermarriage with Ngāti Awa: Erimana Taniora (doc C2), pp 1–2; Erimana Taniora (doc G1), p 33.

592. Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), p 192; Aldridge, Tauroa, Rapata, and Smith (doc E45), p 29.

593. Anania Wikaira (doc L18(a)), pp 17–18; Murray Painting (doc V12), pp 4–6; Erimana Taniora (doc G1), pp 32–33; Joseph Kingi (doc X17), pp 1, 4.

594. Claimants spoke of two waves of Ngāre Raumati migration. The first occurred during the 1600s, when a section of Ngāre Raumati became involved in conflicts with Ngāti Awa as far north as Kaitāia and Rangaunu. The second occurred during the late 1700s after Ngāre Raumati's disastrous interaction with Marion du Fresne, and took a section of Ngāre Raumati along the coast to Matauri and Mahinepua, then inland to Kāeo and Kaingapipiwai: Erimana Taniora (doc G1), pp 31, 32–35, 38, 55; Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 35–36; Aldridge, Tauroa, Rapata, and Smith (doc E45), p 31; Nuki Aldridge (doc AA154(c)), p 7.

595. Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 23, 28, 29, 34–35, 60, 141.

3.3.8.2 *Hongi's defeat of Ngāti Pou*

The final stage of Ngāpuhi settlement of Whangaroa lands occurred under Hongi Hika, whose mother was from Pūpuke.[596] After falling out with his Kaikohe kin in 1826, Hongi went to live on his mother's lands, where he quickly came into conflict with Ngāti Pou.[597] There were several causes, including Ngāti Pou occupation of these lands and desecration of his grandfather's bones.[598] Hongi gathered a force that included most Whangaroa hapū and was led by two of Hongi's cousins, Tāreha (Ngāti Rēhia) and Ururoa (Te Tahawai).[599] Together, these laid siege to the Ngāti Pou pā at Taratara. Most Ngāti Pou fled into the Mangamuka Valley before continuing on to Waimamaku on the Hokianga coast. During the hostilities, Hongi was shot and wounded, and Ururoa's brother was killed. Over a year later, in March 1828, Hongi died from the wounds he had sustained.[600]

According to the traditional history of Whangaroa compiled by a team led by claimant historian Dr Aroha Harris, authority over the harbour and its environs was then shared among Ururoa, Tāreha, Tupe of Te Whānaupani, and Hongi's son Hare Hongi Hika.[601] Pairama Tahere also named Te Hōtete and Pororua (who inherited leadership of Te Uri o Te Aho) as leaders for the western side of Whangaroa, extending to Maungataniwha and Kohumaru.[602] According to Rihari Dargaville (Te Rarawa, Ngāti Kaitutae, Ngāti Manawa), these leaders were responsible for protecting Whangaroa from further conflict, and also seemingly

596. Hongi's mother Tuhikura was the daughter of Tahapango (Ngāti Mokokohi) and Taingariu (who descended from Māhia and Torongare, founding ancestors of the northern and southern alliances): Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 43, 116–117, 192. Tahapango had grown up near Taupō Bay in northern Whangaroa, but had been gifted Pūpuke and Kaingapipiwai lands after defending them against an attack from Hokianga: Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 42–43, 117, 233–234. He also occupied Kaheka Point at the entrance to Waitapu Bay: Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), p 43.

597. Hongi blamed Kaikohe relatives for the suicide of his wife, Tangiwhare: Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 135–136.

598. Other causes included Ngāti Pou harassment of the Wesleyan mission at Whangaroa, and earlier grievances arising from Moremonui and the *Boyd* killings: Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 134–136.

599. Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 60, 131, 136–138, 154; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 190. Hapū involved included Te Tahawai, Ngāi Tūpango, and Ngāti Kuta, as well as Te Awaraupo, Ngāti Kahuiti, Te Aeto, Toihau, Te Uruputete, Ngāti Kawau, Te Whānaupani, Ngāti Paruru, and even Ngāti Miru. Ururoa was also known as Rewharewha.

600. Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 34–35, 137–139. The Ngāpuhi campaign also extended into Maungataniwha and Kohumaru, claiming lands there. According to Mr Tahere, the leaders in these battles included Ururoa, Te Hōtete, and Te Awha, who was principal rangatira of Te Uri o Te Aho: Pairama Tahere (doc G17(b)), pp 3–4. Mr Tahere also gave an account from Hōne Mohi Tāwhai of Te Uri o Te Aho involvement in the campaigns and subsequent occupation of inland Whangaroa: Pairama Tahere (doc Q2(a)), p 4.

601. Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 140, 154.

602. Pairama Tahere (doc G17(b)), pp 3–4.

for managing trading resources (such as timber) and relationships.[603] As part of this role, a section of Te Matarahurahu (whose origins are discussed later) migrated from Kaikohe and, according to claimant Rose Huru, occupied lands at Maungataniwha, Ōtangaroa, and Kohumaru, where they intermarried with and have since come to see themselves as part of Ngāti Kahu.[604]

3.3.8.3 *Western Whangaroa*

All of the rangatira who exercised mana over Whangaroa territories after Hongi's defeat of Ngāti Pou had prior rights in the district – most through ancestry, and Tāreha through the prior raupatu (conqest followed by occupation) of Ngāti Miru in the territories from Waimate to Tākou.[605] The tūpuna involved were Te Puta and his son Tahapango, who affiliated to a number of groups, including Ngāti Mokokohi (a hapū of Ngāti Kahu), Ngāti Awa, and Ngāti Miru.[606] Te Puta and his descendants are said to have exercised mana over most of Whangaroa Harbour.[607] Hapū descending from him include Te Aeto, Kaitangata, Ngāti Imiru, Ngāti Kahuiti, and Ngāti Rangi.[608]

Together with Ngāti Mokokohi, these hapū were linked with territories along the western side of the harbour, inland as far as Ōtangaroa and Kohumaru. More specifically, Ngāti Mokokohi were linked with Taupō Bay, Ōtangaroa, and Pūpuke-Kaingapipiwai, but were said to have associations throughout the harbour.[609] Te Aeto were connected with the eastern harbour lands from Taupō Bay inland to

603. Rihari Takuira (doc C7), p 21.

604. Rose Huru (doc G10), pp 3–4, 7, 11; Patricia Tauroa, transcript 4.1.15, Whangaroa, pp 81–82; see also Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 249.

605. Owen Kingi (doc N15), pp 5–7; Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), p 140; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 145–146. Claimant Terry Tauroa referred to Whiro of Te Aeto gifting land to Hongi at Pūpuke in recognition of his descent and his assistance in dealing with Ngāti Pou: doc AA107, p 5.

606. Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 34–35, 43, 191–192; Owen Kingi (doc N15), p 4. Ngāti Mokokohi is said to have originated at Ōruru near Mangonui, before occupying Whangaroa. Te Puta is specifically associated with Matanehunehu (an island in Frear Bay), Taupō Bay, Tauranga Bay, Pararako Bay, Touwai Bay, Matangirau, and Kāeo: Robyn Tauroa (doc S28), p 11. Angela Ballara identified Ngāti Mokokohi as a hapū of Te Wahineiti: Ballara, *Iwi*, p 130.

607. Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 191–192, 220–222, 227–228. Hapū associated with Te Puta occupied lands as far inland as Ōtangaroa and Kohumaru.

608. Hapū specifically associated with Te Puta included Te Aeto: Owen Kingi (doc N15), pp 4–5; Terence Tauroa (doc N1), pp 1–2; with Kaitangata: Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 138, 192; Ngāti Rangi: Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), p 239; and Ngāti Imiru: Terence Tauroa (doc N1), p 2; Erimana Taniora (doc G1), p 35. Ngāti Kahuiti is associated with Te Aeto and Kaitangata: Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), p 34. Ngāti Rangi is in turn closely associated with Ngāti Rangimatamoemoe and Ngāti Tara: Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), p 35.

609. Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), p 34; Lloyd Pōpata (doc G9), p 37; Brougham, 'Report on Whaingaroa Lands' (doc E2), pp 48–49.

Kohumaru, and also with Matangirau. They later relocated to Kāeo and Pūpuke.[610] Kaitangata were associated with Rere Bay at the north-western harbour entrance, and later relocated to Kāeo and Pūpuke-Kaingapipiwai.[611] Ngāti Rangi (and affiliated hapū) were associated with inland territories from Ōtangaroa to Waitaruke and Pūpuke-Kaingapipiwai.[612] Ngāti Imiru were associated with Pūpuke and Kaingapipiwai.[613] Also descending from Te Puta were Ngāti Kawau, who were mainly associated with territories along the eastern side of the harbour from Ōhākiri to Wainui, but also had interests inland at Kāeo and Pūpuke.[614]

Claimants told us that the inland interests of these hapū intersected with others, including Te Matarahurahu, and Pikaahu at Ōtangaroa, Maungataniwha, and Kohumaru;[615] Te Uri o Te Aho at Maungataniwha and Kohumaru;[616] and Te Ihutai and other Mangamuka hapū at Maungataniwha.[617] Nuki Aldridge noted that several hapū and iwi groupings claimed interests in Ōtangaroa, including Ngāti Kahu, Ngāti Kahu ki Whangaroa, Ngāpuhi ki Whangaroa, and Hokianga and Waimate–Taiāmai peoples.[618]

3.3.8.4 *Eastern Whangaroa*

Te Puta's sons Tahapango and Ngāropuku were both important ancestors for Whangaroa hapū. Tahapango, in particular, is recalled for defending Whangaroa lands against Ngāti Pou encroachment, and for a series of strategic marriages between his children and their Ngāpuhi neighbours. His own marriage was to Taingariu of Ngāti Rēhia and Ngāti Ruangāio. Their daughter Tuhikura married Te Hōtete of Ngāi Tāwake and moved with him to Kaikohe. Hongi Hika was their son, and Tupe also descended from them. Another of Tahapango's children, Te Koki, married Te Mutunga of Ngāti Hine and Ngāti Rēhia. Ururoa was their son.

610. Aldridge, Tauroa, Rapata, and Smith (doc E45), p 32; Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 34–35; Robyn Tauroa (doc S28), p 11.

611. Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 34, 138, 192.

612. Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), p 35; Ihapera Baker (doc N9), p 2; see also Arena Heta (doc B30), p 2; Aldridge, Tauroa, Rapata, and Smith (doc E45), p 27.

613. Erimana Taniora (doc G1), p 35.

614. Terence Tauroa (doc N1), p 3; Ani Taniwha (doc G3), pp 6–7; Moana Woods and Harry Brown (doc N8(a)), p 1; Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 34–36; Aldridge, Tauroa, Rapata, and Smith (doc E45), p 31.

615. Rose Huru (doc G10), pp 3–4, 7, 11; Patricia Tauroa, transcript 4.1.15, Whangaroa, pp 81–82; see also Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 249.

616. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 249; Pairama Tahere (doc G17(b)), pp 4–6; Pairama Tahere (doc V19(b)), pp 2–3, 20.

617. Pairama Tahere (doc V19(b)), p 20; see also Te Enga Harris (doc V2), p 2; Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 249; Pairama Tahere (doc G17(b)), pp 4–6; Rose Huru (doc G10), pp 3–4, 7, 11; Patricia Tauroa, transcript 4.1.15, Whangaroa, pp 81–82.

618. Nuki Aldridge, transcript 4.1.6, Waitangi Marae, pp 140–141; Aldridge, Tauroa, Rapata, and Smith (doc E45), pp 11–12, 27–28.

Tahapango's third child was Te Putahi, whose son Whiro became leader of Te Aeto.[619]

Tuhikura, claimants said, was an example of the importance of wāhine rangatira in Whangaroa tradition.[620] So, too, were Hongi's wives Turikatuku and Tangiwhare, who were daughters of Te Koki and Te Mutunga.[621] Turikatuku was 'probably [Hongi's] closest friend and confidante'.[622] She was a matakite (seer or visionary)[623] and, though completely blind from 1816, she accompanied Hongi on his expeditions to the Bay of Plenty, Hauraki, and Waikato, advising him on strategy. Hongi's victory over Ngāti Maru in 1821 is credited to her tactics, and the power of her rhetoric inspired Hongi's troops at Te Ika a Ranganui. She was seriously ill when she accompanied Hongi on his Whangaroa campaign and passed away before it ended.[624]

Hapū associated with Tahapango and Taingariu include Ngāi Tūpango, Te Tahawai, Te Whānaupani, and Ngāti Uru.[625] Their overlapping territories extended along the eastern side of the harbour from Matauri to Pūpuke-Kaingapipiwai and inland to Taraire and Te Huia. More specifically, Ngāi Tūpango are now mainly associated with Te Ngāere,[626] but claimants told us they were associated with a much broader area extending from Whangaihe to Matauri and inland to Taraire.[627] Te Whānaupani are said to descend from Ngāti Miru survivors of the Waimate campaign.[628] Their territories extend from Matangirau to Kāeo and inland to Te Huia. They are also associated with Pūpuke-Kaingapipiwai.[629] Ngāti Uru are associated

619. Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 35, 42–43, 116–117,154, 192, 228–229; Marina Fletcher (doc U55), p 5; Terence Tauroa (doc N1), pp 2, 5; Terence Tauroa (doc N1(a)); Paeata Brougham-Clark (doc AA158), p 7; Rihari Takuira (doc C7), p 13; Tom Bennion, 'Kororipo Pa' (commissioned research report, Wellington: Waitangi Tribunal, 1997) (doc E7), p 4; Marina Fletcher (doc U55), pp 5–6; Joseph Kingi (doc X17), p 4. Te Mutunga is said to be of Ngāti Hine and Ngāti Rēhia, but also had older Whangaroa connections through descent from Tīpoki of Ngāpuhi and Orongoiti of Ngāti Awa: Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 116, 192; Owen Kingi (doc N15), p 5; Walzl, 'Ngati Rehia' (doc R2), p 32.

620. Robyn Tauroa and Thomas Hawtin (doc AA149), pp 9–10.

621. Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 116–117.

622. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 252.

623. Ani Taniwha (doc G3), p 42.

624. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 252–254.

625. Kawhena Paul (doc S1), p 13; Nuki Aldridge (doc AA167), p 13; Reuben Porter (doc S6), p 4; Aldridge, Tauroa, Rapata, and Smith (doc E45), p 32; Erimana Taniora (doc G1), p 35; Owen Kingi (doc N15), p 2.

626. Aldridge, Tauroa, Rapata, and Smith (doc E45), p 30; Nau Epiha and Hohepa Epiha (doc S25), pp 8–9; Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 28, 137.

627. Rihari Takuira (doc C7), pp 21–22; see also Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 32, 36–37, 206, 207, 249, 313; Sailor Morgan (doc S13), p 2. Ngāi Tūpango are also said to have interests in Matangirau through intermarriage with other hapū.

628. Erimana Taniora (doc G1), p 43.

629. Erimana Taniora (doc G1), pp 35–37, 43; Aldridge, Tauroa, Rapata, and Smith (doc E45), pp 31–32; Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), p 36.

with lands north of Puketī Forest, including Ōtangaroa and Maungataniwha in the north-west and Waipapa and Puketōtara in the south-east. Their main settlements were at Kāeo and Kaingapipiwai.[630] Closely related to Ngāti Uru are Ngāti Pakahi of Mangaiti.[631] Te Tahawai are mainly associated with Waitaruke, Pūpuke-Kaingapipiwai, and Kāeo.[632] Several of these hapū shared seasonal occupation and fishing rights at Mahinepua, and islands such as Motueka, Motukawanui, and Motukawaiti.[633]

Although Tahapango is recalled as a rangatira tupuna for these hapū,[634] there are several other important lines of descent. Ngāti Ruamahue, who are mainly associated with coastal territories such as Wainui, Te Ngāere, and Taupō Bay, are said to descend from intermarriage between Whangaroa peoples and Ngāre Raumati.[635] Ngāi Tūpango, Te Whānaupani, Ngāti Uru, and Te Tahawai have significant connections with Te Pōpoto, Te Hikutū, and Ngāi Te Whiu, which were forged after the final Hokianga battles with Ngāti Awa.[636] These connections saved Ngāti Uru from Hongi's utu after that hapū refused to join him in the campaign against Ngāti Pou. Kaitangata also refused to join Hongi and suffered heavy loss of life as a result.[637] Auha settled in Matauri late in his life and is recalled as a tupuna for Ngāi Tūpango and Ngāti Kura.[638] Although Ngāti Awa and Ngāti Miru were pushed out of Hokianga and the Bay of Islands, their bloodlines remain in all these Whangaroa hapū. Ngāti Torehina retain interests along the coast,[639] and a small group of Ngāti Miru continues to live at Mahinepua under that name.[640]

630. Aldridge, Tauroa, Rapata, and Smith (doc E45), pp 31–32; Erimana Taniora (doc C2), pp 5–6; Nuki Aldridge (doc AA154(c)), pp 9–10; Erimana Taniora (doc G1), p 47; Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 35–36.

631. Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), p 37; Nuki Aldridge (doc AA154(b)), p 7.

632. Aldridge, Tauroa, Rapata, and Smith (doc E45), pp 8–11.

633. Rihari Takuira (doc C7), p 22; Aldridge, Tauroa, Rapata, and Smith (doc E45), pp 29, 32.

634. Aldridge, Tauroa, Rapata, and Smith (doc E45), p 32.

635. Tahua Murray (doc S21), pp 7–8, 10; Nau Epiha and Hohepa Epiha (doc S25), pp 8–9; Hone Hare (doc AA112), pp 1–2.

636. Ngāi Tūpango is said to descend from Tūpoto's son Tūteauru, founding tupuna of Te Māhurehure: Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 158, 175,319; Gary Hooker in 'Maori, the Crown and the Northern Wairoa District, A Te Roroa Perspective', report commissioned by the Waitangi Tribunal (Wai 674 R01, doc L2), pp 79–80; Te Tahawai is said to descend from Te Waiariki and Ngāti Ruanui of northern Hokianga: Joseph Kingi (doc X17), p 4; closing submissions for Wai 2382 (#3.3.339), pp 3, 339. Ngāti Uru descends from Tūiti, one of the founding tūpuna for all inner Hokianga hapū including Ngāti Pou, Te Pōpoto, and Ngāti Hao: Ngāti Uru and Te Whānaupani descended from Rāhiri's grandson Rongomaitekawa, as did the Ngāti Hao leaders Patuone and Nene: Erimana Taniora (doc C2), pp 7–9; Erimana Taniora (doc G1), pp 31, 37, 39–40. Ngāti Uru intermarried with Ngāi Te Whiu from the late 1700s onwards: Erimana Taniora (doc G1), pp 31, 35–36, 38.

637. Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 137–138.

638. Anaru Kira (doc S7), p 4; Rihari Takuira (doc C7), p 22.

639. Herbert Rihari (doc R14), p 4; Herbert Rihari (doc R14(a)), p 1; Hugh Rihari (doc R7), p 2.

640. Nau Epiha and Hohepa Epiha (doc S25), pp 8–9.

Many Whangaroa hapū names are relatively recent, emerging after the Ngāpuhi defeat of Ngāti Miru at Waimate, or after Hongi's ejection of Ngāti Pou. In turn, extensive intermarriage has blurred lines between them,[641] and land interests have also become blurred as a result of movements around the harbour during the 1800s, especially so from coastal areas to Pūpuke and Kaingapipiwai after Hongi's campaign against Ngāti Pou.[642] Rueben Taipari Porter told us that no one owned the land: '[it] was vested in everyone and we all shared in [it]'.[643] Likewise, Robyn Tauroa told us that Whangaroa peoples had many hapū affiliations but did not identify with any single waka or iwi. When asked to which she belonged, she replied, 'My dad used to say we were Whangaroa.'[644]

3.4 Ngā Hononga Hou / New Relationships, 1830–40

From the mid-1820s, Ngāpuhi involvement in warfare declined. Secure in their own territories, hapū leaders increasingly turned their attention towards advancing the prosperity of their people by taking advantage of their rapidly growing contact with Pākehā. From the late 1820s on, the number of whaling and trading ships visiting the Bay of Islands grew rapidly, creating demand for pork, potatoes, liquor, labour, and other provisions and services. Flax and timber became valuable export commodities. And missionaries, traders, sawyers, and others arrived to settle in ever-increasing numbers.

These developments affected the district unevenly. In Mahurangi and Whāngārei, European settlement was minimal and was confined to temporary sawmilling gangs, two small missions, and a handful of farmers and traders. Settlement concentrated mainly in the Bay of Islands and (to lesser degrees) Hokianga and Whangaroa. In those locations, growth in trading relationships brought opportunities for unprecedented material prosperity. By the 1830s, thousands of British pounds were flowing each year into those economies.[645] Demand for European clothing, goods, and other technology correspondingly grew. Mission schools taught the sons of rangatira to read and write while also learning about Europe's atua. Official contact with Britain increased, too, as rangatira sought an international alliance to help manage the challenges associated with growth in trade and settlement.

These events brought significant economic change, along with some accommodations by both Māori and Pākehā that were aimed at ensuring that relationships were harmonious and mutually beneficial. But these changes did not fundamentally alter the district's social or political organisation. With very limited

641. Erimana Taniora (doc G1), p 36, Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 21,33, 195.

642. Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 34–36.

643. Reuben Porter (doc S6), p 55.

644. Robyn Tauroa and Thomas Hawtin (doc AA149(b)), p 4.

645. Henare, Petrie, and Puckey, 'Oral and Traditional History on Te Waimate Taiamai Alliance' (doc E33), pp 142–143; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 631.

exceptions, the various Ngāpuhi hapū and alliances continued to exercise mana in the territories discussed earlier. Mana, including political and economic authority, remained with hapū; rangatira exercised that authority on behalf of their people, in pursuit of collective security and well-being. Inter-hapū alliances that had formed before 1830 endured and were strengthened by continued intermarriage. Pākehā arrivals were welcomed and incorporated into a Māori world in which whanaungatanga and associated values and tikanga continued to dominate.

We described these events in depth in chapters 3 to 5 of our stage 1 report. What follows is a summary acknowledging the changes that occurred, which brings our description of this district's tribal landscape up to the time of the treaty.

3.4.1 Conflict and peacemaking

Large-scale regional warfare reached its climax at Te Ika a Ranganui in 1825, and declined thereafter.[646] Ngāti Whātua and their allies suffered a defeat and subsequently left the Kaipara and Tāmaki areas.[647] A buffer zone had been established south of Whāngārei, reducing the likelihood that the Bay of Islands would again face attack from the south.[648] And the peoples of Waikato and Hauraki had obtained muskets in sufficient quantities to discourage further campaigns, at least on the scale of the Ngāpuhi-led conflict of 1821 to 1825.[649]

Under Hongi's instruction, Rewa, Te Wharerahi, and Hinutote of Ngāi Tawake negotiated early peace agreements between the northern alliance and Waikato and Hauraki tribes. Hokianga hapū also respected these arrangements.[650] Of the three taua that travelled south after 1825, all were led by southern alliance or Te Parawhau rangatira seeking utu for causes that did not directly involve Hongi or Hokianga people.[651] Missionaries often sought to present themselves as the peacemakers, and on occasion were viewed as such in inter-iwi conflicts, which downplayed the traditional roles played by rangatira in negotiating peace and restoring relationships.[652] In fact, Māori had long peacemaking traditions which involved direct negotiation between the parties, often in the presence of a neutral ariki or rangatira. Peace agreements were typically secured through intermarriage and other means such as gifts (as in Takapuna), transfer of resources or land (as

646. Michael Beazley (doc K8), pp 24–25, Walzl, 'Mana Whenua Report' (doc E34), p 61.
647. Walzl, 'Mana Whenua Report' (doc E34), p 61.
648. McBurney, 'Traditional History Overview' (doc A36), pp 308, 329.
649. McBurney, 'Traditional History Overview' (doc A36), p 317.
650. McBurney, 'Traditional History Overview' (doc A36), pp 300–303, 333–334, 338, 340–341.
651. In 1826, Pōmare I of Ngāti Manu invaded Waikato and was killed by Hauraki and Waikato tribes. In 1828, his nephew Pōmare II sought utu by killing two Ngāti Maru leaders, leading to Hauraki tribes defeating a combined Te Parawhau-Ngāti Wai-Ngāti Manu force on the Coromandel Peninsula. In 1832, a Whāngārei taua travelled into Waikato, suffering serious defeat. These conflicts are described by McBurney: McBurney, 'Traditional History Overview' (doc A36), pp 314–324.
652. See Harrison Wright, *New Zealand, 1769–1840: Early Years of Western Contact* (Cambridge: Harvard University Press, 1959), pp 180–181; Belich, *Making Peoples*, pp 164, 168; Angela Ballara, 'Warfare and Government in Ngapuhi Tribal Society, 1814–1833: Institutions of Authority and the Function of Warfare in the Period of Early Settlement, 1814–1833, in the Bay of Islands and related Territories' (MA thesis, University of Auckland, 1973), fols 188–192.

in Mahurangi where Hauraki tribes acquired fishing rights), and return of war captives.[653]

Many of the senior Ngāpuhi rangatira of the 1820s and 1830s had reputations as peacemakers, and were involved in resolving both internal and external conflicts.[654] Rewa and Wharerahi played central roles in peacemaking negotiations with Waikato in 1823; notably, Rewa's daughter Matire Toha was betrothed to Katitakiwā, the younger brother of Te Wherowhero, and their marriage preserved the peace between the two powerful confederations.[655] Rewa and, it seems, Wharerahi and Pōmare II also became involved in peace negotiations after the southern alliance, Ngātiwai, and Te Parawhau became involved in conflict with Hauraki tribes in 1828.[656] Patuone played a critical role in securing peace between Ngāpuhi and Ngāti Paoa, marrying into that tribe and settling within their territory.[657] Patuone, Rewa, and Wharerahi were all involved in negotiations between Waikato, Hauraki, and Ngāti Whātua at Tāmaki in the late 1830s, which resulted in Te Taoū and other Tāmaki peoples returning to their former lands.[658] Southern alliance hapū, meanwhile, appear to have negotiated independently. Pōmare II reached a peace agreement with Ngāti Raukawa in the 1830s, which was cemented through his marriage to a senior woman of that iwi, and by Ngāti Raukawa gifting him a whare whakairo (carved house) at Kāretu.[659] Claimants told us that peace agreements such as these were regarded as highly tapu, and were sealed with ceremonies that invoked atua and sought their sanction, as well as through marriages that bound the parties together through whanaungatanga.[660] Ngāpuhi also secured peace with Ngāti Kahungunu and Ngāti Porou in the late 1830s.[661]

Northern alliance hapū were involved in some conflicts after 1825, but they tended to be local and relatively restrained. As well as Hongi's Whangaroa campaign against Ngāti Pou, there were minor conflicts in Hokianga during the 1820s as hapū contested authority over trading relationships and resources. One of those would lead to Ngāti Korokoro agreeing to confine their trading activities to the southern side of the harbour.[662] In the last few years of the 1820s, a coalition of Ngāi Tāwake, Ngāti Rēhia, Ngāti Rāhiri, and other northern alliance hapū mounted a series of attacks on Ngāre Raumati territories in the southern Bay of

653. These matters are discussed in our stage 1 report: Waitangi Tribunal, *He Whakaputanga me te Tiriti*, *The Declaration and the Treaty*, pp 261–262.

654. Rewa, Wharerahi, Patuone, Tītore, Pōmare II, and Kāwiti were all regarded as peacemakers: see Waitangi Tribunal, *He Whakaputanga me te Tiriti*, p 261.

655. McBurney, 'Traditional History Overview' (doc A36), pp 300–303, 339–340; Joseph Kingi (doc W34), pp 3–5; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 403.

656. McBurney, 'Traditional History Overview' (doc A36), pp 320–322.

657. McBurney, 'Traditional History Overview' (doc A36), pp 338, 340–341, 354.

658. McBurney, 'Traditional History Overview' (doc A36), pp 347–350.

659. Document F11, pp 1–2. The house was dismantled after Pōmare II's death.

660. John Klaricich (doc C9(b)), para 5; Tonga Paati (doc C40), pp 3–4.

661. McBurney, 'Traditional History Overview' (doc A36), pp 325–326.

662. Hohepa, 'Hokianga' (doc E36), pp 279–280; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 616, 618–619, 622–623; see also Hinerangi Cooper-Puru (doc C37), pp 6–7; John Klaricich (doc C9), pp 21–22.

Islands. Utu for the death of Rewa's mother was one cause; another, underlying cause was the quest for control of Bay of Islands trading relationships. During the 1820s, Pāroa Bay (controlled by Ngāre Raumati) had gradually replaced Rangihoua (controlled by the northern alliance) as the preferred anchorage for visiting ships. The conflict ended with the northern alliance gaining control of Ngāre Raumati territories from Pāroa to the headlands at Rākaumangamanga and on to Taupiri Bay. Some Ngāre Raumati departed for Whangaruru, Whananaki, Matapōuri, and Ngunguru where they intermarried with Ngāti Wai and other occupants; others are said to have remained in the Bay of Islands under the authority of northern alliance hapū.[663] In memory of these events the descendants of Rewa and Moka adopted a new hapū name, Te Patukeha.[664]

Te Matarahurahu (closely associated with Te Whānau Rara and sometimes recorded as Ngāti Rahurahu)[665] also seems to have emerged during the 1820s or thereabouts. They were closely associated with Ngāti Rāhiri and Ngāti Kawa,[666] and shared their territorial interests with those hapū at Waitangi, Puketona, Oromāhoe, and Pākaraka,[667] but they also had close links with Ngāti Tautahi, Ngāi Tāwake, and other Kaikohe hapū,[668] and were said by one claimant to be the descendants of Hongi.[669] During the 1840s, rangatira with Te Matarahurahu affiliations were among those who played a significant role in the Maori–Crown relationship: Hōne Heke (also of Ngāti Rāhiri, Ngāi Tawake, Ngāti Tautahi, and Te Uri o Hua), Marupō (also of Ngāti Kawa, Ngāti Pou, and Ngāti Rēhia), and Te Kēmara (also of Ngāti Rāhiri and Ngāti Kawa).[670]

After the northern alliance gained control of Pāroa, it ceased to be a major anchorage, with that role passing to the Ngāti Manu settlement at Kororāreka. In 1830 that, too, passed into northern alliance hands following a conflict caused by a visiting ship captain. We heard two accounts of its origins. In one, the captain discarded his Ngāti Manu wives (one a daughter of the Kororāreka rangatira Kiwikiwi and the other a relative of Te Morenga) in favour of the daughters of Hongi and Rewa, and serious insults were then exchanged. In the second account, the captain, while under Ngāti Manu protection, abducted Hongi's daughter. In

663. Walzl, 'Ngati Rehia' (doc R2), pp 61–62; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 384–388; Taipari Munro (doc I26(a)), p 16; Sissons et al, *Ngā Pūriri o Taiamai*, pp 37–38, 52. The main Ngāpuhi leaders in this campaign were Rewa (Ngāi Tāwake), Tītore (Ngāti Rēhia), and Te Kēmara and Marupō (Ngāti Rāhiri). Some sources also name Mohi Tāwhai (Te Māhurehure of Hokianga) and Rewharewha (another name for Ururoa of Whangaroa) as being involved.

664. This refers to the turnip garden in which Rewa's mother was killed – 'keha', meaning 'turnip', and 'patu', meaning 'killing': Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 385.

665. Bruce Stirling, 'From Busby to Bledisloe: A History of the Waitangi Lands', report commissioned by the Waitangi Marae Trustees and James Henare Maori Research Centre, 2016 (doc W5), p 75.

666. Merata Kawharu (doc E50), pp [4]–[5]; Stirling, 'From Busby to Bledisloe' (doc W5), pp 34, 39, 56; Renata Tane (doc C18(a)), p 9.

667. Stirling, 'From Busby to Bledisloe' (doc W5), pp 34, 39, 41; Merata Kawharu (doc E50), pp [3]–[5]; Joyce Baker (doc W37), p 4.

668. Merata Kawharu (doc E50), pp [3]–[5]; Stirling, 'From Busby to Bledisloe' (doc W5), p 56.

669. Rose Huru (doc G10), p 7.

670. Stirling, 'From Busby to Bledisloe' (doc W5), p 56; Merata Kawharu (doc E50), pp [3]–[5].

any event, the northern alliance, including Hongi's cousin Ururoa, responded by instigating a muru against Ngāti Manu. Ngāti Manu resisted and a woman from Ururoa's party was accidentally shot. The ensuing battle left at least 30 dead (and some estimates are much higher). Critically, one was the senior Ngāti Rēhia rangatira Hengi, whose death demanded utu. This conflict is commonly referred to as the 'Girls' War'.[671]

To prevent further hostilities, Ngāti Manu left Kororāreka, led by Pōmare II and Kiwikiwi to occupy Paihia initially, and then Ōtuihu. Tītore and Tāreha of Ngāti Rehia, Rewa and Moka of Ngāi Tāwake, and Hongi's cousin Ururoa (Te Tahawai) all acquired interests in Kororāreka,[672] though Ngāti Manu claimants told us that their forebears had never relinquished their claim to mana whenua over the township.[673] Ngāti Manu retained control of the bays immediately south of Kororāreka, from Matauwhī to Ōkiato, but left them unoccupied, apparently as a buffer zone against further conflicts.[674]

Other conflicts would occur, most notably in 1837 when northern and southern alliance hapū again clashed.[675] But this was the last significant shift in control of the Bay of Islands land and trading relationships prior to the signing of te Tiriti o Waitangi in February 1840. By 1832, the musket wars would effectively be at an end so far as Ngāpuhi were concerned. The 'crisis of mana' that had afflicted them after Moremonui and Waiwhāriki had been resolved in their favour. Hongi and those who fought alongside him had brought Ngāpuhi a level of security that had not been felt for at least two generations and probably not since the wars with Ngāti Awa began in the 1600s.[676]

Although Hongi is recalled as a great leader, his legacy is broader than that. He was also one of the first Ngāpuhi leaders to sponsor missionaries; one of the first to plant and harvest wheat; one of the first to understand the economic and political importance of controlling trade; one of the first to grasp the potential for a large labour force using iron tools to revolutionise agricultural production; and one of the first to consciously foster alliance with Britain. He was, as recorded in the Whangaroa traditional history, a traditionalist in his motives (utu and mana) yet a modernist in the means he used to serve those motives.[677]

Hongi was one of several senior Ngāpuhi rangatira who died during the 1820s; Muriwai of Te Pōpoto, and Pōmare I and Te Whareumu of Ngāti Manu were

671. Waitangi Tribunal, *He Whakaputanga*, Wai 1040, pp 109–110; Walzl, 'Ngati Rehia' (doc R2), pp 62–65; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 388–389; Ruiha Collier (doc AA162), pp 5–6; Te Huranga Hohaia (doc D8), pp 16–17, Ngāti Manu closing submissions (#3.3.99), p 41.

672. Walzl, 'Ngati Rehia' (doc R2), pp 62–65; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 388–389; Ruiha Collier (doc AA162), pp 5–6; Te Huranga Hohaia (doc D8), pp 16–17.

673. Joyce Baker (doc F16(b)), pp 3–4, 7; Marsha Davis (doc F33), pp 10–11.

674. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 43.

675. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 415.

676. Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 142–143.

677. Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 142–143.

others.[678] Their deaths left younger generations of leaders to guide their people through the 1830s and into the post-treaty years.[679]

3.4.2 Missions and trade

From 1823 to 1840, the number of missions in this district increased six-fold. After the early experiments at Ōihi and Kerikeri, four more missions were opened in the Bay of Islands, four in Hokianga, three in Whangaroa (though one was subsequently abandoned after just four years), and one at Tangiterōria in the lower Mangakāhia Valley.[680] Rangatira initially competed to attract missions because they were seen as a step towards attracting settlers and traders.[681] From the mid-to-late 1820s, missions and mission schools became the means by which hapū could acquire literacy, farming skills, and cultural knowledge needed to further advance trading and other relationships.[682]

Trade advanced at a similar rate. The number of ships visiting the Bay of Islands grew from about 20 per year in the 1820s to well in excess of 100 by 1839.[683] Many of these were whaling ships which called at Kororāreka, Ōtuihu, or Waikare seeking provisions of water, pork, potatoes, and dried fish. But by the late 1830s, trading ships were seeking whole cargoes of food for export to New South Wales. Areas under cultivation grew rapidly as Waimate and Taiāmai effectively became market gardens for Sydney.[684] Flax was a highly valued commodity by the end of the 1820s, becoming a leading export item by 1831 (with a value of £26,000 that year) before it declined in importance.[685] Hokianga was the centre of that trade, and also became a centre for timber exports from the late 1820s. Whangaroa, Mahurangi, and to a lesser degree, Mangakāhia, also became sites for timber exports in the following decade.[686] By 1840, more than 20 sawmills had been established along the Hokianga rivers, and another two at Whangaroa, while a Mahurangi site had come and gone.[687]

678. The dispute was known as the Pigs' War and concerned a dispute over pigs that Ngāti Manu gifted to the people of Waimā in the early 1800s and later reclaimed: Hohepa, 'Hokianga' (doc E36), pp 279–280; Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), p 136.

679. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 388.

680. Nolan, mapbook (doc B10(b)), pl 19.

681. Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), pp 119–120.

682. O'Malley, 'The Nature and Extent of Contact and Adaptation in Northland' (doc A11), pp 195–197.

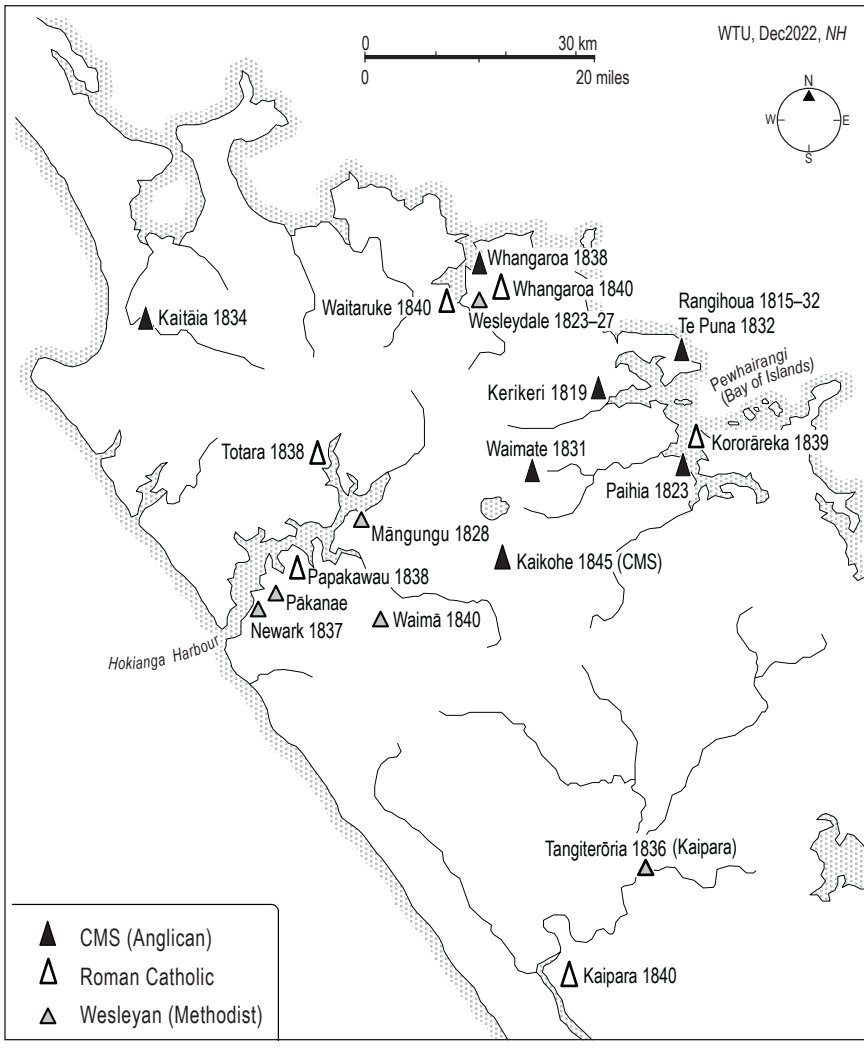
683. O'Malley, 'The Nature and Extent of Contact and Adaptation in Northland' (doc A11), p 119; see also Nolan, mapbook (doc B10(b)), pl 16.

684. Henare, Petrie, and Puckey, 'Oral and Traditional History on Te Waimate Taiamai Alliance' (doc E33), pp 146–148; O'Malley, 'The Nature and Extent of Contact and Adaptation in Northland' (doc A11), pp 118–119.

685. O'Malley, 'The Nature and Extent of Contact and Adaptation in Northland' (doc A11), pp 151–152.

686. O'Malley, 'The Nature and Extent of Contact and Adaptation in Northland' (doc A11), pp 152–153.

687. Nolan, mapbook (doc B10(b)), pl 18.



Map 3.9: Missions, circa 1840.

Business opportunities brought permanent settlers in far greater numbers. Early settlement had been almost entirely limited to missionaries and escaped convicts,[688] but from about 1830 traders began to settle around the Bay of Islands and Hokianga coasts (and later also in Mangakāhia),[689] and they, in turn, brought

688. O'Malley, 'The Nature and Extent of Contact and Adaptation in Northland' (doc A11), pp 13–14, 117.

689. Walzl, 'Mana Whenua Report' (doc E34), pp 253–255.

sawyers, blacksmiths, shipwrights, and other tradespeople and labourers.[690] The European population north of Tāmaki probably numbered about 300 by the early 1830s, and about 800 by 1839, of whom most lived in the Bay of Islands (about 500) and Hokianga (about 200), with much smaller populations in Whangaroa and Mangonui, and little more than a handful near Whāngārei.[691]

Increased trade and settlement brought advances in prosperity but also new challenges. Agriculture, flax production, and timber milling all required coordination of substantial labour forces, and trade required negotiation across a cultural divide. Certain rangatira excelled in this new environment, establishing long-term relationships with traders who settled in territories under their authority.[692] Tītore of Ngāti Rēhia was one of those. He controlled shipping in Whangaroa, diverting international vessels to Kororāreka, which he shared with his Ngāi Tāwake relatives Rewa, Moka, and Wharerahi.[693] He also brokered timber arrangements in territories as diverse as Hokianga, Whangaroa, and Mahurangi.[694]

After leaving Kororāreka in 1830, Pōmare II and Kiwikiwi of Ngāti Manu quickly established Ōtuihu as a major trading station for visiting ships, offering liquor, prostitution, and dance and haka performances as well as the usual food supplies.[695] In Hokianga, a group of Te Pōpoto leaders – Taonui, Hōne Mohi Tāwhai, and the brothers Patuone and Nene – oversaw lucrative flax and timber trades in the Waihou and Mangamuka Valleys,[696] and Taonui provided land at Hōreke for the establishment of a shipyard.[697] Pī of Te Māhurehure in 1831 purchased his own coastal trading vessel, while others such as Pōmare II and Tītore seized vessels as utu and put them to commercial use.[698] Moetara of Ngāti Korokoro supplied visiting ships, and in the late 1820s lured sawmillers and carpenters from elsewhere in Hokianga to work under his protection.[699] Te Tirarau Kūkupa of Whāngārei and

690. O'Malley, 'The Nature and Extent of Contact and Adaptation in Northland' (doc A11), p 119.

691. O'Malley, 'The Nature and Extent of Contact and Adaptation in Northland' (doc A11), pp 14, 119–121; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 55–57; Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 47.

692. Henare, Petrie, and Puckey, 'Oral and Traditional History on Te Waimate Taiamai Alliance' (doc E33), p 121.

693. Merata Kawharu (doc E50), p [4]; Walzl, 'Ngati Rehia' (doc R2), pp 24, 47, 71–72; Henare, Petrie, and Puckey, 'Oral and Traditional History on Te Waimate Taiamai Alliance' (doc E33), pp 145–147.

694. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 621, 631, 671; Te Uira Associates, 'Oral and Traditional History for Te Rohe o Whangaroa' (doc E32), p 155; McBurney, 'Traditional History Overview' (doc A36), pp 356–365.

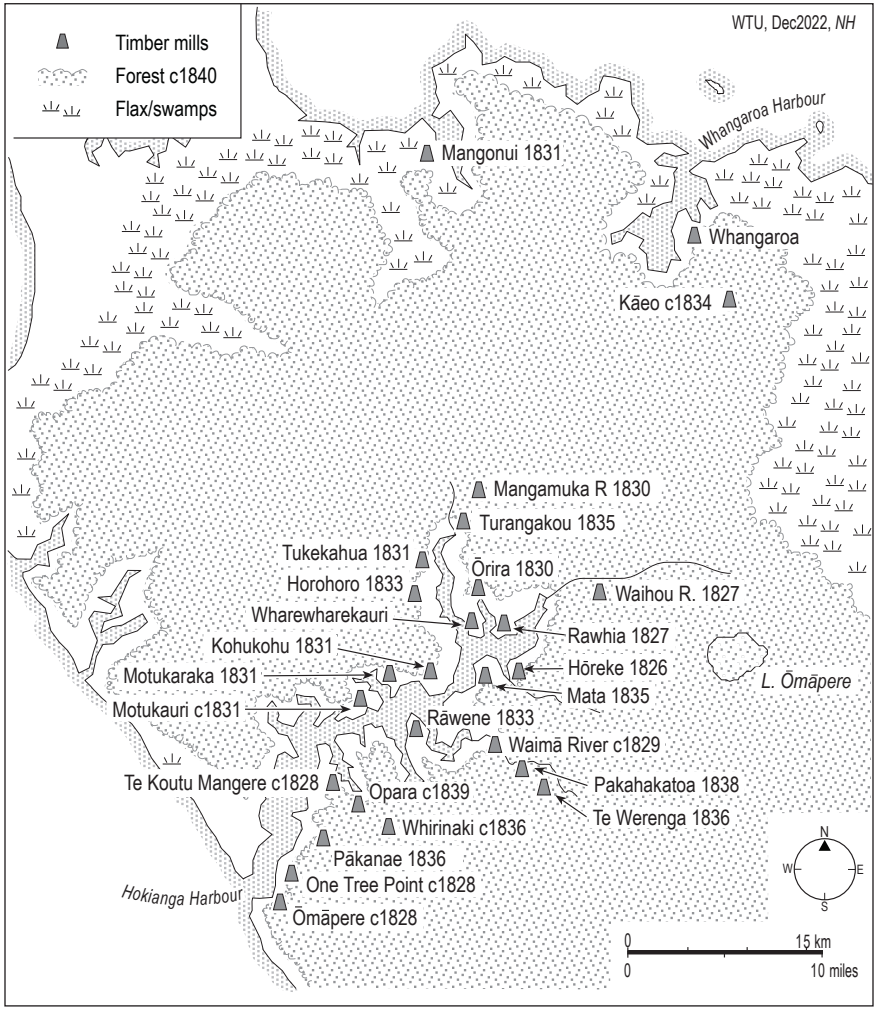
695. Henare, Petrie, and Puckey, 'Oral and Traditional History on Te Waimate Taiamai Alliance' (doc E33), pp 148–149, 153.

696. Jennifer Rutene (doc C38), pp 7–8; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 620, 668.

697. Jack Lee, *Hokianga* (Auckland: Hodder and Stoughton, 1987), pp 47–52.

698. Henare, Petrie, and Puckey, 'Oral and Traditional History on Te Waimate Taiamai Alliance' (doc E33), pp 151, 208.

699. John Klaricich (doc C9), pp 22–23; Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), p 420; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 622–623.



Map 3.10: The timber trade in Hokianga, Whangaroa, and the Bay of Islands.

Mangakāhia brokered timber deals,[700] and Parore Te Āwhā of Mangakāhia and southern Hokianga traded in timber and flax.[701] Though it is not widely known or acknowledged, Hongi's daughter Hinewhare played a critical role in Bay of Islands trading relationships. Hinewhare settled at Te Rāwhiti during the 1830s

700. Te Tirarau Kūkupa was Kūkupa's son and is also sometimes known as Te Tirarau III: Henare, Middleton, and Puckey, 'Oral and Traditional History' (doc E67), p 146.

701. Walzl, 'Mana Whenua Report' (doc E34), pp 252–253; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 617–618.

and exercised mana whenua there, supplying water and food for visiting ships. According to her descendant Ruiha Collier:

> She was well gifted in growing and creating horticultural opportunities . . . She produced mara kai (cultivated food) in areas that appeared to be sheer rock faces. She also grew a certain type of harakeke amongst the rock crevasses that were bound into rope, which allowed the native gourds to be hung for the purpose of selling the water. In other inland areas such as Kaingahoa, Te Kokinga, and Wharau, she grew other extensive agricultural mara kai gardens which included taro, kumara and riwai and which provided another economic means for their hapu. . . . The successful economic well-being of their hapu was largely attributed to the wahine, such as Hinewhare, who applied the rules of te maramataka (the Maori calendar).[702]

These and other rangatira settled traders, sawyers, missionaries, and others on their lands and offered them protection. Under such arrangements, settlers were expected to live as part of the hapū; to serve hapū interests by bringing goods and services that benefited the collective, and to accept the responsibilities expected of members.[703] Settlers were also expected to comply with their hosts' customary laws; for instance, by complying with tapu and rāhui, and could be subject to muru for transgressions.[704] Often, they were expected to marry into (and thereby align their interests with) the hapū.[705] Under tikanga, rights to occupy land and use resources were typically conditional on membership of and contribution to the hapū, and were non-exclusive; a family might occupy an area of land, for example, while other hapū members retained rights over the food sources on that land.[706]

With ongoing contact, Māori and Europeans acquired insights into each other's laws,[707] and accommodations often occurred in order to smooth relationships,[708] such as the more flexible and lenient enforcement of tapu by rangatira in contact situations.[709] Some rangitira began to acknowledge the weight Pākehā placed

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702. Ruiha Collier (doc AA162), p 8.

703. For example, see Erimana Taniora (doc C2), pp 9–14; Te Kapotai claimants, 'Te Kapotai Hapu Korero' (doc D5), p 21; Meere Shepherd Lloyd, 'Kenana in the Days of Yore' (doc G18(a)), pp 57–58; see also Tai Tokerau District Māori Council, 'Oral History Report' (doc AA3), pp 15–19.

704. Henare, Petrie, and Puckey, 'Oral and Traditional History on Te Waimate Taiamai Alliance' (doc E33), pp 122, 129.

705. Jennifer Rutene (doc C38), p 5.

706. Waimarie Bruce-Kingi, answers to Tribunal questions (doc U16(b)), p 2; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 532–536, 582, 686; Walzl, 'Ngati Rehia' (doc R2), pp 79–80.

707. For settler understanding of Māori land tenure, see Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 532–535. For settler understanding of tapu, see O'Malley, 'The Nature and Extent of Contact and Adaptation in Northland' (doc A11), pp 11, 19, 214–217.

708. O'Malley, 'The Nature and Extent of Contact and Adaptation in Northland' (doc A11), pp 11–12, 221, 265–266.

709. Henare, Petrie, and Puckey, 'Oral and Traditional History on Te Waimate Taiamai Alliance' (doc E33), p 152.

on written documents, while continuing themselves to place more importance on oral agreements and on the maintenance of ongoing relationships.[710]

While these Māori–settler relationships often flourished, they could also turn sour if settlers failed to respect their hosts' mana or transgressed against tapu.[711] An example of this occurred when Wesleyan missionaries at Kāeo sought to make themselves independent of their Ngāti Uru hosts, effectively 'set[ting] themselves up as a separate hapu without any consideration of the people who had put them there'. The missionaries were subjected to muru, in which their gardening tools and other goods were taken.[712] Among missionaries and other settlers, muru were often regarded as acts of theft,[713] whereas Māori saw them as rightful responses to offences against tikanga.[714]

3.4.3 Towards alliance

As contact increased, so, too, did associated challenges. Three issues emerged for which rangatira sought answers. The first was control of settlers, particularly where tens or hundreds were located together and had access to alcohol, but also in situations where settlers were disinclined to respect their hosts' mana and laws. In Kororāreka, growth in numbers of settlers and visiting whalers sometimes challenged order and Māori authority. Rangatira were also concerned about drunkenness there and at Hokianga sawmills. Occasionally, settlers and visiting whalers committed acts of violence against Māori.[715] Māori continued to vastly outnumber the settler population,[716] and while they possessed sufficient firepower to impose law and rein in disorderly Pākehā, they were reluctant to do so in case enforcement action might discourage other trade or provoke a military response from Britain.[717] While these concerns were real, it is important to recognise that they were also limited to a handful of settlements in a district comprising many hundreds of thousands of acres.[718]

A second and related issue for Māori was foreign threat, either through outsiders swamping them from abroad, or by military engagement. By the 1830s, significant numbers of Bay of Islands and Hokianga rangatira had visited Sydney, and some had visited London. They were well aware that European countries

710. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 533–534.
711. Henare, Petrie, and Puckey, 'Oral and Traditional History on Te Waimate Taiamai Alliance' (doc E33), pp 129–132.
712. Erimana Taniora (doc C2), pp 13–14; see also pp 10–11.
713. Henare, Petrie, and Puckey, 'Oral and Traditional History on Te Waimate Taiamai Alliance' (doc E33), p 1295.
714. Erimana Taniora (doc C2), p 14.
715. O'Malley, 'The Nature and Extent of Contact and Adaptation in Northland' (doc A11), pp 178–179; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 72–74; Shawcross, 'Maoris of the Bay of Islands', fols 333, 350–352, 364–365.
716. O'Malley, 'The Nature and Extent of Contact and Adaptation in Northland' (doc A11), pp 14, 119–121; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 55–57.
717. Belich, *Making Peoples*, pp 198–200; O'Malley, 'The Nature and Extent of Contact and Adaptation in Northland' (doc A11), pp 247–248.
718. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 72–74.

had large populations, and that uncontrolled immigration could have dire effects on indigenous populations. Ruatara had expressed such concerns before allowing Marsden to establish the first mission, and had only allowed it to go ahead after receiving assurances that missions would be managed in ways that brought mutual benefit.[719] More specifically, during the 1830s rumours emerged that France or French individuals were planning to annex Aotearoa and assert their authority here.[720]

A third, also related issue concerned management of trading and other international relationships. In 1830, the Hokianga-built vessel *Sir George Murray* was detained at an Australian port for sailing without a register or flag. On board were Te Pōpoto rangatira Taonui and Nene, which meant the incident was not only a threat to trade but a considerable affront to their mana.[721]

Ngāpuhi leaders responded to these challenges by seeking alliance with Britain, building on the relationship established by Hongi. Following on from this meeting, leaders from the Bay of Islands and Hokianga wrote to King William IV to express interest in continued trade, seek his friendship and protection against foreign threat, and ask him to deal with troublesome settlers before Māori were forced to take matters into their own hands.[722] The King responded with a promise of 'friendship and alliance',[723] and the appointment of James Busby as British Resident, charged with mediating between rangatira and Europeans to facilitate trade and address Māori concerns.[724] During 1834 and 1835, Ngāpuhi leaders, following Busby's advice, adopted a national flag so that Aotearoa vessels could trade internationally, and asserted their mana and sovereignty by signing he Whakaputanga, the Declaration of Independence.[725] In turn, Britain responded with acknowledgement of the independence and nationhood of the northern tribes.[726]

Also of significance were trading arrangements during the mid-1830s in which Tītore and Patuone brokered the supply of kauri spars for the Royal Navy. When the HMS *Buffalo* sailed for Britain carrying the spars, it carried mere pounamu and kākahu (feather cloaks) from the rangatira for King William, along with a letter inviting him to see the spars as a contribution to Britain's defence against any

719. O'Malley, 'The Nature and Extent of Contact and Adaptation in Northland' (doc A11), p 102; Binney, *The Legacy of Guilt*, p 46.

720. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 217, 219, 223, 231.

721. Donald Loveridge, '"The Knot of a Thousand Difficulties": Britain and New Zealand, 1769–1840', report commissioned by Crown Law Office, 2009 (doc A18), pp 54–55; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 240.

722. Manuka Henare, 'The Changing Images of Nineteenth Century Māori Society' (doc A16), pp 173–175; Nuki Aldridge (doc B10), p 4; Patu Hohepa (doc D4), pp 25, 27–28.

723. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, p 123.

724. Loveridge, '"The Knot of a Thousand Difficulties"' (doc A18), pp 51–52.

725. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 240–243.

726. Crown document bank (submission 3.1.142(a)), pp 575–576; Arena Heta (doc B30), p 13; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 249. Pari Walker of Te Parawhau noted that when the flag was raised in 1834, the HMS *Alligator* fired a 21-gun salute in recognition of independent statehood: Pari Walker (doc C34), p 5.

future aggression by France. From the perspective of Tītore and Patuone, this was more than an exchange of goods: it was the establishment of a commercial and military alliance. William, in response, sent both rangatira suits of armour.[727]

Britain was not the only nation engaging with Aotearoa during the 1830s. The United States had appointed a consul, and American vessels were visiting frequently, as were those of France and other European nations.[728] As we explained in our stage 1 report, northern Māori chose to align with Britain because the relationship was furthest advanced, and because missionary and trading contacts had been largely positive, in contrast with the sometimes disastrous interactions between Māori and the French.[729]

As with commercial and resource arrangements, the political relationship between rangatira and Britain was subject to different cultural interpretations. Māori and British leaders had different notions of authority: those of Britain based on a monarch who was nominal head of state in a highly centralised system in which sovereignty resided in Parliament; those of Te Raki Māori based on mana possessed by many autonomous hapū, each exercisinged authority through its rangatira and with its consent in accordance with tikanga.[730] They also had different ways of concluding agreements. In British culture, the written word was paramount; in Māori culture, as we have seen, agreements were concluded orally, a rangatira's word being regarded as unbreakable.[731] He Whakaputanga in 1835 and the treaty signed at Waitangi in 1840 drew on the distinct notions of authority and methods for reaching agreement within the two cultures.

3.4.4 Conclusion: the situation in 1840

In this chapter we have described the enormous changes that occurred within this district since Rāhiri's time, particularly during the 70 or so years prior to the signing of te Tiriti o Waitangi. We have focused on the 'unfolding of Ngāpuhi', which began with Rāhiri's defence of his Hokianga and Kaikohe homelands, and was followed much later by Rāhiri's descendants expanding their influence into the Bay of Islands, Mangakāhia, Whāngārei, Mahurangi, and – in several waves – into Whangaroa.[732]

The tribal landscape that Europeans first encountered in the late 1700s was much altered by the time the treaty was signed some decades later. Migrations, sustained warfare, intermarriages, and other events had all played their part. New hapū had emerged, and some older ones had departed or lost their identities. By 1840, descendants of Rāhiri exercised dominance over most of the district, though

727. Phil Parkinson, evidence on behalf of the Crown (doc D1), pp 65–67; Henare, Petrie, and Puckey, 'Oral and Traditional History on Te Waimate Taiamai Alliance' (doc E33), pp 149–150.
728. Shawcross, 'Maoris of the Bay of Islands', fols 414.
729. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, pp 284, 497–502, 519, 524.
730. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, pp 22–32, 42–43, 47–48.
731. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, pp 418–426; see also Alison Jones and Kuni Jenkins, 'Aitanga: Māori – Pākeha Relationships in Northland between 1793 and 1825', 2010 (doc A26), p 6; Wiremu Heihei (doc D9), p 34.
732. Hohepa, 'Hokianga' (doc E36), p 166.

their whakapapa reflected multiple generations of intermarriage between peoples of many waka and iwi. Ngāi Tāhuhu, Ngāti Awa, Ngāti Miru, Ngāi Tamatea, Ngāti Rangi, and others were not supplanted, but became part of the emerging Ngāpuhi story.

Claimants emphasised that political and economic authority remained with hapū, even as inter-hapū alliances emerged. Hongi did not exercise authority over all of Ngāpuhi; even in wartime, other leaders made independent decisions and took independent actions. As attention turned increasingly to trade in the 1820s and 1830s, hapū continued to act independently, and to defend their mana over important relationships and resources. Hapū did cooperate to manage and maintain trading relationships, but such arrangements typically occurred among closely related leaders, such as those of the Te Pōpoto confederation in Hokianga, and the Ngāi Tāwake-Ngāti Rēhia alliance in the Bay of Islands and Whangaroa.

Claimants told us of increasing inter-hapū coordination from the early 1800s onwards. Major annual hui began in Whangaroa in about 1808, which subsequently grew to encompass the Bay of Islands, Hokianga, and Whāngārei.[733] Similarly, inter-hapū councils of war occurred at Kororipo (Kerikeri) and Terengaparāoa (Whāngārei) before the conflicts of the 1820s.[734] Later, annual hui were associated with major hākari, attended by thousands, where Ngāpuhi wealth was celebrated and displayed.[735] Rangatira engaged in political discussions at these hui, with a focus on management of their emerging relationships with Europeans. On occasion, they also called at Busby's residence at Waitangi to make important decisions about international relations, such as the adoption of the flag and he Whakaputanga. Gatherings like these typically brought together all major leaders from the Bay of Islands, Hokianga, Whangaroa, Whāngārei, and Mangakāhia, as well as those of Te Roroa and Muriwhenua.[736]

Such arrangements supplemented and enhanced hapū authority, adding a new layer of coordination and decision-making through which rangatira could discuss and make collective decisions about the management of settler and foreign relationships. But claimants also emphasised, with considerable force, that hapū autonomy endured,[737] and the historical evidence supports that view.[738] Jointly made decisions could bind those who consented – as was always the case when a rangatira gave his word – but they could not bind hapū that did not participate or consent. 'Ngāpuhi' therefore remained, by 1840, a collection of autonomous hapū,

733. Nuki Aldridge (doc B10), pp 46–48; Nolan, mapbook (doc B10(b)), pls 12–15; Anania Wikaira (doc C20), pp [6]–[7].

734. Taipari Munro (doc I26), p 10; Arena Munro (doc R16), pp 21–22.

735. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 307–312; O'Malley, 'The Nature and Extent of Contact and Adaptation in Northland' (doc A11), pp 185, 212; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 79, 83, 247; Henare, Petrie, and Puckey, 'Oral and Traditional History on Te Waimate Taiamai Alliance' (doc E33), pp 234, 249.

736. Manuka Henare, 'The Changing Images of Nineteenth Century Māori Society' (doc A16), p 108; Helen Lyall (doc C31), pp 2–3.

737. For example, see Nuki Aldridge (doc B10), p 50.

738. For example, see Mary-Anne Baker (doc W23), p 20.

each with their own zones of influence and resource rights, sharing common descent and able to cooperate or compete as circumstances and tikanga required. Sovereignty remained with hapū; te kawa o Rāhiri endured.[739]

739. Nuki Aldridge (doc B10), pp 47, 50–51; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 27–29; Reuben Porter (doc S6), p 16; Manuka Henare (doc B3), p 5; Hohepa, 'Hokianga' (doc E36), pp 185–186, 190.

CHAPTER 4

TINO RANGATIRATANGA ME TE KĀWANATANGA, 1840–44: NGĀ TŪTAKITANGA TUATAHI O TE RAKI MĀORI KI TE KĀWANATANGA / TINO RANGATIRATANGA AND KĀWANATANGA, 1840–44: FIRST TE RAKI MĀORI ENCOUNTERS WITH KĀWANATANGA

> Ko te kawenata tenei i hanga ki Waitangi hei ture mo Niu Tireni, katahi ka pekea mai e te kaahu paoa iho e te kaahu, werewere haere ana i nga waewae, heoi tenei.
>
> —Maihi Parāone Kawiti[1]

4.1 Hei Tīmatanga Kōrero / Introduction

Tino rangatiratanga and its relationship with kāwanatanga lies at the heart of Te Raki claimant grievances against the Crown. Of all questions about the treaty, it is the most important and most contentious. It raises questions of enormous weight about authority over Māori communities and their well-being, and over Māori land and resources.

In our stage 1 report, we concluded that the rangatira who signed te Tiriti in February 1840 at Waitangi, Waimate, and Māngungu did not cede their sovereignty in so doing. They welcomed Captain William Hobson and agreed to recognise the Queen's kāwanatanga on the basis that they and the Governor would be equals, albeit with different roles and spheres of influence: the Governor would exercise control over settlers, and Māori would retain control over their communities. Where Māori and settler interests overlapped, the details of the relationship remained to be negotiated, rangatira to kāwana, on a case-by-case basis.[2] The Crown, in our view, had also promised to investigate pre-treaty land transactions and return any lands that had not been properly acquired from Māori; and the rangatira appeared to have agreed that the Crown would protect them from foreign threats and represent them in international affairs.[3]

1. 'This was the covenant made at Waitangi as a law for New Zealand. Suddenly a hawk interposed itself, snatched up the Treaty and flew away with it clutched dangling in its claws. That is this.': Maihi P Kawiti to Taonui, 24 March 1876 (translation of Erima Henare, 4 October 2010) talking about te Tiriti; Erima Henare, translations (doc D14(d)), p [13]–[14].

2. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040 (Wellington: Legislation Direct, 2014), pp 527–529.

3. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 528, 529.

The Crown, whose understanding was reflected in the English text, saw the treaty as conveying Māori consent to a permanent cession of sovereignty. On 21 May 1840, Captain Hobson proclaimed British sovereignty over all New Zealand. On 16 June, the New South Wales Legislative Council passed an ordinance extending that colony's laws to New Zealand. In October, the Crown gazetted Hobson's proclamations in London, and in December the Crown issued a Charter establishing New Zealand as a separate colony; Hobson was appointed its first Governor.[4] Based on the Crown's assertion of sovereignty, Hobson and his officials set about establishing the machinery of government and courts, and making laws which they presumed to be enforceable against all subjects, Māori or Pākehā.

Claimants told us that the Crown's proclamation of sovereignty was in breach of te Tiriti, and that subsequent Crown actions which presumed Crown sovereignty over Te Raki Māori were also in breach.[5] More particularly, claimants said the Crown breached the treaty during these early years by presuming that its laws applied to Māori; enforcing its criminal law against Māori; asserting control over Māori lands, resources, and trading relationships; and importing its system of land tenure under which the Crown claimed ultimate ownership of all New Zealand lands and also saw itself as entitled to the 'waste' land; that is, all land not actually used and occupied by Māori.[6]

The Crown, in its submissions about political engagement, made no specific concessions of treaty breach.[7] Crown counsel argued that the Crown acquired sovereignty, in accordance with its own laws, through a series of steps that included the treaty and the proclamations of sovereignty. The extension of British legal sovereignty over the whole of New Zealand was completed by 2 October 1840 when the imperial government published Hobson's proclamations.[8] Crown counsel submitted that, up to 1844 and well beyond, the Crown made very few attempts to exert authority over Te Raki Māori. Where the Crown attempted to apply English law, it did so gradually and with the consent of rangatira; otherwise, Te Raki Māori continued to govern themselves in accordance with their own laws for several decades after signing te Tiriti.[9]

In this chapter, we examine the extent to which the Crown's February 1840 agreement was honoured in the period from the signing of te Tiriti up to the end of 1844. We also examine the Crown's actions in proclaiming sovereignty and establishing Crown Colony government for New Zealand, and we consider the

4. Crown closing submissions (#3.3.402), p 4.

5. Crown closing submissions in reply (#3.3.450), pp 121–128, 132; claimant closing submissions (#3.3.228), pp 153–155; closing submissions for Wai 320, Wai 736, Wai 1307, Wai 2026, Wai 2476 and Wai 1958 (#3.3.234), pp 4–5.

6. Claimant closing submissions (#3.3.228), pp 8–9, 28, 211–212; claimant closing submissions (#3.3.219), pp 21–22; claimant closing submissions (#3.3.223), pp 5, 11, 29–31; claimant closing submissions (#3.3.222), p 32.

7. The submissions did refer to concessions about land titling: Crown closing submission (#3.3.402), pp 167–168; see also Crown statement of position and concessions (#1.3.2), pp 1–7.

8. Crown closing submission (#3.3.402), pp 4, 9–16.

9. Crown closing submission (#3.3.402), pp 48, 59.

extent to which the new Government attempted to, and succeeded in, exerting authority over Te Raki Māori during these early years.

4.1.1 Purpose of this chapter

In the previous chapter, we examined the diverse communities and polities, governed in accordance with their tikanga, that emerged in the inquiry district in the generations prior to 1840. In considering how migration, conflict, relationship-building, and other dynamics shaped the tribal landscape of the north over centuries, we sought to understand the world of Te Raki Māori: the principles, values, and beliefs constituting the world inhabited by the peoples whose rangatira first signed te Tiriti.

In this chapter, we turn our attention to an issue central to the claims in this inquiry: the relationship – in the period under consideration, from the signing of te Tiriti to the end of 1844 – between the tino rangatiratanga intrinsic to the Māori world, and the governing authority the Crown believed it had acquired. We have chosen this brief period because, early in 1845, war broke out in the north between some Ngāpuhi leaders and the Crown. The Northern War points to a remarkably rapid deterioration in the Crown–Māori relationship during these early years. We consider the origins and course of the war in chapter 5.

We also chart the development of the Crown–Māori relationship in the wake of the Crown's proclamations of sovereignty and its establishment of Crown Colony government. Is there evidence that it began well? How and when do tensions begin to appear, and how did leaders on both sides handle them? Our purpose is to understand the nature of the political engagement between Kāwana and rangatira as it evolved on the ground in different parts of this inquiry district.

4.1.2 Structure of this chapter

This report is necessarily shaped by our understanding of the treaty relationship in the north, as set out in our stage 1 report. We therefore begin in section 4.2 by summarising the key findings from our stage 1 report, along with Tribunal findings from other districts that provide relevant guidance about the early years after te Tiriti was signed. We then consider the parties' arguments – where they agree and disagree on facts and matters of treaty interpretation – in order to identify the issues for determination in this chapter.

We address each of these issues in turn. In section 4.3, we consider the steps the Crown took to proclaim sovereignty and establish Crown Colony government, asking whether those steps were consistent with the treaty agreement.

In section 4.4, we consider the Crown–Māori relationship on the ground during these early years – and in particular, the Crown's attempts to assert effective authority over Te Raki Māori on matters such as land, trade, and criminal law.

In section 4.5, we consider the overall state of the Crown–Māori relationship in the north at the end of 1844. We summarise our findings (section 4.6) and assess the prejudice experienced by Te Raki hapū as a result of Crown treaty breaches (section 4.7).

4.2 Ngā Kaupapa / Issues

This chapter is about claims that, during the years 1840 to 1844, the Crown acted in ways that were inconsistent with the treaty agreement – by proclaiming sovereignty over the whole of New Zealand without first having obtained free, informed consent;[10] by asserting radical or underlying title over all New Zealand lands;[11] by establishing institutions of government that purported to have authority over Māori;[12] by making laws that applied to Māori;[13] by enforcing introduced criminal law against Māori;[14] and by asserting control over Māori lands, resources, and trading relationships.[15] We consider how far the Crown discussed these matters with Te Raki rangatira and how far it made provision for the exercise of Te Raki Māori rangatiratanga as it introduced British law and planned for the colonisation of New Zealand.

4.2.1 Our stage 1 conclusions

In our report on stage 1 of this inquiry, we described the relationship between the Crown and Te Raki Māori as it developed during the first part of the nineteenth century. As discussed in chapter 3 of that report, early relationships developed between Governors of New South Wales and rangatira; and from 1820, when Hongi Hika visited England with the missionary Thomas Kendall and met King George IV, Te Raki Māori sought to build an alliance with Britain, then the world's pre-eminent military and trading power. Through this alliance, they sought knowledge, trading opportunities, and protection from the potential harms arising from settlement and invasion by foreign powers, while also asserting their

10. Claimant closing submissions (#3.3.228), pp 8, 11, 153–155, 209–211; claimant submissions in reply (#3.3.450), pp 130, 132.

11. Claimant closing submissions (#3.3.223), pp 5, 29–31; claimant closing submissions (#3.3.222), p 32; claimant submissions in reply (#3.3.470), p 14.

12. Claimant closing submissions (#3.3.228), pp 8–9, 28, 211–212; closing submissions on behalf of Wai 320, Wai 736, Wai 1307, Wai 2026, Wai 2476 and Wai 1958 (#3.3.234), pp 4–5.

13. Claimant closing submissions (#3.3.228), pp 59–60; claimant closing submissions (#3.3.219), pp 21–22; claimant closing submissions (#3.3.221), pp 101–102; submissions in reply for Wai 2382 (#3.3.553), pp 26–28.

14. Claimant closing submissions (#3.3.219), pp 10–11, 20–21; claimant closing submissions (#3.3.221), pp 94–97; closing submissions for Wai 1477 (#3.3.338), pp 31–34; closing submissions for Wai 1477, Wai 1522, Wai 1531, Wai 1716, Wai 1957, Wai 1968, Wai 2061, Wai 2063, Wai 2377, Wai 2382 and Wai 2394 (#3.3.338(a)), pp 28–32; closing submissions for Wai 1354 (#3.3.292(a)), p 17; closing submissions for Wai 2377 (#3.3.333(a)), pp 29–30; submissions in reply for Wai 2382 (#3.3.553), pp 26–27; closing submissions for Wai 1514 (#3.3.357), pp 53–54; claimant submissions in reply for Wai 121 and others (#3.3.49(a)), p 15; Claimant submissions in reply (#3.3.420), p 8.

15. Claimant closing submissions in reply (#3.3.228), pp 153–155; claimant closing submissions (#3.3.219), pp 21–24; claimant closing submissions (#3.3.220), pp 8–9; submissions in reply for Wai 2382 (#3.3.553), pp 26–28; closing submissions for Wai 1514 (#3.3.357), pp 53–54; claimant closing submissions (#3.3.220(a)), p 6; closing submissions for Wai 1968 (#3.3.551), pp 24–25. Mr Rueben Porter's (Wai 1968) submissions were repeated in several other closing submissions: submissions in reply for Wai 1522 and Wai 1716 (#3.3.548), pp 25–26; submissions in reply for Wai 2394 (#3.3.546), pp 25–26; submissions in reply for Wai 2063 (#3.3.544), pp 24–26; submissions in reply for Wai 1477 (#3.3.547), pp 24–26; submissions in reply for Wai 2000 (#3.3.541), pp 23–26; submissions in reply for Wai 2005 (#3.3.542), pp 23–26; submissions in reply for Wai 2377 (#3.3.545), pp 26–29.

own mana and governing authority, most notably through he Whakaputanga (the Declaration of Independence) in 1835. Britain responded during the 1830s by acknowledging the sovereignty of northern hapū, recognising their flag, and promising protection. These events shaped Te Raki Māori understandings of the treaty and expectations for the post-treaty relationship.[16]

We also described (in chapter 6 of our stage 1 report) the British government's decision to intervene in and annex New Zealand. Britain made this decision because settlement was already occurring, and officials reasoned that civil government was necessary to protect British imperial interests and prevent harm to the Māori population. To control settlers, the Crown (under its own laws) needed sovereign authority over the relevant territories. It therefore sent Captain Hobson with instructions to obtain Māori consent for a declaration of British sovereignty over as much of New Zealand as they were willing to cede. The Crown also took a series of steps, in 1839 and early 1840, to prepare for the establishment of a British colonial Government in New Zealand.[17]

When Hobson met rangatira at Waitangi, Waimate, and Māngungu during February 1840, he and other British representatives explained that Britain's immediate practical objectives were to control settlers and protect Māori. Hobson also assured Māori that they would retain their lands and their independence. Hobson and his representatives did not explain that 'sovereignty', in British eyes, meant that the colonial Government would have a right to make laws for and govern over Māori as well as settlers; nor that Britain planned to control all land transactions, and fund the colony by buying and selling Māori land.[18]

Accordingly, we concluded in our stage 1 report that rangatira who signed te Tiriti o Waitangi did not consent to the Crown acquiring sovereignty; that is, they did not consent to the Crown having authority to make and enforce law over their people and territories.[19] We concluded that the treaty's meaning and effect

> can only be found in what Britain's representatives clearly explained to the rangatira, and the rangatira then assented to. It is not to be found in Britain's unexpressed intention to acquire overarching sovereign power for itself, and for its own purposes. On that, the rangatira did not give full and free consent, because it was not the proposal that Hobson put to them in February 1840.[20]

Hobson, we concluded, did not clearly explain that the Crown expected to have power to make and enforce law over Māori, and this omission meant 'that the Crown's own self-imposed condition of obtaining full and free Māori consent was not met'.[21]

16. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 55–137, 502.
17. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 295–333, 505–506.
18. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 509, 524–525, 526–528.
19. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 526, 529.
20. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 528.
21. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 527.

Rather than consenting to the Crown exercising sovereignty over them, we concluded that the rangatira had agreed to a new arrangement in which they would share power and authority with the Crown, with each having different roles and spheres of influence, the Governor for settlers and rangatira for Māori. They 'agreed to the Governor having authority to control British subjects in New Zealand, and thereby keep the peace and protect Māori interests'. They entered this arrangement 'on the basis that they and the Governor were to be equals, though they were to have different roles and different spheres of influence'.[22]

We concluded that Te Raki leaders appeared to have agreed that the Crown would protect them from foreign threats and represent them in international affairs when necessary.[23] Rangatira saw te Tiriti as continuing and strengthening their pre-Tiriti alliance with Britain, and as affirming he Whakaputanga, the 1835 Declaration of Independence in which northern rangatira asserted their kīngitanga and mana over their territories, including their exclusive authority to govern over and make laws for their people. As we explained, rangatira believed they were aligning with a powerful empire which had guaranteed to protect them and their chiefly authority. Rangatira were aware, however, that there were risks from an alliance with an imperial power – they knew, for example, of the experiences of indigenous people in New South Wales and Tahiti, and feared they could face the same threats if settlement was not controlled.[24] In their prior relationship with Britain, they had sought and received assurances that the monarch would protect them. The treaty negotiations provided the rangatira with further reassurance that Britain's intentions were peaceful and protective; the Governor would be 'a powerful rangatira to control Pākehā and protect them from foreign powers', but would not undermine their authority or exert power over them.[25]

We also concluded that the Crown and Māori spheres of influence would inevitably intersect, especially where Māori and settler populations intermingled; in those circumstances, the Governor and Māori would have to negotiate questions of relative authority case by case – as was typical for rangatira-to-rangatira relationships. But Te Raki rangatira 'did not regard kāwanatanga as undermining their own status or authority. Rather, the treaty was a means of protecting, or even enhancing, their rangatiratanga as contact with Europeans increased.'[26]

With respect to land, it was our view that Hobson and other British representatives did not clearly explain the Crown's intention to exercise a right of pre-emption; indeed, it was not clear from the text of te Tiriti or the treaty debates that the Crown even expected a right of first refusal. All that could be said, in our view, was that rangatira had agreed to enter land transactions with the Crown, and that the

22. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 524–525, 529.
23. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 529; see also p 526.
24. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 89–90, 124–125, 100, 195, 284, 356, 399, 512, 520.
25. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 520–521, 524–525, 528;
26. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 528, 529.

Crown had 'promised to investigate pre-treaty land transactions and to return any land that had not been properly acquired from Māori'.[27]

This, then, was the basis on which Te Raki leaders had agreed to allow the Crown to establish a new form of authority, kāwanatanga, in their territories.

4.2.2 What previous Tribunals have said

While our consideration of the issues in this chapter will reflect the specific circumstances in which te Tiriti was signed in this district and the particular constitutional issues that claimants have raised in our inquiry, other Tribunal reports also provide valuable guidance on the nature of the treaty relationship during the early 1840s and on the matters we are examining here.

4.2.2.1 *Hobson's May 1840 proclamations of sovereignty*

As discussed in chapter 2, the Tribunal has consistently found that the treaty provided for kāwanatanga and rangatiratanga to coexist, with the right of tino rangatiratanga acting as a fetter or constraint on the Crown's power.[28] In treaty terms, therefore, previous reports have found that Captain Hobson's 21 May 1840 proclamations of sovereignty did not provide for the Crown to exercise supreme or unconstrained governing authority over Māori, but did impose obligations on the Crown to protect Māori autonomy, authority, lands, and resources.[29]

In the *Report of the Waitangi Tribunal on the Orakei Claim* (1987), the Tribunal concluded that the Māori text of the treaty – which did not provide for sovereignty, parliamentary supremacy, or English common law – did not invalidate Hobson's proclamations of sovereignty. This it based on surrounding circumstances in which Māori in that district accepted the Crown as having a higher, albeit protective authority. Nonetheless, after the proclamations, 'substantial

27. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 518–519, 523, 529.

28. For example, see Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui–Waitara Claim*, Wai 6, 2nd ed (Wellington: Government Printing Office, 1989), p 51; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, Wai 8 (Wellington: Government Printer, 1985), pp 66–67; Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi*, Wai 143 (Wellington: Legislation Direct, 1996), p 20; Waitangi Tribunal, *The Muriwhenua Land Report*, Wai 45 (Wellington: GP Publications, 1997), pp 115–116; Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims – Pre-publication Version*, Wai 898 (Wellington: Legislation Direct, 2018), pts 1–2, p 169. In some reports, the Tribunal has found that Māori did not clearly consent to any transfer of power, either because the treaty terms were too vague or because they were never asked to sign: Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report*, Wai 903, 3 vols (Wellington: Legislation Direct, 2015), vol 1, p 151; Waitangi Tribunal, *Te Urewera*, Wai 894, 8 vols (Wellington: Legislation Direct, 2017), vol 1, p 164.

29. Waitangi Tribunal, *The Taranaki Report*, Wai 143, p 20; Waitangi Tribunal, *Muriwhenua Land Report*, p 2; Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands*, Wai 64 (Wellington: Legislation Direct, 2001), pp 30–31; Waitangi Tribunal, *He Maunga Rongo: Report on the Central North Island Claims*, Wai 1200, stage 1, vol 1 (Wellington: Legislation Direct, 2008), pp 196, 200; Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims – Pre-publication Version*, Wai 898, pts 1–2, pp 178–181, 190.

rights' were reserved to Māori under the treaty.[30] In *The Taranaki Report: Kaupapa Tuatahi* (1996), the Tribunal found that 'from the day it was proclaimed, sovereignty was constrained in New Zealand by the need to respect Māori authority (or "tino rangatiratanga")'.[31]

The *Muriwhenua Land Report* (1997) concluded that, during treaty debates, the Crown had not explained the nature of the power it was seeking. It did not explain, for example, 'that, for the British, sovereignty meant that the Queen's authority was absolute'. Nor did it explain 'that with sovereignty came British law, with hardly any modification, or that Maori law and authority would prevail only until they could be replaced'. The Crown's unspoken assumption was that it 'would rule on all matters', but Māori expected their relationships with the Crown and settlers to be defined by *their* rules – a view that was reinforced by the text of te Tiriti, by the treaty debate at Kaitāia, and by the fact that Māori were far more numerous than settlers in the far north.[32]

In the Tribunal's view, Māori therefore 'had no cause to consider that their ancestral laws should be abandoned' after signing te Tiriti, and indeed were entitled to assume that their laws would continue in force. Hobson's proclamations were consequently of limited effect, unless the Crown established its authority on the ground:

> Whatever may be said about the Treaty of Waitangi and the proclamation of sovereignty as introducing a new legal regime, no such regime could have been given serious thought [by Māori] until it could be seen to be established in fact and to be working on the ground.[33]

In *Te Whanganui a Tara me ona Takiwa: Report on the Wellington District* (2003), the Tribunal described the circumstances in which the proclamations were issued, pointing to events in the new settler community as triggering Hobson's concern. The Tribunal noted that the treaty had not yet reached Wellington when Hobson proclaimed sovereignty – which he did with immense haste, after learning of events occurring there. On 2 March, New Zealand Company leaders 'had summoned a council of settlers . . . and persuaded the local chiefs to ratify its rules as a provisional constitution for the Wellington district'. Hobson was apprised of the situation on 21 May 1840:

> before the night was out, [he] 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

30. Waitangi Tribunal, *The Orakei Report*, 2nd ed, Wai 9 (Wellington: Brooker and Friend Ltd, 1991), p 189.
31. Waitangi Tribunal, *The Taranaki Report*, Wai 143, p 20.
32. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, pp 115–116.
33. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 2.

Stewart Island in the Queen. Although not so stated in the proclamation, this was done by right of discovery.[34]

Two days later, Hobson issued another proclamation in which he accused the Wellington settlers of forming an illegal association which, as he put it, 'in contempt of her Majesty's authority . . . attempted to usurp the powers vested in me'. The proclamation called on the Wellington settlers to submit to the colony's Government. The Crown then continued with its steps to set up a colonial Government and establish New Zealand as a separate colony.[35]

In *He Maunga Rongo: Report on Central North Island Claims, Stage One* (2008), the Tribunal found that the proclamation of sovereignty brought the treaty relationship into effect. From that time, '[t]here were two authorities, two systems of law, and two overlapping spheres of population and interest, as the settler State sought to establish itself alongside – and over the top of – Maori tribal polities.'[36] The Tribunal said that the 'standard legal orthodoxy . . . accepted by the courts' was that the proclamations established the Crown's sovereignty in New Zealand. However, that was a 'strictly legal argument', not a matter of treaty principle, and furthermore this legal view did not negate Māori rights to autonomy and self-government.[37]

In *He Whiritaunoka: The Whanganui Land Report* (2015), the Tribunal found that Māori had not consented to the Crown's sovereignty, but nonetheless it came to apply to them: first, because the proclamations had immediate legal effect; and secondly, because, over several decades, Māori either accepted or were forced to submit to the Crown's practical or effective authority. Due to the growth of the colonial State, the transfer of authority from the imperial government to an elected New Zealand Parliament, and the use of warfare to suppress Māori resistance, the Crown's sovereignty ultimately became a fait accompli. We note that this report was released soon after our stage 1 report, and did consider its conclusions.[38]

In *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (2018), the Tribunal addressed our stage 1 conclusions as part of its consideration of the treaty's meaning and effect as pertaining to that inquiry district. The Tribunal found that Hobson's proclamations were a matter of English law and had little to do with Māori understanding of the treaty. The North Island proclamation 'refers to Māori consent [to a cession of sovereignty] as judged through British eyes and for British purposes, and says little about how Māori understood the Treaty or what they freely and intelligently consented to in accordance with their own tikanga'. Hobson also 'proclaimed sovereignty over the entire North Island when he was in possession only of the Northland and Waikato–Manukau copies of the Treaty':

34. Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa: Report on the Wellington District*, Wai 145 (Wellington: Legislation Direct, 2003), p 82.
35. Waitangi Tribunal, *Te Whanganui a Tara*, Wai 145, p 82.
36. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, p 166.
37. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, pp 196, 200.
38. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, pp 145–146.

> he did not know whether Māori had signed the Treaty in other parts of the country, let alone what their understandings might be. Britain's principal representative in New Zealand therefore relied on an assumption that Māori would consent, as much as on a belief that they had.[39]

Furthermore, the Tribunal observed that the proclamations were based solely on the English text of the treaty. Officials regarded the proclamations as securing the Crown's 'supreme, unfettered governing and lawmaking authority', when that was not the proposal that they had put before Te Rohe Pōtae Māori and for which they had sought consent. On the contrary, they had sought consent only for a lesser power, sufficient to meet Britain's practical objectives – control of settlement and protection from foreign interference – but not to justify interference with Māori authority or autonomy.[40] The Tribunal likewise found that the proclamations had little practical effect in Te Rohe Pōtae for several decades after they had been issued, despite the Crown's establishment of institutions of government 'with notional authority across the whole country'.[41]

4.2.2.2 *The Crown's assertion of 'radical' title over Māori lands*

Just as the Crown did not explain the full meaning of 'sovereignty' to rangatira who signed te Tiriti, nor did it explain its full intentions for Māori lands, as the Tribunal has found in several reports.

The article 2 guarantee of tino rangatiratanga meant that Māori retained full authority over their lands and resources,[42] or (in the words of the *Report of the Waitangi Tribunal on the Motunui–Waitara Claim* in 1983), 'the sovereignty of their lands'.[43] Yet, as the Tribunal explained in its *Muriwhenua Land Report*, the Crown understood its sovereignty as meaning that it would also import its systems of common law and land tenure to New Zealand. This included the common law doctrine of 'radical title', under which the Crown was presumed to be the ultimate owner of all land in the colony. Hobson and other Crown officials did not explain this doctrine, or its implications, to Māori before they signed te Tiriti.[44]

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39. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pt 1, p 173.
40. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pt 1, pp 178–179; see also p 155.
41. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pt 1, p 109; see also pp 180–181, 190, 1045.
42. Waitangi Tribunal, *The Orakei Report*, Wai 9, p 185; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 3rd ed, Wai 22 (Wellington: GP Publications, 1996), pp 173–174; Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols, Wai 27 (Wellington: GP Publications, 1991), vol 2, p 252.
43. Waitangi Tribunal, *Motunui-Waitara Report*, Wai 6, pp 50–51; Waitangi Tribunal, *Report on the Muriwhenua Fishing Claim*, Wai 22, pp 173–174.
44. Waitangi Tribunal, *The Muriwhenua Land Report*, Wai 45, pp 5, 174–175, 177–178. The legal historian David V Williams has explained radical title as 'the underlying or ultimate title of the Crown to all lands within Commonwealth realms'. Radical title 'is said to be a feature of English Common law, derived from Anglo-Norman feudal doctrines'. Officials and courts in most British colonies assumed the Crown's radical title to be part of their colonies' law: David V Williams, 'Radical Title of the Crown and Aboriginal Title: North America 1763, New South Wales 1788, and New Zealand 1840', in *Common Law, Civil Law and Colonial Law: Essays in Comparative Legal History from the*

The Tribunal in the *Muriwhenua Land Report* found that the Crown's reliance on the legal theory of radical title 'was inappropriate for the circumstances of the colony, where the radical title was already spoken for' (that is, Māori already possessed the title to all land in New Zealand).[45] As the Tribunal explained, the doctrine provided a legal basis for other policies which the Crown applied to Māori land in the 1840s and beyond – including the Crown's pre-emption policy, its presumed ownership of 'surplus' lands from its inquiries into old land claims, and its presumed ownership (until 1846) of so-called 'waste' lands which Māori were not actively occupying and cultivating. The Tribunal said that Hobson and other officials did not explain the surplus or waste land policies to treaty signatories, yet the Crown subsequently relied on those policies to claim ownership of Māori lands.[46]

In *The Ngai Tahu Report* (1991), the Tribunal also considered the surplus and waste lands policies. The Tribunal found that the Crown regarded treaty guarantees over land as 'little more than the opening round in a debate [among officials and settlers] . . . over whether Maori did own lands beyond their villages and cultivations, and whether the guarantees of article 2 . . . extended beyond these very limited classes of property'. The 'whole weight of European cultural assumptions was against acknowledging the ownership of land beyond what was cultivated or held under recognisable legal title'.[47] Yet the Crown's view of Māori land ownership 'did not match the reality of Maori title', under which all land 'was claimed and owned under Maori concepts of ownership, which were in many ways quite different from those of British custom'.[48]

The Whanganui River Report (1999) provided further explanation of the doctrine of radical title and its application to Māori lands. Under that doctrine,

> All land is vested in the Crown. All grants of transferable titles . . . come only from the Crown. Where land was purchased direct from Maori, the purchase was acknowledged in the form of a Crown grant. Though the Crown grants land, it still retains the underlying or radical title.[49]

The Crown's common law acknowledged Māori rights to possess and use land, but not to legally own the land. Land that Māori occupied or used 'was still Crown land, but the Crown's radical title was . . . subject to Maori customary usages until the Maori customary interest had been extinguished'. This customary right (also known as aboriginal or native title) becomes 'a burden on the title of the Crown'.[50] This doctrine was applied from the beginning of Crown colonisation, and meant

Twelfth to the Twentieth Centuries, ed William Eves, John Hudson, Ingrid Ivarsen, and Sarah B White (Cambridge: Cambridge University Press, 2021), p 260.

45. Waitangi Tribunal, *The Muriwhenua Land Report*, Wai 45, p 6.
46. Waitangi Tribunal, *The Muriwhenua Land Report*, Wai 45, pp 5–6, 115–116.
47. Waitangi Tribunal, *The Ngai Tahu Report*, Wai 27, vol 2, p 252.
48. Waitangi Tribunal, *The Ngai Tahu Report*, Wai 27, vol 2, p 255.
49. Waitangi Tribunal, *The Whanganui River Report*, Wai 167 (Wellington: GP Publications, 1999), p 15.
50. Waitangi Tribunal, *The Whanganui River Report*, Wai 167, pp 15–16.

that the State was the source of all private land rights. This, however, 'is not the Maori position. Their title predates the Crown and comes from their ancestors.'[51]

Several Tribunal reports have considered the Crown's policy of pre-emption. In *The Te Roroa Report* (1992), the Tribunal found that Crown officials did not explain the policy to rangatira who signed te Tiriti. Article 2 in English gave the Crown a right of pre-emption, which Crown officials understood as an exclusive right to enter transactions over Māori land. However, the word 'exclusive' was not translated into the Māori text. As a result, the treaty gave the Queen a right to purchase land from sellers at agreed prices, but did not specifically rule out sales of Māori land to private purchasers.[52] In *The Wairarapa ki Tararua Report* (2010), the Tribunal also found that the language used in article 2 'left considerable room for misunderstanding about the rights being given to the Crown' with regard to pre-emption.[53] In the *Report of the Waitangi Tribunal on the Waiheke Island Claim* (1987) and the *Te Whanganui a Tara* inquiry, among others, the Tribunal found that the right of pre-emption imposed obligations on the Crown to protect Māori interests – not prioritise its own or settlers' land-buying objectives over the rights of Māori.[54]

4.2.2.3 *The establishment of Crown Colony government and assertion of Crown authority over Māori, 1840–44*

In *The Te Roroa Report*, the Tribunal described the Crown's intentions for its relationship with Māori after proclaiming sovereignty. The Crown's intention was to establish a colony and then gradually bring Māori 'under British law and British institutions'. As 'a temporary measure', the Crown would leave most Māori communities to govern themselves according to their own customs – albeit with some exceptions; the longer-term plan was that Māori would assimilate into settler culture, and the colony would then become self-governing under one system of law and government.[55]

In *Ngai Tahu*, the Tribunal noted that '[a] sense of cultural superiority' influenced these Crown policies. Officials assumed, based on experiences in other colonies, that Māori were at risk of extinction, that 'only rapid and complete amalgamation with their own culture . . . would preserve Maori at all', and that any temporary tolerance for Māori law and government must 'be rapidly replaced by European customs'.[56]

51. Waitangi Tribunal, *The Whanganui River Report*, Wai 167, p xx.
52. Waitangi Tribunal, *The Te Roroa Report 1992*, Wai 38 (Wellington: Brooker and Friend Ltd, 1992), p 26.
53. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, 3 vols (Wellington: Legislation Direct, 2010), vol 1, p 38.
54. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Waiheke Island Claim*, 2nd ed, Wai 10 (Wellington: Government Printing Office, 1989), pp 35–36; Waitangi Tribunal, *Te Whanganui a Tara*, Wai 145, p 75.
55. Waitangi Tribunal, *The Te Roroa Report*, Wai 38, p 28; see also Waitangi Tribunal, *The Muriwhenua Land Report*, Wai 45, p 2; Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pt 1, p 122.
56. Waitangi Tribunal, *Ngai Tahu*, Wai 27, vol 2, pp 275–276.

In practice, the Tribunal's district inquiries have found that the Crown's approach to asserting authority over Māori communities varied from place to place, depending less on policy than on local circumstances – particularly the population and power balances among Crown officials, Māori, and settlers. In 1844, the Tribunal found in its *Ngai Tahu* report, 'Europeans were heavily outnumbered and almost all the country was still in Maori ownership and control . . . Understaffed, without adequate financial support and at a serious military disadvantage, the governor was unable to assert his authority over Maori.'[57] Similarly, the Tribunal found in *The Te Roroa Report* that many Māori 'still lived beyond the reaches of effective government and law enforcement in Maori districts' into the 1850s and beyond.[58]

That was certainly the case throughout most of the North Island, including (as we will see) much of the north. In its *Muriwhenua Land Report*, for example, the Tribunal noted that Māori continued to outnumber settlers by a considerable margin during the 1840s, and very few Crown officials visited the district, let alone attempted to establish any form of government. The 'numbers alone gave Maori the control', and Māori accordingly continued to live under their own laws and authority throughout the period covered by this chapter and for a considerable time beyond.[59]

However, in other districts the Crown took more determined steps during these early years to assert its authority on the ground. In its *Orakei* report, for example, the Tribunal described the changing population and power balance in Auckland during the 1840s. Ngāti Whātua readily accepted the Crown's presence, which provided economic opportunities and some sense of protection from larger neighbouring tribes, but initially resisted Crown attempts to enforce colonial laws against Māori. But by 1845, settlers outnumbered Māori, who increasingly came to accept the colony's police and court systems.[60] Similarly, in Kaipara, the Government – at least on some occasions – felt able to exert its authority over a small Māori population.[61]

In the New Zealand Company settlements – which from the early 1840s had substantial and organised settler populations with significant influence in London – the Crown also asserted its authority from an early stage, but not always in a manner that protected Māori. In *Te Whanganui a Tara*, the Tribunal described the Crown's initial attempts to establish its authority in Port Nicholson after Hobson had proclaimed the Crown's sovereignty on 21 May 1840. In May, Hobson demanded that newly arrived New Zealand Company settlers submit to his authority;[62] and in June, he sent the Colonial Secretary, Willoughby Shortland, with troops to intervene in a land dispute between Māori and the new settlers. The

57. Waitangi Tribunal, *Ngai Tahu*, Wai 27, vol 2, p 250.
58. Waitangi Tribunal, *The Te Roroa Report*, Wai 38, p 28.
59. Waitangi Tribunal, *Muriwhenua Land*, pp 2, 184–185; see also p 120.
60. Waitangi Tribunal, *The Orakei Report*, Wai 9, pp 24–26.
61. Waitangi Tribunal, *The Kaipara Report*, Wai 674 (Wellington: Legislation Direct, 2006), pp 22, 25–26.
62. Waitangi Tribunal, *Te Whanganui a Tara*, Wai 145, p 82.

Crown's handling of this and other land disputes did not protect Māori interests;[63] rather, throughout the early 1840s, the Crown set about regulating and renegotiating the New Zealand Company's land dealings in a manner that favoured settlers' interests. The Crown then responded to Māori resistance by sending troops and using force against Māori communities.[64] Similarly, in Taranaki, the Crown asserted its authority at an early stage and in a manner that supported settlers' land objectives over the interests of Māori. In the *Taranaki Report*, the Tribunal found that there had been 19 years of intermittent Crown–Māori tension before war broke out in 1860.[65]

The Tribunal has also addressed claims in districts such as the Central North Island, Te Rohe Pōtae, and Te Urewera where Māori greatly outnumbered settlers and the Crown exerted little or no influence until many decades after the treaty. The Tribunal has found that, as Crown–Māori engagement eventually increased in those districts, the Crown attempted to assert its authority and law over Māori populations in breach of treaty guarantees.[66]

In sum, then, the Crown's approach to asserting its effective authority varied according to local circumstances. Where Māori populations were large and powerful, the Crown mostly left them to govern themselves for years after 1840; but where it could, the Crown asserted its effective authority, and on occasions used that authority to advance settler interests over the interests of Māori.

4.2.3 The claimants' submissions

The claimants in our inquiry submitted that Captain Hobson proclaimed sovereignty over the whole of New Zealand even though the Crown had not obtained free, informed consent from Māori for a cession of sovereignty. Rangatira who signed te Tiriti in this inquiry district had not agreed to give up their sovereignty, and many rangatira (in this district and elsewhere) had either refused to sign or not been given the opportunity.[67]

63. Waitangi Tribunal, *Te Whanganui a Tara*, Wai 145, p 87.

64. Waitangi Tribunal, *Te Whanganui a Tara*, Wai 145, pp 143–144; see also pp 108, 139; see also sections 9.6.1, 9.8, and 9.9.

65. Waitangi Tribunal, *The Taranaki Report*, Wai 143, pp 1, 26–31.

66. The *Te Urewera* report provided detailed accounts of negotiations between Māori and the Crown, leading to what the Tribunal regarded as a treaty-compliant agreement to acknowledge Urewera Māori authority: Waitangi Tribunal, *Te Urewera*, Wai 894, vol 2, pp 763–890. The Te Rohe Pōtae inquiry regarded the treaty relationship as involving two spheres of authority (rangatiratanga and kāwanatanga) which were 'subject to ongoing dialogue and negotiation' (pp 175, 183). That inquiry also provided a detailed account of Crown–Māori negotiations that did not produce treaty-compliant results (chapter 8): Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims – Pre-publication Version*, Wai 898 (Wellington: Legislation Direct, 2018), pts 1–2, pp 175, 183, 781–1070. The Central North Island report provided detailed analysis of available models for Māori self-government during the nineteenth century, and of subsequent Crown–Māori negotiations that did not lead to treaty-compliant results: Waitangi Tribunal, *He Maunga Rongo: Report on the Central North Isalnd Claims, Stage 1*, Wai 1200, revised ed, 4 vols (Wellington: Legislations Direct, 2008), vols 1–2, pp 201–208; 282–410).

67. Claimant closing submissions (#3.3.228), pp 209–211; see also pp 153–155.

In submissions on political engagement, counsel Janet Mason submitted that, prior to entering negotiations for the treaty, the Crown 'had . . . recognised that the consent of Māori was a pre-requisite to the valid cession' of sovereignty, yet it failed to fulfil this self-imposed test before proclaiming its sovereign authority over the whole of New Zealand.[68] Ms Mason therefore submitted 'that Hobson's Proclamations did not bestow Crown sovereignty over Te Raki Māori.'[69]

Ms Mason acknowledged the Crown's view that, under its own laws, it had acquired sovereignty through a series of jurisdictional steps – which included pre-treaty instruments, the treaty itself, and a series of post-treaty actions to proclaim sovereignty and establish New Zealand as a separate colony.[70] But counsel submitted that all of these instruments were 'deficient'.[71] The pre-treaty instruments were not valid as they were conditional on Māori consent to a cession of sovereignty,[72] and the post-treaty instruments (including the proclamations) were not valid as they presumed that Māori had consented when that was not the case.[73] Neither the proclamations nor other instruments bestowed sovereign authority on the Crown.[74]

Counsel submitted that, nonetheless, from the time of the first signings of te Tiriti, the Crown presumed that it had fulfilled the requirement to obtain consent and therefore 'acted as though [it] had sovereign authority over New Zealand', imposing its laws and system of government accordingly.[75] By taking these steps, the Crown presumed that its authority applied to all Te Raki Māori people, territories, and resources.[76] It 'effectively denied' the authority of Te Raki Māori by assuming a right to make laws for them and their lands,[77] in breach of the treaty guarantee of tino rangatiratanga and the Crown's obligation to protect Māori authority.[78]

Counsel acknowledged that the Crown only gradually attempted to assert effective authority over Te Raki Māori, and that most Te Raki Māori continued to live under their own tribal structures and laws for several decades after te Tiriti was signed.[79] But she submitted that the Crown tolerated Māori law primarily because it did not yet have the capacity to enforce its own laws – Māori heavily

68. Claimant closing submissions (#3.3.228), pp 154–155.
69. Claimant closing submissions (#3.3.228), p 210.
70. Crown closing submissions (#3.3.402), pp 9–11, 13; claimant submissions in reply (#3.3.450), pp 121–122.
71. Claimant submisions in reply (#3.3.450), p 124.
72. Claimant submissions in reply (#3.3.450), pp 124, 127.
73. Claimant submissions in reply (#3.3.450), p 122; see also pp 128, 132–133.
74. Claimant closing submissions (#3.3.228), p 153.
75. Claimant closing submissions (#3.3.228), pp 9, 154, 155, 211; claimant submissions in reply submissions (#3.3.450), pp 122, 133.
76. Claimant closing submissions (#3.3.228), p 10.
77. Claimant closing submissions (#3.3.228), pp 60–66.
78. Claimant closing submission (#3.3.228), p 138.
79. Claimant closing submissions (#3.3.228), pp 9–10, 27–28; see also pp 212, 303; see also submission in reply for Wai 2382 (#3.3.553), pp 26–28; closing submissions for Wai 1477 and others (#3.3.338(a)), pp 21, 24–25, 27.

outnumbered settlers in the north.[80] She and other claimant counsel submitted that, even in these early years, the Crown was making preparations to assert its effective authority over Te Raki Māori. Darrell Naden, who represented Denise Egen of Te Māhurehure and several other named claimants, submitted that there were 'patent limits on the Queen's writ' during these early years, but the Crown was nonetheless 'developing its sovereign ambit', and it would be 'naïve to think that this was not occurring'.[81]

Indeed, claimants pointed to numerous examples from these early years of the Crown asserting, or at least attempting to assert, its effective authority over Te Raki Māori. In particular, the Crown established courts and institutions of government that purported to have jurisdiction over Te Raki Māori; enacted ordinances that applied to Te Raki Māori; enforced criminal laws against Te Raki Māori and warned Māori against enforcing their own laws; asserted its authority over trading relationships by imposing customs duties and prohibiting anchorage fees; imposed its authority over the timber trade by banning the felling of kauri; asserted its authority over Māori lands by imposing its pre-emption policy, inquiring into old land claims, and asserting ownership of the 'surplus' from those claims; and exercised its authority by moving the capital to Auckland without consulting Te Raki Māori. While taking these actions, claimants said, the Crown failed to enact laws that would prohibit settler transgressions against tikanga, or preserve Māori rights to live according to their own laws.[82]

Claimants also submitted that, from 1840, the Crown applied its laws to Te Raki Māori lands without first having obtained their informed consent.[83] In submissions on old land claims, claimant counsel (Bryce Lyall and Linda Thornton) submitted that the Crown imported the legal doctrine of radical title, under which 'the Crown acquired title to all land in New Zealand as a function of obtaining sovereignty'.[84] Prior to signing te Tiriti, counsel submitted, Māori 'did not consent, nor were they even told, that the Crown intended to rely on this doctrine'. Once adopted by the Crown, 'it became the foundation of the entire system that the Crown created in New Zealand to deal with land'.[85]

80. claimant closing submissions (#3.3.228), pp 26–27; submissions in reply for Wai 2382 (#3.3.553), pp 26–28; closing submissions for Wai 1477 and others (#3.3.338(a)), pp 21, 24–25, 27; claimant closing submissions (#3.3.221), pp 86–87; submissions in reply (#3.3.501), pp 39–40; amended closing submissions for Hokianga (#3.3.297(a)), pp 31–33.

81. Submissions in reply for Wai 2005 (#3.3.542), p 23. Several other claimants made the same submission.

82. Claimant closing submissions (#3.3.219), pp 21–22, 24; claimant closing submissions (#3.3.220), pp 10–11; closing submissions for Wai 1477 (#3.3.338), pp 31–34; closing submissions for Wai 1477 and others (#3.3.338(a)), pp 30–32; closing submission for Wai 1354 (#3.3.292(a)), p 17; closing submissions for Wai 2377 (#3.3.333(a)), pp 27, 32–34; submissions in reply submissions for Wai 2382 (#3.3.553), pp 26–28); #3.3.331 p 52; closing submissions for Wai 1514 (#3.3.357), pp 53–54.

83. Claimant closing submissions (#3.3.228), p 8; claimant closing submissions (#3.3.223), pp 30–31.

84. Claimant closing submissions (#3.3.223), p 5.

85. Claimant closing submissions (#3.3.223), pp 30–31.

In particular, counsel submitted, the doctrine of radical title provided a legal basis for the Crown's investigations into old land claims;[86] for the Crown's decision to retain 'surplus' lands from those claims (that is, lands that settlers were deemed to have legitimately purchased but were not granted); and the Crown's view that it owned all 'waste' lands (that is, lands that Māori were not actively occupying or cultivating).[87] Mr Lyall and Ms Thornton submitted that rangatira who signed te Tiriti had not consented to any of these policies. The Crown had not told rangatira 'that the British government would rely on te Tiriti to claim to govern all land in New Zealand'; it had not explained the surplus or waste lands policies.[88]

Nor, counsel submitted, had the Crown explained that the English text of the treaty granted it pre-emption (an exclusive right to purchase land from Māori), that Māori 'could not sell their land to anyone else', or that the Crown 'was planning to fund the colonial enterprise by buying Māori land at the cheapest possible price and selling it at a high price'. The 'entire colonial plan was known to the Crown representatives on 5 February 1840 at Waitangi, yet none of this was disclosed'. After proclaiming sovereignty, the Crown nonetheless used proclamations and ordinances to bring its land policies into force.[89] These and other land policies caused significant prejudice to Te Raki Māori. In the long term, counsel submitted, the doctrine of radical title was the first step 'in an unbroken chain towards landlessness for Māori'.[90] In other submissions, Bryan Gilling argued that the Crown's attempts to impose its authority over Māori lands, resources, and trading relationships during this period, combined with the impacts of its decision to move the capital to Auckland, created conditions that led to the outbreak of war in this district in 1845 (as discussed in chapter 5).[91] According to claimant counsel, '[a]ny argument for pre-emption as protection is . . . undercut by the unilateral waivers of pre-emption by FitzRoy in 1844'.[92]

In submissions on tikanga, counsel Alana Thomas and Ihipera Peters emphasised that Te Raki Māori expected that they would continue to live according to their own laws after signing te Tiriti. Counsel submitted that tikanga was 'a framework of law and custom' that governed the way of life of Te Raki hapū.[93] They submitted that Captain Hobson and other Crown representatives gave assurances at the Waitangi and Kaitāia signings, and again in a letter to northern rangatira in April 1840, that Māori would be able to maintain their customs.[94] Nonetheless, very soon after giving those assurances, Crown officials began to debate the application of English law to Māori. Some officials favoured a strict application, while others favoured a more gradual approach in which English law was modified to

86. Claimant closing submissions (#3.3.223), pp 30–31.
87. Claimant closing submissions (#3.3.223), pp 11, 30–31.
88. Claimant closing submissions (#3.3.223), pp 12–14.
89. Claimant closing submissions (#3.3.223), pp 12–14.
90. Claimant closing submissions (#3.3.223), p 31.
91. Claimant closing submissions (#3.3.219), pp 19–24.
92. Claimant closing submissions (#3.3.208), p 34.
93. Claimant closing submissions (#3.3.221), pp 56–61, 86.
94. Claimant closing submissions (#3.3.221), p 73.

suit Māori needs and enforced through the agency of rangatira. Early ordinances reflected the latter approach, though it was based on a view 'that eventual assimilation of Māori within a British legal framework was the ultimate goal'. This assimilationist approach was evident in the Crown's handling of early criminal trials, in which the chief justice found that Māori were subject to English law.[95]

Counsel for Hokianga claimants, Jason Pou, told us that the treaty relationship should be viewed through the lens of te kawa o Rāhiri, the system of law (discussed in chapter 3) under which Ngāpuhi hapū had for centuries maintained their autonomy within their own spheres of influence, while also having capacity to work together, manage conflict, and maintain balance.[96] A fundamental principle was that only Hokianga could speak for Hokianga; that is, 'the source of the rights and authority of Hokianga is indigenous, and must be seen to lie in the peoples of Hokianga themselves'.[97] In submissions on the Northern War, claimant counsel Dr Gilling also referred to this kawa, submitting that it was 'the core of political authority in Ngapuhi' and 'central to the independent authority of rangatira of nga hapu o Te Raki'. It was, in short, a form of hapū sovereignty, and in the period after te Tiriti was signed, 'the Crown failed to protect this sovereignty and that of Te Kawa o Rahiri'.[98]

Ms Mason submitted that, because Te Raki Māori did not consent to the Crown exercising sovereign authority over them,

> all subsequent legislative action by the Crown, including the issuing of the Proclamations . . . the establishment of various mechanisms intended to effect colonial government over Aotearoa New Zealand and the passage of legislation, purporting to exert control over Te Raki Māori, their taonga, and people was, and is, in breach of te Tiriti/the Treaty.[99]

The Crown's sovereignty, imposed on Te Raki Māori without their confirmed consent, 'cannot co-exist with their rightful exercise of tino rangatiratanga'.[100]

Te Kani Williams, who represented claimants from Ngāti Kuta, Te Patukeha, and Pikaahu hapū, submitted that all post-treaty Crown attempts to exercise authority over Te Raki Māori were in breach of the treaty. Mr Williams said the Crown did not provide for the exercise of rangatiratanga, 'as the Crown assumed, wrongly, that it was sovereign'. In light of our stage 1 findings, Mr Williams submitted, the onus was on the Crown to demonstrate that it had 'taken positive steps to obtain sovereignty' in a treaty-compliant manner. The Crown had not done so, in

95. Claimant closing submissions (#3.3.221), pp 86, 87–96.
96. Amended closing submissions (#3.3.297(a)), pp 9, 12–13.
97. Amended closing submissions (#3.3.297(a)), p 9.
98. Claimant closing submissions (#3.3.219), pp 14, 15.
99. Claimant closing submissions (#3.3.228), p 8; see also pp 345–346.
100. Claimant closing submissions (#3.3.228), p 8.

his submission, and therefore there 'can be no legitimacy in the sovereignty they purport to hold today'.[101]

4.2.4 The Crown's submissions

Crown counsel Andrew Irwin submitted that: 'The Crown's sovereignty over New Zealand is incontrovertible.' Notwithstanding our stage 1 conclusions, Crown counsel insisted that the Te Raki Māori signatories to te Tiriti consented to the Crown's acquisition of sovereignty in 1840.[102] Crown counsel submitted that there was a need to distinguish between the Crown's effective (de facto) sovereignty on the ground, and its legal (*de jure*) sovereignty under its own constitutional law and theory. The latter, counsel submitted, extended to all its subjects – to Māori (after te Tiriti had been signed) and to settlers. On the other hand, effective sovereignty (that is, the Crown's 'physical capacity to make its writ run throughout the islands', or 'the practical application of British authority or law to Northland Māori') was not achieved by the Crown for many decades.[103]

In accordance with the Crown's constitutional law and theory, its legal sovereignty was achieved in New Zealand through a series of jurisdictional steps during 1840, notably Hobson's proclamations of 21 May 1840, and their publication in the London *Gazette* on 2 October 1840. The extension of British sovereignty to New Zealand was therefore completed by 2 October 1840. The laws of New South Wales applied to New Zealand once New Zealand became a part of New South Wales 'probably from 21 May 1840', but '[a]t the latest . . . as from 16 June 1840', when the New South Wales Legislature enacted law to that effect.[104]

The Crown accepted that the explanation of sovereignty Hobson gave rangatira at Waitangi when he spoke on 5 February 1840 was 'not as comprehensive as it could have been', and that 'Hobson focused on asking the rangatira to give him the power to restrain British subjects in New Zealand'.[105] The Crown also accepted that accounts of the treaty debates did not record Hobson explaining 'precisely how British sovereignty would apply to Māori and how it might affect Māori law and custom'.[106]

Nonetheless, counsel submitted that 'Māori would have understood that the Governor's new form of authority (kawanatanga) was to relate to them and their lands in some way'. This was clear from article 1 of te Tiriti which referred to 'te Kawanatanga katoa o o ratou w[h]enua'.[107] Kāwanatanga and tino rangatiratanga 'were different in nature and application':

101. Closing submissions on behalf of Wai 320 Wai 736, Wai 1307, Wai 2026, Wai 2476, and Wai 1958 (#3.3.234), pp 4–5.
102. Crown closing submissions (#3.3.402), pp 3, 4–5, 9–11.
103. Crown closing submissions (#3.3.402), pp 4, 6.
104. Crown closing submissions (#3.3.402), p 4; see also Donald Loveridge (doc A18), p 245.
105. Crown closing submissions (#3.3.402), p 5.
106. Crown closing submissions (#3.3.402), p 25.
107. Crown closing submissions (#3.3.402), pp 5–6.

> Kawanatanga was to be a new form of authority exercised through the government of New Zealand. Tino rangatiratanga was a localised form of authority in relation to lands and taonga. The two forms of authority overlapped. The exercise of both forms of authority was subject to the paramount principle that the Crown and Māori were to act towards each other honourably, fairly, reasonably and in good faith.[108]

Because the two forms of authority were different in nature, they 'were not equal as such'. Kāwanatanga 'was to have a national focus', and therefore a different geographic reach from tino rangatiratanga; tino rangatiratanga was specific to whenua, kāinga, and 'taonga katoa'; and Māori would have understood 'that their chieftainship over their people and their lands continued, but that the new Governor would have a new over-arching authority over all people and places within New Zealand.'[109]

Counsel submitted, furthermore, that Crown officials in 1840 believed that Māori had consented to a cession of sovereignty:

> The Crown accepts that there was a disjoint in the Crown and Northland Māori understandings of the treaty. For the Crown, it considered Māori had consented to British sovereignty over all New Zealand, though it was honour-bound to respect Māori property rights. For Northland rangatira, they are likely to have considered they retained their chieftainship (tino rangatiratanga) over their people and that a new Governor would exercise a new form of power (kawanatanga).[110]

Because the Crown and rangatira had different understandings about the nature of the Crown's authority and how it might apply to Te Raki Māori, 'the application of that new form of power to Northland Māori had the potential to cause conflict'.[111]

Counsel cited aCrown witness legal scholar Dr Paul McHugh, who said that the proclamations 'amounted to an announcement through the [Crown] prerogative that the process of acquiring sovereignty over all inhabitants was formally over'. This was 'plainly . . . aimed more at the settlers than Māori', and there was 'no supposition [by Crown officials] that such a ceremonial announcement meant that Māori would immediately defer to the Crown and switch to English law'. Crown officials, Dr McHugh said, understood that 'much more work needed to be done in terms of bringing home to Maori the actuality of the sovereignty that Hobson had announced'.[112]

In respect of Māori land, Mr Irwin said that – under the legal doctrine of radical title – the Crown acquired title to all land in New Zealand 'as a function of obtaining sovereignty in 1840'. The Crown regarded its radical title as burdened

108. Crown closing submissions (#3.3.402), p 6.
109. Crown closing submissions (#3.3.402), pp 29–30.
110. Crown closing submissions (#3.3.402), p 25.
111. Crown closing submissions (#3.3.402), p 25; see also p 30.
112. Paul McHugh, brief of evidence (doc A21), p 72 (cited in Crown closing submissions (#3.3.402), p 11).

by, or subject to, customary title until that title was extinguished. Where customary title had been extinguished, 'the Crown considered that Māori had no further legal claim to the land'. Accordingly, 'where Māori had actually sold land to settlers prior to 1840, the Crown considered that it held a full title to that land'. Hence, it had discretion to grant or withhold that land to settlers who made claims to the Land Claims Commission (established by The New Zealand Land Claims Ordinance 1840; see chapter 6). The Crown, counsel added, did not consider the doctrine of radical title 'to be inconsistent with the principles of the treaty'.[113] The Crown made no submission on its right of pre-emption, whether it had been properly explained to Māori at the time of the signing of the treaty, and whether it had been intended to protect them.

Crown counsel distinguished what he called 'the theory' from 'the facts' relating to the extension of British authority to Māori. Counsel said that the treaty was not clear about the extent to which Māori law and custom was to continue after 1840 (as the Crown had earlier accepted in stage 1 of our inquiry). Counsel focused on the various official instructions sent to Hobson about recognition of Māori customs, and on Queen Victoria's Charter of December 1840 establishing New Zealand as a separate colony. Counsel also cited the 1839 instruction of the Secretary of State for War and the Colonies, Lord Normanby, that Hobson should carefully defend Māori customs, with certain exceptions (human sacrifice, cannibalism, and intertribal warfare) for the time being, until Māori could be brought 'within the pale of civilized life'.[114]

In practice, Crown counsel submitted, during the period up to 1844 the Crown attempted to apply English law to Māori 'in only a few instances, and then with respect and through the agreement of rangatira'.[115] The Crown made no attempt to exercise day-to-day authority over Te Raki Māori; on the contrary, it respected the role of Māori law and custom.[116] On occasions, there were misunderstandings that led Te Raki leaders to believe that the Crown was exerting authority over them, when that was not the Crown's intention.[117] The Crown also enacted legislation providing for rangatira involvement in law enforcement.[118] In general, the evidence was that Te Raki rangatira 'continued to govern their communities through their own laws and customs' throughout the period covered by this chapter and until at least the 1870s.[119]

The Crown made no concessions in respect of the Tribunal's first issue; that is, tino rangatiratanga, kāwanatanga, and autonomy in respect of the period from 1840 to 1844.

113. Crown closing submissions (#3.3.412), pp 3–4.
114. Normanby to Hobson, 14 August 1839 (cited in Crown closing submissions (#3.3.402), pp 40–42).
115. Crown closing submissions (#3.3.402), p 48; see also p 6.
116. Crown closing submissions (#3.3.402), pp 6, 48, 59.
117. Crown closing submissions (#3.3.402), pp 55–57.
118. Crown closing submissions (#3.3.402), pp 60–62.
119. Crown closing submissions (#3.3.402), p 59; see also p 6.

4.2.5 Issues for determination

Our stage 1 report also outlined the discussions preceding the signing of te Tiriti in our district and the explanations that Captain Hobson gave to Te Raki rangatira. However, given our jurisdiction, in stage 1 we could not hear claims or make treaty findings about events before 6 February 1840.

In this report, we are considering claims about the Crown's acts and omissions 'on or after' 6 February 1840. This chapter considers claims about the treaty relationship in the period from the signing of te Tiriti through to the end of 1844 – a period marked by the emergence of significant tensions between the Crown and Te Raki Māori over their relative authority. The parties differed over the treaty compliance of the Crown's actions in proclaiming sovereignty and establishing a government with presumed authority over the whole of New Zealand. They also differed over the extent to which the Crown caused prejudice to Te Raki Māori by asserting its effective authority in the district during the years 1840 to 1844. We regard these as important issues. We also consider the overall state of the political relationship between Te Raki Māori and the Crown at the end of 1844, three months before the outbreak of the Northern War.

Accordingly, the issues for determination in this chapter are:

- Did the Crown breach the treaty by proclaiming its sovereignty over New Zealand and establishing Crown Colony government?
- To what extent did the Crown assert its effective authority over Te Raki in the years from 1840 to 1844?
- What was the state of the political relationship between Te Raki Māori and the Crown by 1844?

In considering the claims before us, arising from the Crown's actions from 6 February 1840, we will at times refer to the Crown's preparations for the annexation of New Zealand territory before that date, as a reminder of that context. We note that the parties' submissions were influenced by our stage 1 conclusion – in particular, the conclusion that Te Raki Māori who signed te Tiriti did not cede their sovereignty to the Crown.

4.3 Did the Crown Breach the Treaty by Proclaiming its Sovereignty over New Zealand and Establishing Crown Colony Government?

4.3.1 Introduction

In this section, we discuss the steps the Crown took during 1840 and 1841 to proclaim its sovereignty over New Zealand and establish Crown Colony government. Even though Te Raki Māori had not ceded their sovereignty, Captain Hobson nonetheless proceeded on the basis that they had. On 21 May 1840, he issued two proclamations: one asserting the Crown's sovereignty over the North Island by cession, and the second asserting sovereignty over all the islands of New Zealand

including the 'Southern Islands' (we will not consider the second proclamation insofar as it relates to the southern islands).[120]

Following these proclamations, the Crown took further steps to assert its sovereignty and establish a government with authority over the whole of New Zealand. These steps included publication of the proclamations in the London *Gazette* (2 October 1840), issuing letters patent establishing New Zealand as a separate colony, and appointing Hobson as Governor (November 1840); sending a Charter and Royal Instructions to Hobson for the establishment of a government (December 1840); and then establishing the machinery of government, including an Executive, courts of law, a commission to inquire into old land claims, and the Protectorate of Aborigines.

As set out in section 4.2, the claimants said that the Crown breached the principles of the treaty by proclaiming sovereignty without the consent of Te Raki Māori, and then by establishing a government and making laws with presumed authority over Te Raki Māori people and territories.[121] Crown counsel submitted that, in 1840, Crown officials believed that Māori had consented to British sovereignty and to the establishment of a national government which would exercise some form of authority over them – though the treaty did not provide clarity about the precise relationship between the Crown and Māori, or about the extent to which Māori law would continue in force.[122] Crown counsel noted that early Governors were instructed to tolerate most Māori laws and customs, at least until the Crown was able to assert its practical authority over the whole country.[123]

In this section, we are therefore concerned with the extent to which the Crown's actions in proclaiming sovereignty and establishing a government during 1840 and 1841 were consistent with treaty principles.

We outline in more detail the steps the Crown took to proclaim sovereignty over New Zealand, the Crown's reasons for doing so, and the subsequent steps it took to establish Crown Colony government in New Zealand. We are concerned particularly with the Crown's motives for these steps. What weight did the Crown give to the treaty agreement it had signed with Te Raki rangatira as it assumed sovereign power? Did Crown officials believe Te Raki rangatira had consented to cede sovereignty and that the Crown had therefore met its own preconditions for proclamation of sovereignty? What other factors influenced the Crown's actions? Ultimately, we ask whether, on the basis of official understanding, the Crown's proclamation of sovereignty over New Zealand was reasonable.

We will consider the following three questions:

120. As we noted in our stage 1 report, the second proclamation of sovereignty which referred to the assertion of the Queen's sovereignty over the southern islands of New Zealand omitted any grounds for Hobson's assertion, though in his accompanying despatch to London he stated that it was on the grounds of 'discovery'. The proclamation was later corrected to include this explanation: Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 387, 389.

121. Claimant closing submissions (#3.3.228), pp 57–58, 138, 153, 210–211.

122. Crown closing submissions (#3.3.402), p 30; see also pp 5–6, 25–26.

123. Crown closing submissions (#3.3.402), pp 40–43.

- What was the importance to the Crown of the treaty it had signed with Te Raki rangatira as it proclaimed sovereignty over New Zealand and established Crown Colony government?
- In light of Hobson's understanding of what Te Raki rangatira had consented to when they signed te Tiriti, was it reasonable for him to proclaim Crown sovereignty over New Zealand and thus embark on the establishment of a government with authority over Māori?
- To what extent did the Crown make provision for hapū and iwi to continue to exercise tino rangatiratanga, as it established its new system of government and introduced its own law?

We will conclude with our findings on claims that the Crown breached treaty principles by proclaiming its sovereignty and establishing Crown Colony government.

4.3.2 Tribunal analysis

4.3.2.1 *What was the importance to the Crown of the treaty it had signed with Te Raki rangatira as it proclaimed sovereignty over New Zealand and established Crown colony government?*

Before it had presented te Tiriti to rangatira at Waitangi, the Crown had taken a number of steps to prepare for its planned annexation of New Zealand. Those steps were to come into effect only if the Crown obtained Māori consent to a cession of sovereignty. We outlined these events in our stage 1 report, but provide a summary here since it is valuable context for our understanding of the Crown's intentions and post-treaty actions.

We commented in our stage 1 report on the origins of British economic and political interest in New Zealand and its people.[124] In the 1830s, the British Colonial Office was reluctant to expand its formal empire in the South Pacific, though officials at the periphery in New South Wales were by no means so hesitant. Early Governors, appreciating the potential for trade, had taken action to establish relationships with Māori from the Bay of Islands and Hokianga. From as early as 1813, the New South Wales Governor, anxious about the danger to trade posed by the reaction of Māori communities to the mistreatment of Māori on board ships, issued an order asserting his authority to punish serious criminal acts committed on sealing and whaling ships in New Zealand. In fact, New Zealand lay outside Britain's jurisdiction, as was made clear in subsequent Imperial Acts of 1817, 1823, and 1828, the latter two conferred jurisdiction on New South Wales courts to deal with crimes committed in New Zealand (though perpetrators had to be brought back to British territory).[125]

124. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 504.

125. The three Acts were concerned with providing for the punishment of crimes committed against Maori (in the case of the 1823 and 1828 Acts, in New South Wales courts): the Murders Abroad Act 1817 (UK) 57 Geo III c 53, the New South Wales Act 1823 4 Geo IV c 96, and the Australian Courts Act 1828 (UK) 9 Geo IV c 83. Peter Adams has observed that these statutes recognised that, 'as far as Britain was concerned, New Zealand was independent territory': Peter Adams, *Fatal Necessity:*

The British policy remained one of minimal intervention and acknowledgement that New Zealand lay outside British jurisdiction. But in 1830, the *Elizabeth* affair, in which the master of the brig *Elizabeth* transported Ngāti Toa warriors led by Te Rauparaha to Banks Peninsula to take revenge on Ngāi Tahu, was one factor in the Crown's decision to appoint a diplomatic representative, James Busby, who arrived at Waitangi in 1833.[126]

The missionaries still opposed any British intervention, but from 1837 the pressure from backers of organised emigration increased. The New Zealand Association was founded that year to pursue the object of systematic colonisation in accordance with the theories of Edward Gibbon Wakefield: that colonisation 'in a new land' should be regulated, and 'civilised' self-governing British communities founded. According to Wakefield, the key to the successful establishment of British settlement was to acquire land cheaply from the indigenous people and on-sell it to settlers at a high price; the proceeds could be used to fund working class emigration and ensure a labour supply, until eventually labourers could aspire to buy their own land.[127] Despite the concern of the Church Missionary Society (CMS, which had a number of missionaries in New Zealand) about colonising proposals, the Colonial Office decided at the end of 1837 that an official British presence in New Zealand beyond that represented by the British Resident (Busby) was necessary. In December, it received a despatch from Busby himself which gave a 'dire description of Māori disease and mortality' and of missionary inability to stem the impacts of '[h]aphazard white colonisation'.[128] Though we concluded there was 'a great deal of exaggeration' in the accounts of Busby and others about rapid Māori population decline, the Colonial Office was greatly concerned and became much more open to the idea that Britain should 'take control and impose order' – in Busby's view, 'under the nominal authority of Māori rangatira'.[129]

During 1838, the Colonial Office considered what form British intervention in New Zealand should take, and finally offered Captain William Hobson an appointment as British Consul there. But in early 1839, the New Zealand Association stepped up its own plans. In March, it turned into a public joint stock company, the New Zealand Land Company, and in April it advised the Colonial Office that it would shortly send out a preliminary expedition to New Zealand to

British Intervention in New Zealand, 1830–1847 (Auckland: Auckland University Press, 1977), p 53; Waitangi Tribunal, *He Whakaputanga me te Tiriti*, pp 55–137, 326.

126. At Akaroa, the Pākehā master lured the senior Ngāi Tahu rangatira Tamaiharanui, his wife, and daughter on board, where they were captured by Te Rauparaha. The Ngāti Toa party then attacked the village, while Tamaiharanui and his wife were taken back to Kāpiti and killed; they killed their daughter before their arrival, to spare her the fate that awaited them. Ngāpuhi, later learning of this, were concerned that tactics such as those of Ngāti Toa might be used against them to avenge attacks made by Hongi Hika in his raids, and in 1831 sent a deputation to Sydney to complain to Governor Darling and seek redress and protection from the British government. This led to Darling's decision to appoint a Resident, though he was recalled in 1831 and did not proceed further with the plan himself: Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 110.

127. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 296–297, 313.

128. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 232–233, pp 302–304.

129. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 232–233, 237, 303–304.

acquire land and prepare for the first colonists.[130] It hoped to achieve this before the Government established any authority there. Its first vessel, the *Tory*, set off for this purpose in May 1839, followed in September 1839 by several more New Zealand Company ships.[131] These developments led to a renewed sense of urgency in the Colonial Office and prompted further plans for extending the Crown's authority over any land it might acquire there. In a hasty British government response, Hobson was despatched to negotiate with Māori for recognition of the Queen's sovereign authority over parts or all of the islands.

In our view, Britain was 'by no means a reluctant imperialist – it had long seen New Zealand as part of its de facto realm', even if it was reluctant to add New Zealand to its formal empire.[132] The trigger for change was the determined move of the New Zealand Company to undertake large-scale private colonisation. At that point, the British government responded emphatically, primarily to protect imperial interests; it wanted to take control of the land trade and prevent a private company setting itself up as a colonial Government. Its plans took shape during 1839, as it considered what role a treaty would play in the establishment of British sovereignty in New Zealand, and how a government would be established. It was decided that the most appropriate method of governing New Zealand would be through the Crown Colony model. In such a colony, the Crown would appoint and instruct a Governor in whom legislative, executive, and some judicial powers were combined and concentrated.

The British government, we said, took various circumstances into account in making its decision about the process to be followed in establishing its authority in New Zealand (we consider these circumstances later.) Questions of colonial law and policy were involved. Joseph states that for determing the application of English laws, the common law distinguished between settled colonies and conquered or ceded colonies. In settled colonies the settlers took their own law with them (as far as applicable in the countries they colonised); in conquered or ceded colonies the existing legal system remained intact 'unless or until modified or abrogated by British Statute or Crown ordinance'.[133]

Colonial Office officials evidently grappled with the New Zealand situation. Stephen applied 'two cardinal principles': protection of Maori and recognition of their rights, on the one hand, and 'the introduction among the Colonists of the principle of self-government'.[134] Briefly, Crown Colony government was favoured

130. Loveridge explains that the various organisations formed for the colonisation of New Zealand in the 1830s were often referred to indiscriminately as 'The New Zealand Company'; they included the New Zealand Association and the New Zealand Land Company (1839), while the New Zealand Company was created by the Crown Charter in November 1840. In this report most of our references to the Company date from 1840, and we have decided generally to use that name in this part of our report, with the exception of this specific reference: Donald Loveridge (doc A18), p 6.

131. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 313, p 505.

132. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 505.

133. Philip Joseph, *Joseph on Constitutional and Administrative Law*, 5th ed (Wellington: Thomson Reuters, 2021), p 53.

134. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 327; McHugh (doc A21), p 90.

over the alternative of granting representative institutions to the settlers as soon as the colony was established. As we outlined in our Stage 1 report, in Stephen's view Crown Colony government would offer Māori 'the protection of British law' (though there would be temporary accommodation for Maori customary law), and they would eventually gain the full rights of British subjects. It would also provide for 'peace and order' between Māori and settler communities until a representative assembly could be safely established. There must first, however, be a cession of Māori sovereignty – and some time must be allowed for this; but the departure of the New Zealand Company ship *Tory* left little time. It was decided therefore to adopt a proposal to add New Zealand initially to the existing Crown Colony in New South Wales. The powers vested by Parliament in the Governor and Legislative Council of that colony might then be exercised over the 'inhabitants of the new colony' (see sidebar on page 224).[135] As the Secretary of State for the Colonies later explained, this was a modification of the settlers' right to a legislature; it would, for now, be a nominated legislature.[136]

In McHugh's view, it was because British officials were considering their obligations to both Māori, and to the British settlers (then and in the future) that they not only sought a cession from Māori but at the same time were acting on the basis that any colony would be designated as 'settled' (as opposed to 'conquered or 'ceded'). They saw sovereignty as being established through a series of 'jurisdictional measures' affecting 'different segments of the islands' inhabitants': that is, British subjects, and Māori. Thus, 'one might say that Crown sovereignty was established both by cession and by the occupancy attracting designation as a 'settled colony'. Both steps 'baked into the sovereignty of the whole'. The Colonial Office 'did not feel there was a need to make a choice'; the two steps were 'perfectly consistent'.[137]

On 15 June 1839, the British Crown initially provided for the extension of the boundaries of Her Majesty's territory of New South Wales so to include specifically 'any territory' within the islands of New Zealand 'which is or may be acquired in sovereignty by Her Majesty'. Lord Normanby's official instructions to Hobson of 14 August 1839 stipulated that, at least in the North Island, Hobson was to achieve the acquisition of sovereignty through a treaty. We emphasised in our stage 1 report that '[f]or our purposes, the most important point is that the British clearly and consistently expressed the view that, in achieving their objectives', they must have 'the free consent of the Natives, deliberately given, without Compulsion, and without Fraud'.[138] It would be up to Hobson to decide whether Māori consent had been obtained.

On 14 January 1840, as Hobson prepared to depart from Sydney for the Bay of Islands, George Gipps, Governor-in-Chief of New South Wales, signed three proclamations, the purpose of which was to extend the New South Wales boundaries to

135. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 327–329.
136. McHugh (doc A21), p 90.
137. McHugh (doc A21), p 90.
138. Glenelg, memorandum, 15 December 1837 (cited in Paul McHugh (doc A21), pp 44–45).

include any land acquired in sovereignty in New Zealand, to provide for Hobson's appointment as Lieutenant-Governor, and to put an end to the land trade in New Zealand. The first declared that Her Majesty extended her territory of New South Wales in accordance with the letters patent of 15 June 1839 to include 'any territory which is or may be acquired in sovereignty' by Her Majesty, within the islands of New Zealand.[139]

The second proclaimed that Gipps had sworn in Hobson as Lieutenant-Governor on the basis of his commission issued in Britain on 30 July 1839, 'over such parts of' any territory 'as is or may be acquired in sovereignty' in New Zealand. And the third announced that the Crown would recognise no private purchases of land in any part of New Zealand which might be made by 'any of Her Majesty's subjects' from any chief or tribe after 14 January 1840; such purchases would be considered 'absolutely null and void'. At the same time, the Governor proclaimed the Queen's command that it be announced 'to all [her] subjects in New Zealand' that she would not acknowledge any title to land acquired in New Zealand prior to that date or after it, unless it was 'derived from or confirmed by' a Crown grant, following an investigation into the acquisition of such land by commissioners appointed under a law to be passed in New South Wales.[140] The proclamations were issued in Sydney on 19 January, the day that Hobson sailed for New Zealand in HMS *Herald*, so that they might be issued on either side of the Tasman more or less at the same time.[141] He was acompanied by four police troopers, a sergeant, and a handful of civil servants, well short of the 67 members of staff he had requested.[142]

What was the significance of these January proclamations? Dr McHugh's view was that they 'did not suppose British sovereignty already'; he added that they 'were as much statements of royal intention, channelled through the Crown's commissioned officers, as substantive legal enactments'. They announced publicly to British subjects the consequences of the 'expected acquisition of sovereign authority in New Zealand' when Hobson's mission was complete. In London, the proclamations were received without dissent and 'were never regarded as the basis of Crown sovereignty in New Zealand'.[143]

The day after his arrival, on 30 January 1840 Hobson read aloud to 'all British subjects' whom he had invited to meet him at the church at Kororāreka, his commissions and the proclamations framed by Gipps and the Executive Council of

139. The proclamation provided coordinate details for the area it described as 'that group of islands in the Pacific Ocean commonly called New Zealand, and lying between the latitude of 34 degrees 30 minutes and 47 degrees 10 minutes south, and 166 degrees 5 minutes and 179 degrees east longitude, reckoning from the meridian of Greenwich': Proclamation, 14 January 1840, BPP, vol 3, pp 37–39.

140. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 340; see also Gipps' proclamations dated 14 January 1840, BPP, vol 3, pp 37–39.

141. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 340.

142. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 340; see also McHugh, transcript 4.1.4, Whitiora Marae, p 605.

143. McHugh, brief of evidence (doc A21), p 61.

New South Wales.[144] Three hundred settlers and 100 Māori were present.[145] The first proclamation declared the extension of the boundaries of the Government of New South Wales to include any parts of New Zealand which 'is or may be acquired in sovereignty' (in accordance with letters patent of 15 June 1839), and further declared that Hobson's duties as Lieutenant-Governor had now begun. The second announced that Her Majesty would not recognise any titles to land in New Zealand that are 'not derived from or confirmed by a grant from the Crown'.[146] A commission would, however, be set up to inquire into and report on all claims to such lands.

We noted in our stage 1 report that whereas Normanby had envisaged Hobson landing as British Consul, and progressively proclaiming himself Lieutenant-Governor over lands he acquired in sovereignty from the chiefs, Hobson 'decided to assert this higher status from the outset', before he had entered negotiations at Waitangi.[147] He may have done so on the basis of the 'cession' by the chief Rete in 1834 of some 200 to 300 acres near Busby's Waitangi residence, believing that it was sufficient for him to claim sovereignty over this small corner of the country.[148] Busby did not agree, telling Hobson that 'the land was not ceded in that sense by the natives', and that Hobson should act as consul until he had obtained a cession of territory 'by amicable negotiations with the free concurrence of the native chiefs'.[149] And Captain Joseph Nias of HMS *Herald* refused to accord him the 13-gun salute of a Lieutenant-Governor, giving him only the 11 guns due a British Consul.[150] Hobson was irritated but still asserted his new status, signing the proclamations as 'Lieutenant-Governor'. It seems that he may have sought to downplay the absence of a negotiated cession at that time by heading his proclamations as follows: 'By His Excellency William Hobson . . . Lieutenant-governor of the British Settlements in progress in New Zealand' – which seems a wording designed to evade his instruction that he assume office as Lieutenant-Governor 'over such parts of any territory that may be acquired in sovereignty' (that is, by cession from Māori).[151]

144. Hobson, proclamation, 30 January 1840, BPP, vol 3, p 44; Hobson to Gipps, 4 February 1840, BPP, vol 3, p 43.

145. Forty of those present, led by James Busby, signed a document bearing witness to Hobson's reading of the commissions. The moko of one Māori, Moko, was witnessed by a settler.

146. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 340–341.

147. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 341.

148. The 'cession' had been a forfeiture of land to the King of England, a punishment suggested by Henry Williams after Busby was subjected to a night attack on his home in April 1834, and theft of property, as well as being fired upon; Busby drew up a deed accordingly and had other chiefs sign it. The chiefs also agreed that Rete should be banished from the district, though it appears this did not occur. By 1840, the land had been reoccupied by Māori: Waitangi Tribunal, *He Whakaputanga me te Tiriti*, pp 134–136, 341.

149. Busby quoted in T Lindsay Buick, *The Treaty of Waitangi: How New Zealand became a British Colony*, 3rd ed (New Plymouth: Thomas Avery and Sons Ltd, 1936), p 105 (Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 341).

150. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 341.

151. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 341.

Dr McHugh noted that Hobson would sign the treaty, 'stubbornly one suspects', both as consul and Lieutenant-Governor. He concluded that:

> Whatever the basis for Hobson's Proclamation of 30 January declaring himself Lieutenant-Governor of territory which according to his terms of office had not been yet acquired in sovereignty for the Crown, the declaration if not ineffectual was no more than a declaration of office which came into effect as and when the condition precedent to its effect was met.[152]

In other words, McHugh accepted that Hobson had proclaimed himself Lieutenant-Governor prematurely, before his crucial meeting with the rangatira to seek a cession of sovereignty. But he suggested that for that reason the declaration would have no legal effect, and submitted that events would soon overtake Hobson's jumping the gun: shortly afterwards, he did indeed secure the cession, meaning he had met the condition for his assumption of the office of Lieutenant-Governor.

Meanwhile, Busby circulated invitations to each of the confederated chiefs ('nga Rangatira o te Wakaminenga o Nu Tireni') to meet Hobson at Waitangi on 5 February. Groups of Māori began assembling there from 4 February, and on the morning of the following day, when Hobson arrived at Busby's Residence, waka converged on Waitangi from all directions. When proceedings began, Hobson addressed the large gathering first, reading out the treaty in English. The missionary Henry Williams then read it in te reo Māori and explained it 'clause by clause'. The whaikōrero continued till late afternoon when the chiefs asked for time to discuss the treaty among themselves; the discussions, which included the missionaries, continued well into the evening. On 6 February, te Tiriti was signed by rangatira at Waitangi, and in the following days at Waimate and then at Māngungu, in Hokianga.[153]

4.3.2.1.1 Why did Hobson issue proclamations of sovereignty on 21 May 1840, and what significance was accorded the treaty?

We turn here to the Crown's assumptions about the nature of its authority in New Zealand in the wake of the signing of te Tiriti, and the steps it took to assert sovereignty: Hobson's issue of proclamations of sovereignty in May and June 1840, and the establishment of Crown Colony government over New Zealand within just over a year after the treaty was entered into at Waitangi.

With the signings at Waitangi, and at Waimate and Māngungu completed, Hobson returned to the Bay of Islands and had 200 copies of te Tiriti printed. He was planning to travel south to secure more signatures. His initial plan – based on the signatures he had secured to date – was to issue a proclamation announcing that the Queen had acquired sovereignty in all territories from the North Cape to

152. McHugh, brief of evidence (doc A21), pp 62–63; Paul McHugh, transcript 4.1.4, Whitiora Marae, p 608.

153. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 351–376.

the 36th parallel – that is, about as far south as Whāngārei and Dargaville.[154] As he went further south and gathered more signatures, he would then extend the limits further by proclamation, until the whole country was included. He wrote to Governor Gipps, informing him that, to his mind, 'on the conclusion of the treaty of Waitangi, the sovereignty of Her Majesty over the northern districts was complete'.[155]

On 18 February, Hobson drew up a proclamation announcing the Queen's sovereignty as far as 36 degrees south, but he decided against issuing it on the grounds that it might jeopardise his negotiations further south. This admission, in our view, indicates doubt on Hobson's part that British sovereignty would be generally acceptable to rangatira in those territories, and also a willingness on his part to proceed without clarifying British intentions. He may also have been concerned that he might irritate northern rangatira who were not inclined or had not yet had the opportunity to sign.[156] On 17 February, the rangatira Pōmare had signed, and a few days later Hobson set off for Waitematā.[157] Wiremu Korokoro of Ngāpuhi, Ngāti Wai, and Te Parawhau signed there at Karaka Bay in early March, together with some chiefs of Ngāti Paoa. Subsequently, in May (perhaps on 13 May), the rangatira Kawiti – after strongly expressing his concern about losing his land – and Te Tirarau put their names to te Tiriti in the Bay of Islands.[158]

On 1 March, Hobson suffered a stroke and had to return to the Bay of Islands, where he recuperated quite quickly. In the meantime, Willoughby Shortland, the police magistrate, made arrangements for other signings further south, sending copies of te Tiriti to mission stations or by ship. In late April, Hobson deputed Major Thomas Bunbury, who had recently arrived from Sydney, to carry the treaty in HMS *Herald* to the Bay of Plenty, Port Nicholson, the South Island, and Stewart Island. Over a period of six months, nine copies of te Tiriti were signed at about 50 meetings around the coasts of both islands.[159]

But before the copies were returned to Hobson, news was received that the New Zealand Company settlers recently arrived in Port Nicholson had established their own 'government', which they claimed derived its legality from authority granted by the local chiefs.[160] In March, they had elected a council and appointed Colonel William Wakefield its president and, as Hobson later described it, had

154. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 385; Loveridge, brief of evidence (doc A18), p 213; Claudia Orange, *The Treaty of Waitangi* (Wellington: Allen & Unwin/Port Nicholson Press, 1987), p 66.

155. Hobson to Gipps, 17 February 1840, BPP, vol 3, p 134.

156. Hobson left the document with Shortland on 21 February, instructing him not to circulate it 'unless some circumstances arise that render its publication actually requisite': Hobson to Shortland, 18 February 1840 (Loveridge, brief of evidence (doc A18), p 213).

157. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 385.

158. 'Treaty signatories and signing locations: page 3 – Ngā Wāhi – Treaty Signing Occasions', https://nzhistory.govt.nz/politics/treaty/nga-wahi-signing-occasions.

159. Hobson to Secretary of State for the Colonies, 25 May 1840, BPP, vol 3, pp 137–139; K A Simpson, 'William Hobson', in *The Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, https://teara.govt.nz/en/biographies/1h29/hobson-william.

160. Orange, *The Treaty of Waitangi*, p 84.

'proceeded to enact laws and to appoint magistrates'.[161] They were reported to have a written constitution which had been drawn up before they left England and was now apparently signed and 'ratified' by the 'Sovereign Chiefs of the district of Wanga Nui Atera or Port Nicholson'.[162] This was despite the Colonial Office's strong reaction to an earlier agreement drawn up by the company binding them 'to be governed by a set of "provisional Regulations" which they would be required "to enforce . . . on each other"'. This would form the basis of the 'Constitution'.[163] The flag of the United Tribes, of an independent New Zealand, which had been made aboard the *Tory*, flew above Port Nicholson.[164] Yet the company officials had known that the Crown was intending to proclaim sovereignty, and had known that the Colonial Office considered the regulations to be illegal. Dr McHugh explained that since British subjects lacked judicial power over one another not derived from formal royal warrant, Hobson considered the settlers' activity amounted to 'high treason'.[165]

At this point, Hobson moved with remarkable speed. News from Port Nicholson reached him at 8 pm on the evening of 21 May. Before the night was out, he had issued two proclamations.[166] In McHugh's view, they were aimed 'jurisdictionally at the European settlers'.[167] They were 'primarily directed' at the exercise of the Crown's sovereignty vis à vis the settler population (in particular that of Port Nicholson) rather than Māori – though this did not mean that British sovereignty was restricted to British subjects.[168]

The first proclaimed Her Majesty's sovereignty over the North Island by cession, via a treaty, of 'all rights and powers of sovereignty . . . absolutely and without reservation' by both the 'Chiefs of the Confederation of the United Tribes' and the 'separate and independent Chiefs of New-Zealand' who were not members of the Confederation; ratified also 'by the adherence of the Principal Chiefs' of the North Island. Hobson, as Lieutenant-Governor, declared that 'from and after the date of the above-mentioned treaty' (wrongly given as 5 February), the sovereignty of the North Island 'vests in Her Majesty Queen Victoria, Her heirs and successors for ever'.[169]

161. Hobson to Secretary of State for the Colonies, 25 May 1840, BPP, vol 3, p 138.
162. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 386.
163. The regulations provided for the formation of a governing committee which was empowered to make and enforce laws and to raise a militia: Donald Loveridge, '"An Object of the First Importance": Land Rights, Land Claims and Colonization in New Zealand, 1839–1852', research report commissioned by the Crown Law Office, 2004 (Wai 863 RO1, doc A81), p 35 n
164. Orange, *Treaty of Waitangi*, p 84.
165. Hobson to Russell, 25 May 1840 (cited in McHugh, brief of evidence (doc A21), p 69).
166. Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa*, p 82.
167. McHugh, brief of evidence (doc A21), p 70.
168. McHugh, brief of evidence (doc A21), pp 71–72.
169. Hobson described himself in the text of the North Island proclamation as 'Consul and Lieutenant-governor in New Zealand', but signed as Lieutenant-governor; in the second proclamation he described himself only as 'Lieutenant-governor of New Zealand', and signed as such: Proclamations enclosed in Hobson to Secretary of State for the Colonies, 25 May 1840, BPP, vol 3, pp 140–141.

The second proclamation, bearing the same date, recited the Queen's command to assert her sovereignty over the southern islands (that is the 'Middle Island' and Stewart Island) as well as the northern island, which had been ceded, and declared 'the full Sovereignty of the Islands of New Zealand' to vest in the Queen. It did not give any grounds for Hobson's assertion, and on 16 June Hobson reissued it, specifying that sovereignty over the southern islands was asserted 'on the grounds of Discovery'.[170] Then two days later, he issued a third proclamation, referring to the formation at Port Nicholson of an illegal assocation 'under the title of a Council', which had, 'in contempt of Her Majesty's authority . . . assumed and attempted to usurp the powers vested in me [Hobson]'. He commanded all persons connected with the 'illegal' association to withdraw from it, and all in Port Nicholson or elsewhere 'within the limits of this Government, upon the allegiance they owe to Her Majesty Queen Victoria, to submit to the proper authorities in New Zealand, legally appointed'.[171]

In his despatch to London enclosing the May proclamations, Hobson cited the 'universal adherence' of the chiefs of the North Island (despite the fact that he was still waiting for confirmation of a number of signings of te Tiriti; at the time he held only the sheets signed in the north, and the copy of the Treaty – in English – at Waikato Heads and Manukau Harbour).[172] By this time, we note, Hobson had reconsidered his view of the significance of the various treaty signings. He no longer referred to the Waitangi and Hokianga signings as completing the Queen's sovereignty 'over the northern districts'. In his letter of authorisation to Major Bunbury of 25 April, on the eve of Bunbury's departure to the south with a copy of te Tiriti, Hobson stated:

> The treaty which forms the base of all my proceedings was signed at Waitangi on the 6th February 1840, by 52 chiefs, 26 of whom were of the confederation, and formed a majority of those who signed the Declaration of Independence. This instrument I consider to be *de facto* the treaty, and all the signatures that are subsequently obtained are merely testimonials of adherence to the terms of that original document.[173]

This decision is reflected in the wording of his first proclamation (cited earlier): the treaty (incorrectly) dated 5 February was 'made and executed' by himself, as the Queen's representative, on the one part, and the Chiefs of the Confederation (who are particularly mentioned) and independent chiefs, not members of the Confederation, on the other. The treaty was stated to have been 'further ratified and confirmed by the adherence of the principal Chiefs of this Island [the North

170. Donald Loveridge, 'The New Zealand Claims Act of 1840' (commissioned research report, Wellington: Crown Forestry Rental Trust, 1840), encl in Hobson to Secretary of State for the Colonies, 25 May 1840, BPP, vol 3, p 141; Proclamation, 21 May 1840 (Donald Loveridge, supporting papers (doc A18(d)), p 585); Loveridge, brief of evidence (doc A18), pp 218–219.
171. Proclamation, 23 May 1840, BPP, vol 3, p 141.
172. Waitangi Tribunal, *Te Whakaputanga me te Tiriti*, Wai 1040, pp 387–389.
173. Hobson to Bunbury, 25 April 1840, 25 May 1840, BPP, vol 3, p 139.

Island]'.[174] The treaty entered into at Waitangi was, in Hobson's view, the document of Māori cession. Later, we consider the significance of this further.

Hobson further explained to the Colonial Office that his proclamations had been issued over both islands as a response to the emergency that had arisen in Port Nicholson. He had decided to proclaim sovereignty over the South Island on the grounds of discovery without waiting for the report of Major Bunbury. In any case, he added, the proclamation over the southern islands on grounds of discovery was justified by the 'uncivilized state of the natives' there.[175] At the time, Hobson was not aware that Henry Williams had secured signatures to the treaty at Port Nicholson and Queen Charlotte Sound. Bunbury had yet to travel down the east coast of the South Island, where he would secure signatures from principal Ngāi Tahu chiefs at Ōnuku (Akaroa), Ruapuke Island, and Ōtākou, and from Ngāti Toa at Cloudy Bay before proclaiming sovereignty over 'Tavai Poenammoo' (the South Island) at Cloudy Bay on 17 June 1840 by right of cession from the 'several independent native chiefs.'[176]

It was some time before Hobson received news of all the treaty signings. It was 15 October 1840 before he made a comprehensive report on the treaty to the Colonial Office, to which he attached certified copies of the English and Māori texts and a list of 512 signatories.[177] He did not mention the fact that a number of key senior chiefs had refused to sign: the ariki Te Wherowhero of Waikato, the ariki Mananui Te Heuheu of Ngāti Tūwharetoa; and also Taraia Ngakuti Tumuhuia of Thames, and Hori Kingi Tupaea of Tauranga. Te Arawa and Ngāti Tūwharetoa leaders generally would not sign. No meetings were held from Whanganui to Mōkau, and most of the Hawke's Bay and Wairarapa rangatira were not given a chance to sign; nor were Tūhoe leaders.[178] Nor did Hobson mention that not all chiefs in Te Raki had signed. In any case, the Colonial Office had already published Hobson's proclamations officially in the London *Gazette* on 2 October 1840. The Secretary of State for War and the Colonies, Lord John Russell, replied to Hobson's letter of 25 May 1840 on 10 November 1840, approving the steps he had taken: 'As far as it has been possible to form a judgment, your proceedings appear to have entitled you to the entire approbation of Her Majesty's Government.'[179] In our stage 1 report, we cited the view of Crown expert witness McHugh: if he had to state an exact moment when sovereignty passed, he considered it was 21 May 1840 – at least for the purposes of British and colonial courts:

> Strictly, it amounted to the formal and authoritative announcement by the Crown through the prerogative that the prerequisite it had set itself before annexation could

174. Proclamation, 21 May 1840, BPP, vol 3, p 140.
175. Hobson to Secretary of State for the Colonies, 25 May 1840, BPP, vol 3, p 138.
176. Declaration of Sovereignty over Tavai Poenammoo, BPP, vol 3, p 234.
177. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 389; Orange, *The Treaty of Waitangi*, p 85.
178. Orange, *The Treaty of Waitangi*, pp 54–57.
179. Russell to Hobson, 10 November 1840 (cited in Matthew S R Palmer, The Treaty of Waitangi in New Zealand's Law and Constitution (Wellington: Victoria University Press, 2008), p 56).

occur – Māori consent – had in its estimation been satisfied and that the Crown could now exert sovereign authority over all the inhabitants of the New Zealand islands.[180]

But he argued also that Crown officials never regarded the Crown's acquisition of sovereignty as happening at a single moment; rather, the Crown acquired sovereignty through a process spread over several months.[181] Moreover, it was a process that involved at least two 'jurisdictional communities or constituencies': British settlers and Māori. Hobson was most concerned about the newly arrived New Zealand Company settlers at Port Nicholson, and his proclamations were primarily directed at them. Bunbury was not called back from his signature-gathering mission, Dr McHugh added, indicating that even though Crown sovereignty might now 'technically' have been established, 'British officials remained sincerely committed to meeting the self-imposed condition precedent of Māori consent even if those consents that remained outstanding had now become matters of form rather than actual necessity'. Nor did officials (including Hobson) regard the proclamations as 'impairing the foundations of British sovereignty' on grounds of Māori consent, even if they were 'somewhat premature'.[182]

The 21 May 1840 proclamations, and their gazetting on 2 October, are accepted in colonial and international law as marking the establishment of British sovereignty over New Zealand. In the 1987 case, *New Zealand Maori Council v Attorney-General* (the *Lands* case), Judge Ivor Richardson stated: 'It now seems widely accepted as a matter of colonial law and international law that those proclamations [of 21 May 1840] approved by the Crown and the gazetting of the acquisition of New Zealand by the Crown in the London Gazette on 2 October 1840 authoritatively established Crown sovereignty over New Zealand.' Somers J, referring to the proclamations being approved in London and published in the London *Gazette*, stated: 'The sovereignty of the Crown was then beyond dispute'.[183]

4.3.2.1.2 From proclamations to the establishment of New Zealand as a new Crown Colony of the British Empire

We referred earlier to the initial arrangements for the Government of New Zealand. New Zealand was to be governed from New South Wales, which would pass laws for the new colony. Hobson, as Lieutenant-Governor would, in consultation with Governor Gipps, appoint the first, indispensable subordinate officers: a judge, a public prosecutor, a Protector of Aborigines, a Colonial Secretary, a Treasurer, a Surveyor-General of Lands, and a Superintendant of Police.[184] There was provision

180. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 525.
181. McHugh, transcript 4.1.4, Whitiora Marae, p 523.
182. McHugh, transcript 4.1.4, Whitiora Marae, pp 523, 527.
183. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 671, 690 (CA).
184. The 'protector of aborigines' was the official charged with protecting the interests of the indigenous people of a colony – in New Zealand, the interests of Māori: Normanby to Hobson, 14 August 1839, BPP, vol 3, p 89. George Clarke senior was the first appointed to this position, in 1840. He was initially referred to as the Protector of Aborigines but after sub-protectors were also appointed in 1841, the position was renamed Chief Protector of Aborigines. He began referring to himself as such from

Steps Taken by the Crown to Annex New Zealand and to Establish Crown Colony Government

15 June 1839: Letters patent were signed by Queen Victoria extending the boundaries of New South Wales to include 'any territory which is or may be acquired in sovereignty by her Majesty . . . within that group of Islands in the Pacific Ocean, commonly called New Zealand'.[1]

30 July 1839: A Commission under the Royal Signet and Sign Manual appointed Hobson Lieutenant-Governor 'in and over that part of Our Territory . . . which is or may be acquired in Sovereignty by Us . . . within that group of Islands.commonly called New Zealand'.[2]

13 August 1839: A Commission under the Great Seal appointed Hobson as Consul for the purpose of negotiating the recognition of the Crown's sovereignty by the chiefs of New Zealand.[3]

14 January 1840: Governor Gipps of New South Wales issued three proclamations (published several days later): the first declared that the boundaries of New South Wales were expanded to include any territory which is or may be acquired in sovereignty by Her Majesty in New Zealand; the second declared that Gipps had sworn Hobson in as Lieutenant-Governor to act in that capacity over any such territory so acquired; and the third stated that the Crown would recognise no private purchases of land made from Māori after 14 January 1840, and would not accept the validity of any purchases made before that date until an investigation had taken place.[4]

30 January 1840: Hobson proclaims at Kororāreka that he has 'this day entered on the duties of my said office' as Lieutenant-Governor.[5]

6 February 1840: The Treaty of Waitangi is signed by some 40 Ngāpuhi chiefs and by Hobson, the Crown's representative; also at Waimate on 10 February by some six chiefs and at Māngungu (Hokianga) on 12 February.

21 May 1840: Hobson issued two proclamations asserting Crown sovereignty: the first over the 'Northern Island' by cession, and the second over the islands of New Zealand, including the 'Southern islands' (that is the 'Middle' Island and Stewart's Island), as well as the Northern Island.

16 June 1840: the Legislative Council of New South Wales passed an Act extending the laws of New South Wales to New Zealand; the ordinance provided that

1. Loveridge, brief of evidence (doc A18), pp 148–150; Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 314, 340–341.
2. Loveridge, brief of evidence (doc A18), p 150.
3. McHugh, brief of evidence (doc A21), p 60.
4. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 340.
5. Loveridge, brief of evidence (doc A18), p 188.

'all Laws and Acts or Ordinances of the Governor and Legislative Council of New South Wales which now are or hereafter may be in force within the said Colony shall extend to and be applied in the Administration of Justice within Her Majesty's Dominions in the said Islands of New Zealand so far as the same can be applied therein any Law usage or custom to the contrary in anywise notwithstanding'.[6]

7 August 1840: the New South Wales Continuance Act 1840 was passed by the British Parliament. It extended the provisions of the Australian Courts Act 1828 that provided for the administration of justice in New South Wales and Van Diemen's Land.[7] The New South Wales Continuance Act provided that the Queen might, by letters patent, lawfully erect any islands that were then or might in future be dependencies of the colony of New South Wales into a separate colony or colonies. It also provided that the Queen might lawfully appoint a Legislative Council for any such new colony. This was the Act under which the Queen would issue the letters patent of 16 November and 24 November 1840.[8]

2 October 1840: Hobson's May proclamations were published in the London *Gazette* to secure international recognition of the sovereignty of the British Crown over New Zealand.[9]

9 December 1840: Secretary of State Lord Russell sent a covering despatch to Hobson enclosing the Charter (letters patent) erecting New Zealand into a separate colony dated 16 November 1840; also letters patent dated 24 November 1840 appointing Hobson the first Governor of New Zealand and Commander-in-Chief of the colony; and Queen Victoria issued Royal Instructions under the royal signet and sign manual for the guidance of the Governor and his successors in his administration of the Government, dated 5 December 1840.[10]

3 May 1841: the Charter was publicly read and proclaimed in New Zealand. Hobson issued a proclamation declaring his assumption of the administration of the Government as Governor and Commander-in-Chief; and proclaiming also the Queen's appointment of an Executive Council and a Legislative Council.[11]

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6. Crown closing submission (#3.3.402), p 13.
7. The Australian Court's Act (UK) 1828 Geo IV c 83.
8. New South Wales Coninuance Act 1840 (UK) 4 Vict c 62. This Act provided for the continuation until 31 December 1841 of the hrough the establishment of courts of justice and a judicial system.
9. Crown closing submission (#3.3.402), p 4. McHugh has explained that publication is a 'formal requirement for a valid proclamation (i.e.legislation under the prerogative) although it need not be effected in a special manner or place': McHugh (doc A21), p 60.
10. Russell to Hobson, enclosures no 1–3, 9 December 1840, BPP, vol 3, pp 146–164.
11. Hobson to Russell, 26 May 1841, BPP, vol 3, pp 450–451.

for a court of justice and a judicial system. There were further instructions about raising a revenue to defray the costs of the proposed settlements in New Zealand, by drawing initially on the Government of New South Wales. It was envisaged that moderate import duties on tobacco, spirits, wine, and sugar would avoid the necessity for other forms of taxation. But it was clearly envisaged that a land revenue would also be raised.

In fact, New Zealand's annexation to the colony of New South Wales was short-lived. Following the publication of Hobson's proclamations in the London *Gazette* in October 1840, and a change of government in Britain, it was decided that New Zealand should be a colony separate from New South Wales. At this point, well-oiled imperial machinery swung into action. We outline the provisions made for the government of the new colony in some detail, to underline this point. A key despatch of 9 December 1840 from Lord John Russell (the new Secretary of State for War and the Colonies) to Hobson issued instructions, detailing the machinery of government to be set up in New Zealand and the need for a thorough survey of the colony so that its administrative divisions could be established. It enclosed a number of legal instruments. The Crown preserved its control over the colony through letters patent issued by the Queen (under the New South Wales Continuance Act (UK)), dated 16 November 1840, known as the Charter. By the Charter, issued under the Great Seal of the United Kingdom, Queen Victoria erected the islands of New Zealand and other adjacent islands into a separate colony; renamed the North and South Islands, and Stewart Island (names of British origin commonly used at the time by settlers) as New Ulster, New Munster, and New Leinster respectively; and provided for the future separate administration of the Government of New Zealand.[185] By further letters patent of 24 November 1840 (enclosed in the same despatch), the Queen also appointed Captain Hobson Governor and Commander-in-Chief of the colony of New Zealand. Extensive Royal Instructions issued by Queen Victoria to Hobson dated 5 December 1840 were also enclosed.

By means of these, the new Governor was authorised to appoint an Executive Council of permanent officials (designated in the Secretary of State's covering despatch as the Colonial Secretary, the Attorney-General, and the public treasurer) to advise and assist him in administration of the Government. The Governor was also authorised to appoint judges and justices of the peace.[186] A small, nominated Legislative Council was to be established, comprising the Governor and not fewer than six appointed members (three of whom were his permanent officials). The

about 1843: A H McLintock, *Crown Colony Government in New Zealand* (Wellington: Government Printer, 1958), p180; Ray Grover, 'George Clarke', in *The Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, https://teara.govt.nz/en/biographies/1c18/clarke-george.

185. Stewart Island was named for William Stewart, first mate on board the *Pegasus*, who charted Port Pegasus in 1809. New Munster, New Ulster, and New Leinster were named after provinces in Ireland, which was then part of the Union of Great Britain and Ireland. The proclamation made no mention of the Māori names of the various islands.

186. Charter for erecting the colony of New Zealand, enclosed in Russell to Hobson, 9 December 1840, BPP, vol 3, pp147, 153–155.

nominated Legislature had the power to enact laws and ordinances 'for the peace, order, and good government' of New Zealand.[187] New Zealand ordinances would replace those of the New South Wales Legislative Council. The Governor had the sole right to introduce topics for debate and to propose laws or ordinances. Laws enacted were not to be repugnant to the laws of England and had to comply with any instructions issued by the Queen in Council. All laws passed were subject to the Queen's confirmation or disallowance.[188] Professor Jeremy Finn has emphasised the 'cardinal fact of British colonial legal history is that the ultimate power in regard to legislation did not rest with the colony but with the British Government'. The power was not used all that often, but colonial draftsmen were always mindful of it. Statutes could be disallowed on a range of grounds, principally repugnancy to English law, or if a Governor had assented to a law in breach of his general instructions.[189] The expenses of the new civil administration of the colony were to be met by receipts from land sales and the customs (that is, by revenue raised entirely within the colony); which would initially be supported by a British parliamentary grant.[190] Separate instructions were issued to the Governor by the Lords Commissioners of Her Majesty's Treasury, and to the treasurer, for the conduct of the colony's financial affairs, the care of public moneys, and the keeping of public accounts.[191]

The Governor reported to London that on 3 May 1841 he had publicly read and proclaimed the Charter providing for the administration of the colony 'with all due solemnity, in the presence of the civil and military officers of this government and a large concourse of Europeans and New Zealanders'. He had proclaimed his own appointment by the Queen as first Governor and Commander-in-Chief, and issued two further proclamations which announced, respectively, the separation of the territory of New Zealand from New South Wales, and the appointment of the Executive and Legislative Councils.[192]

The first meeting of the Legislative Council began on 24 May 1841; its second in December 1841, by which time William Swainson (Attorney-General) and William Martin (Judge of the Supreme Court) had arrived in Auckland.[193] Swainson drafted much of the early legislation and guided it through the Council, providing for the machinery of justice in a series of ordinances constituting a supreme court, county courts of civil and criminal jurisdiction, and a jury system.[194] This completed the

187. Instructions, 5 December 1840, BPP, vol 3, p 157.

188. Joseph, *Joseph on Constitutional and Administrative Law*, pp 148–149.

189. Jeremy Finn,'Colonial Government, Colonial Courts and the New Zealand Experience', in Peter Spiller, Jeremy Finn, and Richard Boast, *A New Zealand Legal History*, 2nd ed (Wellington: Brookers Ltd, 2001), pp 61–62.

190. McLintock, *Crown Colony Government in New Zealand*, p 90.

191. Russell to Hobson, 25 February 1841, and encls, BPP, vol 3, pp 169–172.

192. Hobson to Russell, 26 May 1841, and enclosures, BPP, vol 3, pp 450–452.

193. The Legislative Council would sit on 12 occasions, twice under Hobson, three times under FitzRoy, and seven under Grey. It passed 129 ordinances in total. Its sessions were described by McLintock as 'irregular and brief': McLintock, *Crown Colony Government in New Zealand*, pp 103, 132.

194. McLintock, *Crown Colony Government in New Zealand*, pp 132–133.

establishment of the initial governing infrastructure of the new colony, as the British government planned it.

4.3.2.1.3 How was the treaty understood in the context of international law at the time?

We stated in our stage 1 report that the history of British colonisation of territories for settlement in which 'the sovereign capacity of the indigenous inhabitants was recognised' had established clear principles about how sovereignty was to be acquired and a colonial Government established. These principles, the Crown's expert witness Dr McHugh argued, were considered to be binding on the Crown.[195] This was because the authorities saw it as a legal necessity, stemming both from long-standing British imperial precedent, and the 'scope of *jus gentium*, the law of nations.'[196]

Legal writers have considered this question in the broad historical context of the Crown's dealings with indigenous peoples over time, and have examined the importance it placed on the rules of international law. Well before 1840, Dr McHugh argued, 'international law recognized the juridical capacity of tribal societies to enter into treaties related to the powers of government (kawanatanga) in their territory'.[197] In his evidence to us, McHugh emphasised the continuity in British practice evident in its response both to He Whakaputanga and its entering into the Treaty.[198] In his published works, he has discussed in greater detail the origins of what he sees as a major change in Britain's conduct of its relations with 'aboriginal' peoples from the end of the Seven Years War with France (1756 to 1763). Emerging from the war as the dominant European power, with expanding imperial interests which brought it into more frequent contact with non-European societies, Britain was influenced by the ideas of the French jurist Emmerich de Vattel. Vattel's work *Le Droit des Gens* (1758) expounded a law of nations based on independent and equal state sovereignty. He argued that all nations, no matter how small, are independent and equal. In theory, no nation could lawfully interfere with another without consent, regardless of their relative power. His definition of nations or states was wide enough to include most non-Christian and tribal societies. A weaker state might place itself under the protection of a stronger one, but without divesting itself of its right to self-government and its sovereignty.[199] Vattel's work rapidly became influential in the conduct of imperial practice among European states, including Britain (it was first translated into English in 1760).

British imperial practice in respect of the relations between nations was affirmed and influenced by Vattel. In our stage 1 report we cited McHugh on the

195. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 327.
196. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 329.
197. Paul McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Auckland: Oxford University Press, 1991), p 178 (cited in Palmer, *The Treaty of Waitangi*, p 158).
198. McHugh, brief of evidence (doc A21), p 95.
199. P G McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-determination* (Oxford: Oxford University Press, 2004), pp 110–111. Vattel's work became the handbook of the British Foreign Office.

evolution over time of British adaptation to local circumstances when it came to applying their authority. But 'wherever the British went they remained wedded to the belief that their relations with other peoples had to be legitimated.' McHugh emphasised that the British almost invariably made treaties 'whenever and wherever their empire went'.[200] In the latter part of the eighteenth century, Britain 'willingly treated as sovereign any non-Christian polity enjoying a perceptible degree of political organization'; that is, societies with rulers or leaders with whom negotiations could be conducted. Such societies were sovereign according to Vattel's criteria. There was a great increase in British treaty-making in the East Indies, in North America (pre-independence), as well as Africa, where over 100 treaties and formal agreements were entered into with various tribes in the period from 1788 to 1845. Treaties were also made over much of the same period with Malaysian, Arab, and Persian Gulf polities. Post-independence, the United States made its own treaties with independent tribes over the next century.[201]

Tom Bennion has pointed to treaties made by other western powers in the Pacific with island polities. France made four treaties with Hawaii between 1837 and 1846; Britain six between 1843 and 1869; the United States made five. The United States made a treaty with Tahiti in 1826 with 'the King, Council and headmen' of Tahiti;[202] France signed an agreement with the government and Queen of Tahiti in 1838. Pacific treaties, Bennion suggested, 'look like valid agreements in nineteenth century international law'. In each case, the parties to the treaty 'are clearly identified as entities of international standing, capable of entering into treaty obligations'.[203] The treaties dealt with matters of international law, not private law, he stated, and in subject matter were similar to treaties concluded between colonising powers. Some were treaties of cession. Bennion added that it is clear from the seriousness with which the colonising powers viewed these treaties that 'unquestionably, they were intended to be enforceable amongst themselves'.[204]

In our stage 1 report, we emphasised that 'a consistent thread of British policy throughout this entire period was that any form of jurisdiction established in New Zealand would require the consent of Māori, who were recognised as possessing some form of sovereign capacity'.[205] The British consistently expressed the view that, in achieving their objectives, they had what Lord Glenelg (Normanby's predecessor as Secretary of State for war and the Colonies) called 'no legal or moral right to establish a Colony in New Zealand, without the free consent of the Natives, deliberately given, without Compulsion, and without Fraud'.[206]

200. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 45.
201. McHugh, *Aboriginal Societies and the Common Law*, p 111.
202. 'Articles between the United States and Tahiti', 6 September 1826 (Tom Bennion, 'Treaty-Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi', *Victoria University of Wellington Law Review*, vol 35, no 1 (2004), p 188).
203. Bennion, 'Treaty-Making in the Pacific', p 188.
204. Bennion, 'Treaty-Making in the Pacific', pp 188, 195–196.
205. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 333.
206. Glenelg, memorandum, 15 December 1837 (cited in McHugh, brief of evidence (doc A21), p 45); see also Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 506.

The British recognition of an independent New Zealand state was reiterated in Lord Normanby's official instructions to Hobson on 14 August 1839, which acknowledged (albeit with qualifications) 'New Zealand as a sovereign and independent state'[207]

The New Zealand Company would challenge this position, arguing in a letter to Lord Palmerston, the Foreign Secretary, dated 15 November 1839, that the British already had sovereignty. (It cited Cook's taking possession for the Crown in 1769 and Busby's appointment, among other reasons.) Lord John Russell rebutted their view (on the advice of Colonial Under-Secretary Sir James Stephen) the following March, advising Palmerston of the reasons Britain did not have sovereignty:

> that the British Statute Book has, in the present century, in three distinct enactments, declared that New Zealand is not a part of the British dominions; and, secondly, that King William IV made the most public, solemn, and authentic declaration, which it was possible to make, that New Zealand was a substantive and independent State.[208]

Despite all this, the reception of the Treaty of Waitangi in England might be described as low key. Hobson sent a copy of it (in English) to Governor Gipps in a despatch composed over 5 and 6 February 1840, and Gipps enclosed both documents in his own despatch to Russell dated 19 February 1840.[209] The despatch was received in the Colonial Office on 9 July 1840, where confirmation of the 'cession' by Māori chiefs aroused some interest – and quite some relief. The British government was still under some pressure from New Zealand Land Company supporters, dissatisfied with the Government's colonisation policies and its failure to assert sovereignty on the basis of Cook's 'discovery' of the country; they had secured the appointment of a Select Committee to examine these issues in July.[210] An internal Colonial Office minute by Stephen noted that Gipps's despatch had arrived 'very opportunely', and seemed to 'prove, if proof were wanting, how much wiser was the course taken of negotiating for a Cession of the Sovereignty, than would have been the course of relying on the proceedings of Captain Cook or the language of Vattel in opposition to our own Statute Book.'[211] In other words, Loveridge adds, 'those who argued that the time required for negotiations for cession would place British interests in the Islands in danger – the New Zealand Land Company and its supporters, among others – had been proven wrong.'[212]

One further minute was apposite, that of Lord John Russell: 'The English & Natives both rely on our good faith.' Otherwise, there was no reference in the

207. Normanby to Captain Hobson, 14 August 1839, BPP, vol 3, p 85; Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 317.

208. Memorandum, encl in Stephen to Backhouse, 18 March 1840, BPP, vol 3, pp 116–117.

209. Hobson to Gipps, 5 February 1840, enclosed in Gipps to to Lord John Russell, 19 February 1840, BPP, vol 3, pp 42 47.

210. Loveridge (doc A18), pp 174–181.

211. Stephen, Minute on Gipps to Russell, 19 February 1840, BPP, vol 3, p 42. (cited in Loveridge (doc A18), p 212).

212. Loveridge (doc A18), p 212.

Colonial Office minutes to the substance of the treaty. The despatch was designated to be printed for the New Zealand Committee of the Commons soon afterwards, and this was done by the House of Commons on 29 July 1840.[213] Lord Russell replied to Gipps on 17 July, expressing the Government's approval of his measures, and of Hobson's carrying them into effect.[214]

Russell had more to say about the significance of the treaty in his instructions to Hobson of December 1840. Noting the 'progress' of Māori and thus their special claims to the protection of the Crown, he pointed out:

> 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.[215]

Māori chiefs, therefore, were clearly deemed to have the legal and political capacity to enter into an agreement which was 'valid on the international plane', as eminent international lawyer, Ian Brownlie, put it. 'Moreover', he stated, 'there is evidence that, in the decade prior to the conclusion of the Treaty, the British Government conducted itself on the basis that relations with the Māori tribes were governed by the rules of international law.'[216] The British regarded Waitangi as a 'real treaty'.[217] Professor Brownlie, Sir Kenneth Keith, and Dr McHugh are among contemporary writers who have rejected the 'orthodox' view, based on 'eurocentric, mono-cultural and paternalistic' rules of public international law, to use Professor Philip Joseph's words, by which only 'civilised' peoples could exercise rights of state sovereignty.[218] It is their view that the practice of European states before 1840 supported the international capacity of tribal societies, and that their entering into treaties with the leaders of these societies was an 'entirely normal' practice in the first half of the nineteenth century.[219] Professor Brownlie stressed the irrelevancy of subsequent developments in international law doctrine that

213. Hobson to Gipps, 5–6 February 1840, encl in Gipps to Russell, 19 February 1840, and enclosures, BPP, vol 3, pp 45–46. The timing meant that Hobson's report of the signing of the Treaty of Waitangi was available to the select committee, which published Gipps's despatch of 19 February, enclosing Hobson's reports from Waitangi as an appendix to its draft report. This report appeared in the proceedings of the committee for 30 July 1840. The draft report opened with the statement that Hobson's reports 'make it appear probable that sovereign rights over the whole of the islands will shortly be ceded by the natives to the Queen': draft report submitted by Lord Eliot, 30 July 1840, BPP, vol 1, p vi (cited in Loveridge (doc A18), pp 180–181).

214. Russell to Gipps, 17 July 1840, BPP, vol 3, p 47.

215. Russell to Hobson, 9 December 1840, BPP, vol 3, p 149.

216. Ian Brownlie, *Treaties and Indigenous Peoples*, *The Robb Lectures 1991*, ed F M Brookfield (Oxford: Clarendon Press, 1992), p 8.

217. Brownlie, *Treaties and Indigenous Peoples*, p 8 (cited in Palmer, *The Treaty of Waitangi*, pp 158–159). Brownlie added that the Treaty of Waitangi appears in authoritative collections such as *British and Foreign State Papers* and *Hertslet's Commercial Treaties*.

218. Joseph, *Constitutional and Administrative Law*, 4th ed (Wellington: Brookers Ltd, 2014), p 67.

219. Brownlie, *Treaties and Indigenous Peoples*, p 8 (cited in Joseph, *Constitutional and Administrative Law*, pp 70–71).

denied treaty-making capacity to what were described as 'Native Chiefs and Peoples'. What mattered was 'the principles of international law prevailing at the material time'.[220]

Thus, the British government entered into a treaty at Waitangi because international law at the time recognised that Māori had that capacity. It was also considered that such a move would strengthen recognition of the sovereignty of the British Crown over New Zealand. The historian Professor Alan Ward suggested an important concern for the British in their decision to negotiate a treaty was the likely reaction of France and the Americans, whose nationals – like Britain's – had also been buying land from Māori in preceding years. It seems that Stephen, despite his staunch defence of Britain's recognition of New Zealand as an independent state (as cited earlier), was also susceptible to the argument that by 'selling' vast tracts of land, Māori may have 'divested themselves of any real sovereignty they had possessed'. Ward concluded that the British authorities decided they 'would be in a stronger position politically, to investigate pre-1840 land purchases, including those of French and American citizens, if the chiefs ceded sovereignty to the Crown'.[221]

This decision was certainly vindicated by the response to the British assertion of sovereignty of the French, who were interested at the time in establishing a sphere of influence in the south Pacific. A small band of colonists from the Nanto–Bordelaise Company, protected by a French naval corvette, arrived in New Zealand in July 1840 to settle on land they claimed to have purchased from Māori at Akaroa two years earlier. The leader of the expedition, Captain Lavaud, called at the Bay of Islands where he met Hobson and learned of the British annexation of the whole of New Zealand. Initially, he thought that the British claim to the South Island by discovery was weak in international law; and he hoped that the island – or at least part of it – might yet be saved for the French. But that hope, according to Dr Peter Tremewan, was dashed when Lavaud found that the treaty had also been signed by southern chiefs.[222] Good relations between Hobson and Lavaud seem to have allowed an amicable solution to be reached in Akaroa, which recognised the twin realities of the arrival of French colonists and the assertion of British sovereignty, while preserving – at least until the French and British governments could reach agreement on New Zealand's colonial status – the dignity of the French leader and his authority over his people. Lavaud neither challenged nor recognised British sovereignty, while Hobson sent a man-of-war (whose French-speaking captain had been the interpreter at his meetings with Lavaud) and two magistrates to provide an official British presence in Akaroa when the French colonists landed.[223] The French Chamber of Deputies did later debate the validity of

220. Brownlie, *Treaties and Indigenous Peoples*, pp 8–9.

221. Alan Ward, *An Unsettled History: Treaty Claims in New Zealand Today* (Wellington: Bridget Williams Books, 1999), p 13.

222. Peter Tremewan, *French Akaroa: An Attempt to Colonise Southern New Zealand* (Christchurch: University of Canterbury Press, 1990), pp 83–88, 119.

223. Peter Tremewan, *French Akaroa*, pp 87–101. Dr Tremewan's view is that Hobson and Lavaud got on well and that each understood the other's position, but that they were not entirely frank with

British sovereignty in 1844, but the status of the French settlement at Akaroa was finally resolved when the Nanto-Bordelaise company wound up and sold its claim to the New Zealand Company in 1849.[224]

The first recognition by an international tribunal that the treaty of Waitangi constituted a cession to Great Britain would follow in 1854. Drs McHugh and Palmer have both noted an arbitration case between Britain and the United States, heard between 1853 and 1855 following a claim by American firm U L Rogers and Brothers.[225] The claim, for return of customs duties assessed on cargoes of rum landed in the Bay of Islands in 1840 and 1841, was arbitrated by an international commission, the 'London Commission'. The British commissioner's opinion (1854) was that 'it is proved beyond all doubt that the British sovereignty [acquired by cession from Māori] of New Zealand was assumed and declared in the month of February, 1840'. The American commissioner did not deliver a judgment but dissented from the British commissioner's opinion – though it seems only on the question of the amount of compensation to be awarded.[226]

For Māori, however, recognition of the independence of New Zealand under their authority and of their capacity to enter into the treaty might be a two-edged sword. Legal writers have pointed out that by contemporary international law, if Māori exercised this right, 'the international obligation they entered into . . . was the cession of sovereignty'. As public law expert Dr Matthew Palmer explained, this meant:

> Any conditions to the cession . . . are unable to be enforced under international law since the ceding party no longer has legal status internationally – they are no longer sovereign. On that basis, hapū had, and have, no standing at international law to enforce the Treaty of Waitangi as a treaty of cession.[227]

More specifically, Brownlie states that by the Treaty of Waitangi, the 'separate international identity of the Confederation of Chiefs was extinguished and the procedure of implementation of the reciprocal promises was transferred from the plane of international law to the plane of internal public law'.[228] And precisely because Britain and the United States had recognised Māori as possessing sovereignty in New Zealand *before* 1840, the Treaty was drafted (in English) as a treaty of cession. Accordingly, the United States and France eventually recognised sovereignty in New Zealand as being held by Britain, rather than remaining with in-

each other. Hobson did not tell Lavaud about Bunbury's declaration of sovereignty over the South Island by cession after signatures of Ngāi Tahu chiefs had been obtained; and Lavaud did not tell Hobson of the French government's financial and political backing for a projected French colony, or its wish to set up a penal colony: Tremewan, *French Akaroa*, p 96.

224. Palmer, *The Treaty of Waitangi*, p 165 n

225. Palmer acknowledged McHugh's discussion of the case in in his book *Aboriginal Societies and the Common Law*.

226. 'Messrs Rogers and Co., Opinion', 1854, p 125 (Palmer, *The Treaty of Waitangi*, pp 159–169 n).

227. Palmer, *The Treaty of Waitangi*, pp 159, 160.

228. Brownlie, *Treaties and Indigenous Peoples*, p 8 (cited in Palmer, *The Treaty of Waitangi*, p 161).

dividual Māori hapu. At international law, this meant that though one or more Māori states might continue to exist, 'they were not treated as having that status'.[229] By signing the te Tiriti, Māori were deemed to have lost their sovereignty, despite the Queen's guarantees of their tino rangatiratanga. As Palmer explains, 'an effect of the implementation of a treaty of cession is that the party ceding sovereignty ceases to exist in the international sphere'.[230]

Yet, despite the strongly worded statements of British Ministers and bureaucrats in 1839 and 1840 about the importance of securing Māori consent to Crown sovereignty, it became evident only a couple of years later that there was some doubt among senior New Zealand officials as to whether the Crown had in fact secured the Māori consent upon which it had insisted. This led to the British government explaining its position in no uncertain terms, and closing the discussion. Because of its importance to our understanding of the Crown position, we include it here.

4.3.2.1.4 The Swainson Assertion of Incomplete British sovereignty and the British government's rebuttal

The Crown's position in this inquiry is that its sovereignty over New Zealand was established as a matter of law from 2 October 1840, when Hobson's proclamations were published in the London *Gazette*. During 1842, however, colonial officials questioned whether that was in fact the case. More particularly, they questioned whether the Crown could assert its sovereignty over Māori who had not signed the treaty, or had signed without intending to give up their own authority or laws. The Colonial Office responded with a categorical statement: because the Queen had proclaimed her sovereignty, it was not now open to question. We consider this episode in some detail because of the light it sheds on both contemporary qualms among New Zealand officials about the extent of Māori consent to a cession of sovereignty, and on imperial sensitivities to this question.

The context which sparked the debate among New Zealand officials, including the Chief Protector of Aborigines, George Clarke senior; the Attorney-General, William Swainson; and the Acting Governor, Willoughby Shortland,[231] involved separate disputes in the Bay of Plenty. The first involved Taraia, chief of Ngāti Tamatera of Hauraki, and his attack on a Ngāi Te Rangi settlement near Tauranga. Officials debated whether Māori should be left to continue customary feuds, and it was decided to try to mediate rather than to arrest Taraia. In a strong assertion of tino rangatiratanga, Taraia told Shortland 'that the Governor was no Governor for him or his people and that he had never signed the Treaty nor would he acknowledge its authority'.[232] Ultimately however, he offered to give up fighting if

229. Palmer, *The Treaty of Waitangi*, p 165.
230. Palmer, *The Treaty of Waitangi*, p 160.
231. Shortland assumed this office after Hobson's death in September 1842. His official title was officer administering the Government.
232. Abel D W Best, *Journal of Ensign Best, 1837–1843*, ed N Taylor (Wellington: Government Printer, 1966), p 364 (cited in Richard Boast, 'Maori and the Law, 1840–2000' in Spiller, Finn, and Boast, *A New Zealand Legal History*, pp 136–137).

the Governor would send some soldiers to protect his district.[233] But five months later, Ngāti Whakaue of Maketū also attacked Ngāi Te Rangi. Shortland proposed to send troops this time, as further hostilities seemed imminent. At this point, he received a protest from the Protector and a letter from the Attorney-General 'expressing doubts as to whether the natives of Maketu came within the operation of British law'.[234]

Swainson's position, which he argued forcefully, was that Great Britain had acquired by treaty 'the sovereignty over a portion of [New Zealand] only'. He pointed to the refusal of 'many influential chiefs in various districts' to cede their sovereignty; to the fact that many important districts had never been visited; and also to 'constantly occurring' cases 'in which powerful chiefs are found, who, in the most indignant manner disclaim any acknowledgement of the Queen's authority'. He added that Major Bunbury had found the 'natives' of the southern island to be 'intelligen[t] and enterprising', and quite misunderstood by the Government when it decided to proclaim sovereignty over their island by discovery. In Swainson's view, given the stated determination of the Crown to obtain the 'intelligent consent' of Māori before acquiring sovereignty, 'those only who have acknowledged the Queen's authority . . . can be considered British subjects, and amenable to British law'. 'As regards the aborigines', he concluded, 'our title to the sovereignty over the whole of New Zealand appears to be incomplete'.[235]

Chief Protector Clarke, who appeared before the Executive Council in its two-day deliberation on the issue, gave written answers to questions put to him. Asked how far the various tribes acknowledged the Queen's sovereignty, he replied:

> The natives alone who signed the treaty acknowledged the Queen's sovereignty, and that only in a limited sense, the treaty guaranteeing their own customs to them; they acknowledge a right of interference only in grave cases, such as war and murder, and all disputes and offences between themselves and Europeans, and hitherto they have acted upon this principle. The natives who have not signed the treaty consider that the British Government, in common with themselves, have a right to interfere in all cases of disputes between their tribes and Europeans, but limit British interference to European British subjects.

And in answer to a further question, he added:

> In all my communications with the natives I have been instructed to assert, and have always asserted, that they are British subjects, and amenable to British authority, in which very few, even of those who signed the treaty, would acquiesce, save in

233. Alan Ward, *A Show of Justice: A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand* (Auckland: Auckland University Press/Oxford University Press, 1973), p 58.
234. W Shortland to Stanley, 31 December 1842, BPP, vol 2, p 456.
235. Swainson to officer administering the Government, 27 December 1842, BPP, vol 2, pp 470–471.

matters relating to disputes or depredations upon each other (viz, differences between Europeans and natives).[236]

Shortland, in his despatch to Lord Stanley, the Secretary of State for War and the Colonies, repeated a further answer given by Clarke to the Executive Council: that it would be 'destructive to the interests of the natives and the prosperity of the colony' to admit that the tribes of New Zealand were not British subjects, and not amenable to the colony's laws, as it would open the way for 'designing men' to embarrass the Government.[237] But Shortland did not agree with Clarke and said that the Government should make 'honourable' attempts to persuade tribes who had not ceded sovereignty to do so now, 'as this would be an admission of the fact, and no more effectual means could be taken to disseminate it'. In other words, it would amount to an admission on the part of the Crown that it had not yet secured cession of sovereignty from those tribes it approached, and that it needed to complete the task it had set itself. Nor did Shortland agree with the views of the Attorney-General; and he sought instructions from Stanley.[238]

Stanley's response, when it came, was blistering:

> It is my duty to deny, in the most unequivocal terms, the accuracy of any opinion . . . which may deny Her Majesty's sovereign title to any part of the territories comprised within the terms of the commissions issued under the Great Seal of the United Kingdom for the government of New Zealand.[239]
>
> Throughout the whole of his discussion of this subject, Mr Swainson makes no allusion to the terms of those instruments. The omission is very remarkable. If accidental and inadvertent, it is not creditable to Mr Swainson's accuracy. If he omitted all allusion to those commissions, as being irrelevant or unimportant to the question in debate, then the omission is hardly reconcileable with his possession of a just view of the history and constitution of the British colonial settlements.
>
> I regard the Royal Commissions for the government of New Zealand as ascertaining beyond all controversy the limits of Her Majesty's sovereignty in that part of the world – that is, I hold that it is not competent for any subject of the Queen's to controvert the rights which in those commissions Her Majesty has solemnly asserted.
>
> I do not think it necessary or convenient to discuss with Mr Swainson the justice or the policy of the course which the Queen has been advised to pursue. For the present purpose, it is sufficient to say that Her Majesty has pursued it. All the territories comprised within the commissions for the government of New Zealand, and all persons inhabiting those territories, are and must be considered as being to all intents and purposes within the dominions of the British Crown.[240]

236. Clarke's answers to Executive Council, 29 December 1842, BPP, vol 2, pp 459–460.
237. Willoughby Shortland to Stanley, 31 December 1842, BPP, vol 2, p 457.
238. Willoughby Shortland to Stanley, 31 December 1842, BPP, vol 2, p 457.
239. McHugh stated in his evidence that the reference to public assertion under the Great Seal was a reference among other things to the charter of the colony of December 1840: McHugh, brief of evidence (doc A21), p 76.
240. Stanley to officer administering the Government, 21 June 1843, BPP, vol 2, p 475.

This was, in our view, a remarkable discussion (though cut short by the reprimands from London). Some two years after te Tiriti was signed at Waitangi, the Attorney-General of New Zealand was expressing concern that the Crown had not in fact obtained the consent of Māori throughout all of New Zealand, and therefore had not met its own test for proclamation of sovereignty over those people and territories. The Chief Protector (Clarke) stated that, for the rangatira who signed the treaty, acceptance of their status as British subjects and their allegiance to the Crown was conditional on the Crown fulfilling its undertakings in the treaty. In particular, Clarke specified the guarantee to Māori that they would continue to live according to their own customs. Clarke said very few Māori, even those who signed the treaty, would agree that they were British subjects and amenable to British authority. But the Secretary of State was not prepared to consider the arguments of Swainson and Clarke at all. The Queen's sovereignty could not be denied; the act was done.[241]

The issue, we note, was raised by two key New Zealand officials: the senior legal official, and the Chief Protector. To them it raised doubts about whether the Crown had passed its own key test before asserting sovereignty; and doubts, too, about whether the Crown was upholding its treaty commitments.

In his examination of British intervention in New Zealand, historian Peter Adams commented that the Colonial Office 'had not given much thought to the matter of unanimity' but considered that the fact that some chiefs might cede their sovereignty, and others retain it 'should not have seemed so dangerous'. Hobson himself had based his factories plan of 1837 on it, and it had been the basis of Colonial Office thinking until at least May 1839.[242] But when it came to the point, the attempt of some chiefs to stay outside British sovereignty 'proved unacceptable to the civil servants and politicians'.[243]

4.3.2.1.5 Conclusion: The importance to the Crown of the treaty in its processes of asserting sovereignty and establishing a colonial Government in New Zealand

We have reviewed the processes by which the Crown asserted its sovereignty over New Zealand, annexed the islands to the colony of New South Wales, and finally erected New Zealand as a separate Crown Colony. We return here to the question of the significance to the Crown of the treaty it signed with Te Raki chiefs to secure their consent to its sovereignty. This is a question that goes to the heart of British intent in annexing and assuming the government of New Zealand.

At the time when the Colonial Office was considering the unwelcome views of Attorney-General Swainson on the extent of Māori consent to the treaty, Under-Secretary James Stephen wrote an internal note to his colleague G W Hope, on which Stanley's response (quoted earlier) was based. Dr McHugh noted Stephen's

241. In a later despatch to FitzRoy, when the treaty was under attack from the report of the select committee of the House of Commons, Stanley would add that it had been 'officially promulgated and laid before Parliament': Stanley to FitzRoy, 13 August 1844, BPP, vol 4, p 146.

242. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 212–213.

243. Peter Adams, *Fatal Necessity: British Intervention in New Zealand 1830–1847* (Auckland: Auckland University Press, 1977), p 163.

criticism of Swainson: '[who] wholly omits to notice that by three separate Commissions under the Great Seal of the United Kingdom, and by every other formal and solemn act, the Queen has *now* publicly asserted Her Sovereignty over the whole of the New Zealand Islands' (emphasis in original).[244] 'By 1843', McHugh stated, 'the thoroughgoing sovereignty of the Crown was incontrovertible.'[245] That is, Stephen saw sovereignty as a process, which by 1843 was 'surely complete'. We take him to mean that in the view of the Colonial Office, what was crucial were the Queen's own formal acts.

Dr Matthew Palmer, in his study *The Treaty of Waitangi*, has contrasted the significance of the treaty in British policy, and international law, with its significance at British law. In 1840 he suggested, it is clear that

> British government practice, British government interpretation of international law and other sources of international law were all consistent with the stated British recognition of sovereignty residing with . . . hapu. This recognition of New Zealand sovereignty was a reason, in terms of government policy, and international law at the time, for Britain to treat with Māori for cession of sovereignty.[246]

Palmer emphasises that British Colonial Office officials were aware that Māori 'were not a single monolithic nation' yet still sought their binding agreement. In his view, 'Māori and British colonial belief and practice at the time of the Treaty of Waitangi were based on the view that Māori rangatira held and exercised sovereignty in New Zealand on behalf of their hapū'. This included the capacity to enter into binding international legal obligations.[247] This recognition of New Zealand sovereignty, he states, 'was a reason, in terms of government policy, and international law at the time, for Britain to treat with Māori for cession of sovereignty'.[248]

But Dr Palmer argued that the status of the treaty at British law was quite different from that accorded it in British government policy and at international law. It was sufficient for British courts that the British Crown had asserted its sovereignty over New Zealand. The courts 'would not second-guess the executive branch of government in exercising the Queen's prerogative, or Parliament in conferring statutory powers, in defining the territory over which Britain did or did not have sovereignty'.[249] Thus, although the treaty was a 'necessary precondition, in terms of

244. The original minute was on Shortland's despatch to Stanley of 31 December 1842. Stephen added that Mr Swainson's arguments were those of 'a Politician or a Moralist, not of a Lawyer'. He believed that 'to have such privileged spots [that is, parts whose chiefs had not 'ceded the dominion', where the inhabitants were not the Queen's subjects] in the centre of a British Territory, would be injurious to everyone. I apprehend that the assent of the preponderating majority of the Chiefs is binding on the Dissentient minority.' We are not as certain as McHugh is that Stephen underlined the word 'now', but perhaps not a great deal hangs on the point; the word 'now' is itself telling: Stephen to Hope, 19 May 1843 (McHugh (doc A21), pp 75–76).
245. McHugh, brief of evidence (doc A21), p 76.
246. Palmer, *The Treaty of Waitangi*, p 74.
247. Palmer, *The Treaty of Waitangi*, p 159.
248. Palmer, *The Treaty of Waitangi*, p 74.
249. Palmer, *The Treaty of Waitangi*, pp 74–75.

policy and international law, to the British acquisition of sovereignty', Dr Palmer wrote (and this was evident in Hobson's proclamation), in British law, it was not the basis for the Queen's assertion of sovereignty:

> as far as imperial British law was concerned, the legal authority for Britain exercising sovereign power in New Zealand rested on the royal assertion of sovereignty. This was achieved by the Charter of 16 November 1840 that was issued by the Queen in the form of Letters Patent under the authority of the New South Wales Continuance Act passed on 7 August 1840. Neither the Act, nor the Charter nor even the accompanying Royal Instructions to Hobson as Governor referred to the Treaty of Waitangi. As far as British law was concerned, once sovereignty was asserted by the executive, in accordance with a British statute, that was sufficient authority for the exercise of such sovereignty.[250]

These pronouncements clarify the position at British law. Despite all the political emphasis on securing Māori consent to British sovereignty, in the end the treaty was not considered part of the constitutional process by which the British Crown asserted its sovereignty. It was, we might say, written out of the official British script at that point. Adams described the treaty as a 'constitutional and legal nullity'. He added, 'It seems that Britain had it both ways. If the conditions of a fair cession had not been fulfilled it did not matter: sovereignty had been asserted, and anyway it was up to the British Government to decide whether the conditions had been fulfilled!'[251]

The Treaty of Waitangi reflected years of imperial practice. But not many treaties led to the establishment of a Crown Colony. We have outlined these steps in some detail because they highlight the gulf between Te Raki Māori and British understandings of the treaty. Te Raki leaders waited to see how the Crown would engage with them on the basis of their new agreement. The British, however, declared sovereignty over the whole country and then at once began to establish their own government according to their own protocols without further reference to Te Raki chiefs. With great speed – despite their huge distance from London, and despite the very small number of officials who initially arrived in New Zealand representing Her Majesty's government – they announced that the islands were British.

And despite the doubts raised in New Zealand by key Crown officials in the immediate post-treaty years as to whether that sovereignty was complete, the British government, according to Dr Palmer, was entirely certain that it was. The government's position was entirely at odds with the views of Te Raki Māori, as is clear from our conclusions in the stage 1 report.

250. Palmer, *The Treaty of Waitangi*, p 75.
251. Adams, *Fatal Necessity*, pp 162, 163.

4.3.2.2 *In light of Hobson's understanding of what Te Raki Māori had consented to when they signed te Tiriti, was it reasonable for him to proclaim Crown sovereignty over New Zealand and thus embark on the establishment of a government with authority over Māori?*

We have already concluded that there was no cession of sovereignty to the Crown by Te Raki rangatira in 1840. The question to be considered here is whether Hobson, the Crown's representative, had reason to believe Māori had consented to a cession. And was it therefore reasonable that he proceeded to proclaim Crown sovereignty and thus embark on the establishment of Crown Colony government in New Zealand, in accordance with his instructions?

We begin by reiterating the British government's view, expressed in pre-treaty statements and in Normanby's 1839 instructions to Hobson, that the Crown could proclaim its sovereignty over New Zealand only after obtaining the free, informed consent of rangatira. Yet we note the injunctions in Normanby's instructions to Hobson of August 1839. Normanby admitted the possibility that Māori might not be able to understand the exact meaning of the agreement, owing to their ignorance of a treaty's inherently technical terms, as he put it. Hobson must be mindful of this and attempt to overcome their suspicion by the 'exercise . . . of mildness, justice, and perfect sincerity in your intercourse with them'. And he must give a full account of British intentions: 'You will, therefore, frankly and unreservedly explain to the natives, or their chiefs, the reasons which should urge them to acquiesce in the proposals you will make to them.'[252]

Returning to the Tiriti negotiations themselves, we are struck again both by what Hobson said, and what he did not say. His speech at Waitangi, on such a crucial occasion, was brief. At treaty signings, Te Raki Māori consent to any assertion of Crown authority was dependent on understanding, and understanding was dependent on the explanations given of Hobson's speech to rangatira both at the time, and at the later hui by the missionaries in te reo. In turn, the British government was dependent on Hobson for his accounts of the extent of Māori consent to the treaty (we return to this point later.)

To what extent did Hobson believe he had met this requirement? Did he leave Waitangi and Hokianga believing that he had fully and 'frankly' explained the powers that the Crown intended to exercise? Did he believe that he had fully and clearly explained that the Crown would have power to govern over Māori; that they would be subject to English law and law enforcement; and that the Crown would assume new powers over their lands? We concluded in our stage 1 report, from the considerable evidence before us, that he failed to explain those powers with sufficient clarity and frankness for rangatira to have understood the full implications of British sovereignty. Hobson further failed to communicate the intention of the British to assert their overriding authority over law-making and law enforcement;[253] rather, he and his representatives presented the treaty as a

252. Normanby to Hobson, 14 August 1839 (cited Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 317–318).

253. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 526–527.

means of protecting Māori rights and interests, and preserving Māori independence, authority, and property. We reiterate some of that evidence here.

According to the account of Felton Mathew (the acting surveyor-general, who could follow only what was said in English), after Hobson spoke, the treaty was read to the chiefs

> by which the native chiefs agreed to cede the sovereignty of their country to the Queen of England, throwing themselves on her protection but retaining full power over their own people – remaining perfectly independent, but only resigning to the Queen such portion of their country as they might think proper on receiving a fair and suitable consideration for the same.[254]

Hobson's report to Gipps of 5 February stated that, in his explanations to the chiefs, he had 'assured them in the most fervent manner that they might rely implicitly on the good faith of Her Majesty's Government in the transaction'.[255] Hobson's letter to Bunbury two months later added a further explanation he had given the chiefs: 'I offered a Solemn pledge that the most perfect good Faith would be kept by Her Majesty's Government that their Property their Rights and Privileges should be most fully preserved.'[256] According to the French priest Father Louis Catherin Servant, Hobson also told the chiefs they would 'retain their powers and possessions'.[257] Henry Williams, writing to Bishop George Selwyn in 1847, described how he had explained the treaty to rangatira at Waitangi, also stressing the guarantee of their 'full rights as chiefs, their rights of possession of their lands, and all their other property'. It seems clear that Williams also stressed that the Queen wished to establish a 'settled government, to prevent evil occurring to the natives and Europeans who are now residing in New Zealand without law'.[258]

According to an account of Hobson's speech by the missionary William Colenso, the Queen was anxious to 'restrain' her subjects who had settled among them. He, Hobson, had been sent as Governor to 'do good' to the rangatira and their people, but would not be able to do so until the chiefs consented and signed the treaty.[259]

254. Felton Mathew, *The Founding of New Zealand: The Journals of Felton Mathew, First Surveyor-General of New Zealand, and his Wife, 1840–1847*, ed J Rutherford (Dunedin: A H & A W Reed, 1940), p 34; see also Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 467.

255. Hobson to Gipps, 5 February 1840, BPP, vol 3, p 130.

256. Hobson to Bunbury, 25 April 1840 (cited in Loveridge, brief of evidence (doc A18), p 193 (Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 355)).

257. Louis Catherin Servant as translated by Peter Low, 'French Bishop, Maori Chiefs, British Treaty', in *The French and the Maori*, ed John Dunmore (Waikanae: The Heritage Press Ltd, 1992), pp 102–103; Waitangi Tribunal, *He Whakaputanga me te Tiriti*, p 516.

258. H Williams to Selwyn, 12 July 1847 (cited in Hugh Carleton, *The Life of Henry Williams: Archdeacon of Waimate*, 2 vols (Auckland: Wilsons & Horton, 1877), vol 2, pp 156–157); Grant Phillipson, 'Bay of Islands Maori and the Crown, 1793–1853' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2005) (doc A1), p 282.

259. William Colenso, *The Authentic and Genuine History of the Signing of the Treaty of Waitangi* (Christchurch: Capper Press, 1971), pp 16–17 (Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 355).

At his hui at Māngungu, Hobson took a similar approach, telling the rangatira that they would be 'stripped of all your land by a worthless class of British subjects' unless he was given the authority to deal with them under English law.[260]

On the other hand, absolutely no explanations were offered to Te Raki rangatira about the impact of the treaty agreement on their own authority – even though it was evident in his meetings that this was a major concern to them. We pointed to the key difficulties that Henry Williams faced in translating the treaty: his translation of 'sovereignty', and also 'civil government' as 'kawanatanga' (government, or governorship), and his avoidance of the term 'mana', without which, in our view, it was difficult to give a straightforward explanation of 'sovereignty'. (We refer readers to our detailed discussion of the treaty texts and negotiations, and various interpretations of them, in chapters 7, 8, and 9 of the stage 1 report.) We concluded that there was an agreement between Te Raki rangatira and the Crown's representatives, as is evident from the similarities between the Māori text, on the one hand, and the verbal explanations and assurances given by the missionaries and Hobson on the other. But this was despite the fact that Hobson and his agents concealed the full intentions of the British. As we put it:

> . . . Hobson laid no emphasis on law-making and law-enforcement, which – after all – was the overriding intention of the British, concentrating instead on acquiring control over British settlers. . . . As such, he omitted to mention the very powers Britain then claimed it had obtained: the authority to make and enforce law for all people and over all places in New Zealand.[261]

As a result, we add, Te Raki rangatira were unaware of the impact Crown sovereignty would potentially have on every aspect of their lives. They did not know how it would affect their own relationship with, and ownership of, their territories: their lands, rivers, lakes, and the takutai moana. They did not know about radical title or the control it gave the Crown over the status of their land under the new law. They did not know that the Crown would seek to buy large tracts of their land and would have a monopoly over land transactions.[262] There had been no explanation of such a monopoly. Nor is it clear that they could have understood the Crown had a first right of refusal when they offered to transact land – despite the fact that the concern of rangatira about such transactions was evident and that it was well known to the British that Māori were accustomed to conducting their own arrangements with settlers. Nor could it have been clear to the rangatira that the Crown might assume ownership of the foreshore by prerogative right (that is, powers exercised by the monarch alone). They were not aware of the implications of the exercise of Crown sovereignty for their tikanga. They were not aware of the scale of systematic British colonisation that was planned, or the fact that the

260. Hobson to Normanby, 17 February 1840 (Anne Salmond, brief of evidence, 17 April 2010 (doc A22), p 66); see also Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 380.
261. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 526.
262. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 519.

new settlers would bring with them a strong commitment to their own governing assemblies that would be established by the mid-1850s, and have little respect for what Māori might think or want. They were not aware of the nature and complexity of the English legal system, or of the impending introduction of statute law and the common law (judge-made law, arising from litigation, and based on precedent)[263] which would be applied by the Crown's courts in their country. They were not aware that police forces would be organised to enforce English law.

We noted in our stage 1 report the comment of Crown witness, Dr Donald Loveridge, that the missionaries 'sought to present the Treaty in the best possible light', and to emphasise the protections available rather than the changes that would come with the new regime. But he also argued that future arrangements for the Government were yet to be decided, and 'the missionaries themselves would have had only a general idea of what shape that regime would ultimately take'. Hobson himself, he added, would not have been able to answer with any confidence Māori questions on (for instance) the land claims process, the Crown land system, and the judicial system. There was, in addition, the problem of the opposition of some settlers who might wish to undermine the land claims investigation process, which doubtless affected the way supporters of the treaty responded when they described it and its probable consequences. Loveridge concluded, 'This is not to say their descriptions were inaccurate, but they probably focused on certain issues at the expense of others.'[264]

We accept that Hobson and the missionaries may have been selective in their discussion of the impact of the treaty because they were anxious to secure Māori agreement, but our view is that the omissions were so significant as to amount to misrepresentation. It may be the case that Hobson could not have answered Māori questions about how a land claims commission would work (though doubtless he had had some discussions on the subject with Gipps in Sydney); indeed, he had sought more clarity himself on this from the Colonial Office before he left England – without success.[265] But as the Tribunal pointed out in *The Hauraki Report* (2006), there is no evidence that Hobson and his officials explained the 'surplus lands' principle, other than to respond to the clear anxieties expressed about land loss, by assuring the rangatira that 'all lands unjustly held would be returned'.[266] In hindsight, the Tribunal wrote, it would have been 'politic' to make some effort to do so, given the huge land claims pending in some parts of the country (and we add, the great number pending in parts of Te Raki). The silence was filled before long by allegations made by settlers and entrepreneurs that 'the Crown had been devious

263. Joseph, *Constitutional and Administrative Law*, p 32.

264. Loveridge, brief of evidence (doc A18), p 239 (cited in Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 467–468).

265. Hobson to Under-Secretary, Colonial Department, August 1839; Normanby to Hobson, 15 August 1839, BPP, vol 3, pp 90–93.

266. Hobson quoted in Colenso, *The Authentic and Genuine History*, p 19 (cited in Waitangi Tribunal, *The Hauraki Report*, Wai 686, 3 vols (Wellington: Legislation Direct, 2006), vol 1, pp 83–84).

and, under a guise of offering protection, was in fact grabbing land from Maori and settlers alike. This charge quickly aroused Maori suspicion in Northland'.[267]

More broadly, Hobson was well aware of the nature of the acts of state that he was about to embark on: of the governing institutions he would shortly establish in the new colony, initially as Lieutenant-Governor of the colony of New South Wales; of the investigations of settler land claims that were to take place; and of the broad purpose of those investigations – namely, to limit settler grants so that the Crown might itself acquire large tracts of land for the programme of extensive British settlement it was now backing. He also knew the importance the Colonial Office attached to his securing Māori consent to the Crown's exclusive right to negotiate for the 'cession . . . of such waste lands', either 'gratuitously or otherwise', as required for settlers.[268] There is a fine line, it seems to us, between conscious omission and deliberate deception. Either way, if, as it seems, the full message of the Crown's representative was deemed so awkward and unpalatable that it could not be delivered, it must raise questions about the nature of the Crown's proceedings subsequently.

There was another important omission in Hobson's explanations to the rangatira of the significance of the treaty. When he reported his view of the Waitangi signings as being '*de facto* the treaty', he referred specifically to the signatures of the chiefs of the United Tribes who several years before had signed he Whakaputanga (the Declaration of Independence).[269]

It is clear that this was a deliberate move by the Crown's representative (and particularly by the British Resident James Busby) to ensure that cession was made by those who were party to he Whakaputanga. Busby had sent out invitations to 'all the chiefs of the confederation of New Zealand' on 30 January 1840 to meet the 'chief on board sent by the Queen of England to be a Governor for us both' at Waitangi.[270] In the Tiriti text, the note at its foot read:

> Na ko matou ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i te ritenga o enei kupu, ka tangohia ka wakaaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu.[271]

This was recorded in the English text as:

> Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi, and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to

267. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 1, p 83.
268. Normanby to Hobson, 14 August 1839, BPP, vol 3, pp 86, 87.
269. Hobson to Bunbury, 25 April 1840, BPP, vol 3, p 139.
270. Busby, invitation, 30 January 1840 (cited in Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 342).
271. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 346, 348.

understand the Provisions of the foregoing Treaty, accept and enter into the same [by attaching] our signatures or marks.

In other words, the treaty essentially invoked the wording used in the Declaration of Independence for the decision-making body of the assembly ('The hereditary chiefs and heads of tribes agree to meet in Congress at Waitangi').[272] Those chiefs were not signing te Tiriti as individuals, but collectively as the 'Congress assembled'. Dr McHugh noted that Hobson insisted that all northern chiefs be invited, whether party to he Whakaputanga or not,[273] which is not surprising; he wanted as many signatures as possible and was not sure of the extent of support for the Confederation. In his letter to Bunbury, cited earlier, he would make a point of recording that of 52 chiefs who signed te Tiriti at Waitangi, 26 were 'of the confederation', and constituted a majority of those who signed the declaration.[274]

These are all clear indications of the importance the British government attached to securing the signatures of those who had endorsed he Whakaputanga. It is possible that the number of these signatures is one reason Hobson decided to attach such importance to the Waitangi treaty. Though Normanby did not instruct Hobson to do so, he did refer to the Crown's recognition of New Zealand as a 'sovereign and independent state' (which the Colonial Office often discussed in the same breath as the Declaration of Independence), and the importance therefore of securing the consent of 'the natives' to British governance of the islands of New Zealand.

As Crown counsel explained it, as far as the British were concerned, the treaty brought to an end the Māori sovereignty and independence asserted through the declaration.[275] But there is no record of Hobson mentioning he Whakaputanga at the Waitangi hui. We noted in our stage 1 report that this was a 'striking absence'.[276]

Te Raki Māori viewed the relationship between he Whakaputanga and te Tiriti much differently. The treaty came only a few years since they had asserted their mana and independence. Given the assertions in he Whakaputanga of the chiefs' kīngitanga and mana over the land, as well as their rangatiratanga, and its provisions that 'no one other than the rangatira would have the power to make law within their territories, nor exercise any function of government (kāwanatanga) unless appointed by them and acting under their authority', as well as its request for Britain to protect them from threats to their rangatiratanga, the treaty 'may well have seemed like the application of these provisions'.[277] Hōne Heke would write to Queen Victoria in 1849 that he had been misled by Hobson who had failed to explain that the 1834 flag of the United Tribes would be replaced by a British

272. See Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 169.
273. McHugh, brief of evidence (doc A21), p 63.
274. Hobson to Bunbury, 25 April 1840, BPP, vol 3, p 139.
275. Crown closing submission (#3.3.33), p 189.
276. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 520.
277. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 521.

ensign.[278] It is our view that, given the Crown's own intention was to nullify he Whakaputanga, the onus was on Hobson to have explained that the treaty would replace he Whakaputanga, and to have discussed this with the rangatira.[279] How otherwise could he have expected Te Raki Māori to understand that the authority asserted in he Whakaputanga – the mana and the kīngitanga – would be replaced?

4.3.2.2.1 After the Tiriti signings, did Hobson have any reason to believe that Māori had not accepted British sovereignty?

Not only did Hobson fail to meet the transparency standard in his negotiations with the rangatira (which Normanby had urged on him), he was not open with Governor Gipps or the Colonial Office either. In his determination to report Māori adherence to the treaty, Hobson was less than forthcoming in his reports. He assured Gipps, immediately after the signing at Waitangi, that 'the acquiescence of these chiefs . . . must be deemed a full and clear recognition of the sovereign rights of Her Majesty over the northern parts of this island', and accordingly arranged a 21-gun salute to be fired from the ship the following morning.[280]

Hobson also failed to give an accurate report of the proceedings at Māngungu on 12 February 1840, where opposition brewed both on the day of the large treaty hui, and two days later. It is not entirely clear how many Hokianga leaders signed. Hobson himself put the number at 'upwards of 56'; historians have estimated between 56 and 70.[281] Then, on 14 February, according to an account by the missionary Richard Taylor, as Hobson prepared to depart Māngungu, a waka arrived, and a letter was given to his party 'signed by 50 individuals stating that if the Governor thought that they had received the Queen he was much mistaken and then they threw in the blankets they had received into our boat'.[282] Hobson reported that 'two tribes, of the Roman Catholic communion, requested that their names might be withdrawn from the treaty'. His own response was unequivocal: 'I did not, of course, suffer the alteration'.[283] We do not know whether the 50 who signed the letter included all 50 who had signed te Tiriti at Māngungu a couple of days earlier, or simply some of them. Certainly, the letter represented a block of resistance to the treaty signing at Māngungu, and a clear wish on the part of two Hokianga hapū that a number of signatures be removed, which Hobson did not acknowledge in his official report on the outcome, in which he declared the

278. Heke to Queen Victoria, 10 July 1849 (cited in Ralph Johnson, 'The Northern War, 1844–1846' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2006) (doc A5), pp 402–403).

279. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 520–521.

280. Hobson to Gipps, 5–6 February 1840, BPP, vol 3, p 46.

281. Hobson to Gipps, 17 February, BPP, vol 3, p 133; Hobson to Bunbury, 25 April 1840, BPP, vol 3, p 139; see also Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 383; Buick, *The Treaty of Waitangi*, p 175; Orange, *The Treaty of Waitangi*, p 275 n 13; Orange, *An Illustrated History*, pp 290–292,

282. Taylor, journal, 14 February 1840 (cited in Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 384–385).

283. Hobson to Gipps, 17 February 1840, BPP, vol 3, p 133.

sovereignty of the Crown complete in the northern districts: 'I can now only add that the adherence of the Hokianga chiefs renders the question beyond dispute.'[284]

Hobson also failed to clarify in his comprehensive 15 October 1840 report to the Colonial Office the extent of Māori opposition to the treaty in major tribal areas of the North Island. As we saw in section 4.3.2.1, he neither mentioned that senior chiefs in a number of districts had refused to put their names to the treaty, nor that the treaty had not been taken to some districts.[285] His proclamation of sovereignty over the North Island left no room for doubt about the quality of Māori consent to the treaty. It referred to the chiefs' cession of sovereignty as absolute and unreserved – which was certainly not the case in Te Raki – and to adherence of the principal North Island chiefs; also not the case.[286] Hobson had already decided, however, that the Waitangi signings constituted the treaty, and that later signatures would merely be affirmations – although he was aware that there were many more tribal groups in the North Island. In effect, this position allowed him not to worry about non-signing chiefs, and allowed him to misrepresent the extent of Māori unwillingness to sign to the Colonial Office. James Stephen would note in 1842, when the question of non-signatory tribes was raised by Attorney-General Swainson, that he had no way of knowing whether the 'dissentients' were in fact a minority.[287]

And in the months after February 1840, as we discuss further in section 4.4, Hobson had also been well aware of continuing Māori concern in the Bay of Islands and Hokianga districts about the future of the treaty relationship, and how the Crown might attempt to assert its authority. He had been approached directly by Te Raki rangatira in April who had expressed their misgivings about the treaty, about the arrival of soldiers, and about the Crown's prohibition on private land arrangements.

4.3.2.2.2 Conclusion: Was it reasonable in the circumstances for Hobson to have proceeded in May to issue proclamations of sovereignty?

We return here to the question of Hobson's authority in making the decision that Māori had consented to British sovereignty. As we noted in our stage 1 report, Dr McHugh explained to us that Hobson was acting under the Royal prerogative when he treated with the rangatira for a cession of sovereignty, and he was therefore given the authority to determine when he had 'discharged his office'. That is, McHugh explained, Hobson was not to meet particular legal requirements or to adjudicate on the quality of consent that was given; rather, the Governor would have approached his task in terms of 'discharge of office' when he judged that he had secured Māori consent.[288] And, in Dr McHugh's view, by making exhaustive

284. Hobson to Gipps, 17 February 1840, BPP, vol 3, p 134.
285. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 389.
286. Proclamations enclosed in Hobson to Secretary of State for the Colonies, 25 May 1840, BPP, vol 3, pp 140–141; Orange, *The Treaty of Waitangi*, p 85.
287. McHugh, brief of evidence (doc A21), p 76.
288. McHugh, transcript 4.1.4, Whitiora Marae, pp 544–545.

efforts to secure Māori consent (even after he had had his stroke), the Governor took this office 'very, very seriously'.[289]

We make two comments on this. First, it seems to us that Hobson was more anxious about dealing with the New Zealand Company settlers at Port Nicholson, who in his view were attempting 'to usurp the powers' vested in him, than he was about gathering more Māori signatures.[290] On hearing news that the Port Nicholson settlers had declared the establishment of their own government, Hobson had acted immediately, issuing the proclamations and bringing the settlers under the Crown's authority. This is not surprising. His instructions placed more emphasis on the need to control British settlers than on ensuring Māori would be subject to the Crown's law-making authority. And, as we have said in the previous section, Hobson had already decided he had his treaty – the Waitangi document – and that more signatures were a bonus. They certainly would serve the purpose of impressing the humanitarian movement in Britain and would allow the Crown to claim legitimacy for its subsequent annexation. Securing signatures on te Tiriti also sent a message to European audiences – notably the French, who (as noted earlier) were sending settlers to the South Island. Our view, however, is that Hobson did not regard additional signatures as essential to securing Māori 'consent'; it was a matter of form, rather than substance.

The second point is that Hobson seems to have relied on the leeway he had in deciding when he had 'discharged his office'. He made a convincing case to the Colonial Office about the extent of Māori adherence to the treaty, and one which was certainly not fully accurate. We might add that he had already shown he was in something of a hurry when he first arrived in New Zealand with his proclamation of 30 January, in which he declared himself Lieutenant-Governor despite having not yet received any cession of sovereignty. We note that Professor James Rutherford, in his study of the treaty and the British acquisition of sovereignty, considered that Hobson thereby departed from both the letter and the spirit of Normanby's instructions, which envisaged him treating with Māori first and then assuming office over lands as they were 'ceded'.[291]

But Hobson's early assumption of the office of Lieutenant-Governor leaves us in some doubt on this point. In fact, we do know that when he reported his taking of the oaths of office to Normanby on 16 February 1840, and offered his respectful and humble congratulations to the Queen on the 'acquisition of a large extent of territory in this country', he added, 'to which, I hope, may soon be added the remaining parts of these islands'.[292] He was already set on extending British sovereignty over the whole of New Zealand.

It is our view that Hobson, who had been sent to secure the sovereignty of the Queen over 'all or parts of New Zealand', early reached the decision that he could

289. McHugh, transcript 4.1.4, Whitiora Marae, pp 544–545.
290. Proclamation to Port Nicholson settlers, 23 May 1840 (cited in McHugh (doc A21), pp 69–70).
291. James Rutherford, *The Treaty of Waitangi and the Acquisition of British Sovereignty over New Zealand, 1840*, History Series 3: Bulletin 36 (Auckland: University College, 1949), p 19.
292. Hobson to Normanby, 16 February 1840, BPP, vol 3, p 132.

and should secure the whole country. The actions of the New Zealand Company settlers in Port Nicholson triggered an immediate response from him. But he had already laid the basis for his proclamations by his decision to regard the treaty at Waitangi as the document of cession. This enabled him to proclaim sovereignty over the North Island on the basis of a cession by Māori. And the Colonial Office was happy to accept his assurances. The Secretary of State was able to reach the comfortable conclusion that Hobson had done his job well. By July 1840 – before he knew of the proclamations of sovereignty – he had already reached his verdict on Hobson's proceedings when he received a copy of the Treaty (in English) in July 1840, and Hobson's account of his proceedings: the negotiations for a cession of sovereignty had been a success.

4.3.2.3 *To what extent did the Crown make provision for hapū and iwi to continue to exercise tino rangatiratanga, as it established its new system of government and introduced its own law?*

As we set out in our stage 1 report, the treaty provided for Māori and the Governor to exercise distinct but potentially overlapping spheres of influence – the rangatiratanga sphere focused on Māori communities and the kāwanatanga sphere focused on control of settlers and protection from foreign threat. During the treaty debates, Hobson and other Crown representatives made explicit promises to Māori about their sphere of influence. Through the text of te Tiriti they promised that Māori would continue to exercise tino rangatiratanga in respect of their whenua, kāinga, and 'taonga katoa'. During Tiriti debates, Hobson promised that Māori would retain their 'perfect independence' and would continue to live according to their own laws and customs. The question is, how far did these assurances reflect the policies of the Colonial Office as it prepared first to annex New Zealand, and then to establish a Crown Colony there? What policies did Crown ministers and officials contemplate at that time with respect to Māori governance, law, land and resources, and how far did they take account of Te Raki Māori rights?

Hobson was guided at the outset by lengthy instructions from two consecutive Secretaries of State, Lord Normanby and Lord John Russell. The first instructions, Normanby's in August 1839, were issued as Hobson set off for New South Wales to embark on his mission to secure British sovereignty over 'the whole or any parts of' New Zealand.[293] The second, from Russell, was dated December 1840 and addressed to Hobson as the first Governor of New Zealand. James Stephen, the Permanent Under-Secretary at the Colonial Office, had a crucial role in drafting both sets of instructions. Together they illuminate imperial assumptions about the exercise of British authority, and the extent to which Māori were to exercise authority after they accepted British sovereignty, both within their own communities and in the new government it contemplated establishing.

293. Normanby to Hobson, 14 August 1939, BPP, vol 3, p 85; Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 317.

Lord Normanby set the tone in his outline of the broad concerns of the British government in respect of Māori:

> we acknowledge New Zealand as a sovereign and independent state, so far at least as it is possible to make that acknowledgement in favour of a people composed of numerous, dispersed, and petty tribes, who possess few political relations to each other, and are incompetent to act, or even to deliberate, in concert.[294]

The limits on British recognition of Māori sovereignty were thus spelt out. Though Māori rights must be recognised, it would no longer be possible for them to maintain their 'national independence', given the circumstances of existing British settlement in New Zealand and the plans of the new colonising body, the New Zealand Association. The fact of impending British settlement dominated the instructions. It meant that the welfare of the 'natives' would best be served by the surrender of their rights to the Crown, and acceptance of British protection and of laws administered by British officials. Tribal government was inadequate and must be replaced. Similarly, British subjects must be 'protected and restrained by necessary laws and institutions' from repeating the same process of 'war and spoliation' that had had such dire impacts on 'uncivilized tribes' as emigration from Christian countries spread. Once the sovereign authority of the Queen had been recognised by Māori, if not over their entire country, at least in those districts 'within, or adjacent to which, Her Majesty's subjects may acquire land or habitations', civil government must be established, for the benefit of both Māori and of British emigrants.[295]

How would this government be established? As we saw in section 4.3.2.1, considerable thought had already been given in Britain to this question, and it had been agreed, both in the Colonial Office and in the House of Lords, that the most appropriate method of governing New Zealand would be through the Crown Colony model. Given the size of the Māori population and the newness of the colony, a local legislative authority must not yet be established. As Normanby put it:

> It is impossible to confide to an indiscriminate body of persons, who have voluntarily settled themselves in the immediate vicinity of the numerous population of New Zealand, those large and irresponsible powers which belong to the representative system of Colonial Government.[296]

It was impractical to establish legislative, judicial, or fiscal institutions controlled by the settlers. Normanby made it clear that Māori must be protected in the first years of the colony from a representative settler assembly and the possible injustice that might result, while the settlers themselves must be protected from

294. Normanby to Hobson, 14 August 1839, BPP, vol 3, pp 85–86; Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 317.
295. Normanby to Hobson, 14 August 1839, BPP, vol 3, pp 85, 86.
296. Normanby to Hobson, 14 August 1839, BPP, vol 3, p 88.

'calamity' that might result from unregulated interaction with Māori.[297] McHugh has pointed to the history of British imperial policy towards 'aboriginal' peoples as a story of 'centralized control as conducted through the Colonial Office (and its influential Under-Secretaries) . . . and its Governors'.[298] In other words, policy must be kept out of the hands of local legislatures.

At the outset, then, the British government attached considerable importance to balancing the rights of settlers and Māori, but it did not envisage a government representing both peoples. It was focused on protection of Māori interests, rather than their participation in government. Dr McHugh referred in his evidence to Stephen's consideration of the 'thorny question' of Māori representation (given that their proprietary rights, the basis for any franchise, were recognised). He contemplated the possibility of the Crown creating a legislature, but this would have to be a representative assembly, he said, 'which I suppose everyone would agree in pronouncing an absurdity'.[299] To avoid the potential dangers that would arise from a legislature in which only settlers – a small minority of the total population of the islands – sat, there would initially be a largely external government.[300]

In May 1841, Hobson was able to announce his assumption of office as Governor of New Zealand, having received detailed instructions in December 1840 from Russell, the newly appointed Secretary of State for War and the Colonies. These instructions echoed the themes developed by Lord Normanby but provided considerably more guidance on policies that would affect Māori – especially the introduction of English law, and land policy. In both, the assumption was that the Crown would make the decisions on policy and how it would be implemented. There was no expectation that Māori leaders would have any input; the British would decide how far their 'customs' would be tolerated, and for how long; and how far their rights to land would be accepted. Māori authority, at this early stage, seemed barely to be a consideration.

4.3.2.3.1 Were Māori law and customs to be recognised?

When Hobson took up his position as the first Governor of New Zealand, Lord Russell's December 1840 instructions urged him to devote his attention to the welfare of the 'aborigines of New Zealand' and their protection from 'many moral and physical evils, fatal to [their] health and life' which generally arose from intercourse between two 'races'. But in the longer term, welfare, evidently, was code for assimilation, and it was more important than preserving Māori law. Hobson was to 'look rather to the permanent welfare of the tribes now to be connected with us, than to their supposed claim to the maintenance of their own laws and customs'. Where there was damaging conflict between tribes, the Queen's sovereignty 'must

297. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 327–329.
298. McHugh, *Aboriginal Societies and the Common Law*, pp 132–133.
299. Stephen to Vernon Smith, note, 21 July 1840 (cited in McHugh, brief of evidence (doc A21), p 89).
300. McHugh, brief of evidence (doc A21), p 89.

be vindicated, and the benefits of a rule extending its protection to the whole community must be made known by the practical exercise of authority'.[301]

The instructions to Hobson, Professor of Law Shaunnagh Dorsett has suggested in her study *Juridical Encounters*, reflected evolving ideas about the position of indigenous peoples in the various British colonies. Drawing on, and shaping these ideas was the report of the House of Commons Select Committee handed down in 1837 after two years of hearings. Britain, it stated, must rectify the damage done to 'aborigines' in British settlements and protect them in future.[302] The point Dorsett makes is that ideas about the amenability of Māori to British law and toleration of their customs were very much in the minds of imperial officials, colonial administrators, and settlers by the 1840s.[303] As she puts it: 'The exceptional laws of the 1840s were forged over a decade of thinking about exceptionalism, about ways to bring indigenous people to British law, and about how to modify that law for their amelioration, protection and ultimate legal assimilation'.[304]

In general, there was little guidance from the British government on how these various policies should be implemented, or how, if customs led to disputes with settlers, such disputes should be handled. Hobson would be disappointed when he asked for practical advice on how he was to forbid 'intolerable' customs, and how was he to restrain native wars, or protect tribes who were 'oppressed'. Dorsett states that 'no one was sure which customs were not to be tolerated'.[305] Normanby was not sure how to advise Hobson, though he thought such customs might readily be given up. But if persuasion did not work, such customs 'should be repressed by authority, and, if necessary, by actual force'.[306]

His instructions also distinguished between Māori customs that should not be tolerated (cannibalism, human sacrifice, and infanticide in particular) – customs that were 'pernicious' but better overcome by benign influence than by legal penalties; and customs that were 'absurd and impolitic' but not 'directly injurious', which could be tolerated for the time being, until Māori voluntarily set those customs aside. It was important to address this topic directly, as we referenced earlier, Russell told the Governor, because 'without some positive declaratory law, authorizing the executive to tolerate such customs, the law of England would prevail over [Māori]', which would likely cause Māori 'much distress, and many unprofitable hardships'.[307]

301. Russell to Hobson, 9 December 1840, BPP, vol 3, p 149.
302. Shaunnagh Dorsett, *Juridical Encounters: Maori and the Colonial Courts 1840–1852* (Auckland: Auckland University Press, 2017), p 38; We considered the report of the Select Committee Report and historians' views of it in our stage 1 report: Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 323–325.
303. Dorsett, *Juridical Encounters*, p 52.
304. Dorsett, *Juridical Encounters*, p 44.
305. Dorsett, *Juridical Encounters*, p 66.
306. Hobson to Normanby, not dated [ca August 1839], and Normanby to Hobson, 15 August 1839, BPP, vol 3, pp 91, 93.
307. Russell to Hobson, 9 December 1840, BPP, vol 3, p 150.

That was a proposal that, despite its framing, seemed to point to some recognition of tino rangatiratanga. But, according to Professor Ward, Russell had watered down the wording of Stephen's original draft which had suggested a declaratory law 'recognising' such customs, and Stephen had intended explicit recognition or codification of Māori customs, and explicit legal sanctioning of them.[308] Dorsett notes that in any case a 'positive declaratory law' would have required significant effort 'in order to first identify Māori laws, and then to assess which were acceptable'.[309] Nor, we add, did Russell provide any accompanying instruction to discuss such a law or its implementation with rangatira.

Russell envisaged an active role for the Protector of Aborigines and his officers. He emphasised the duty of the Protector of Aborigines to 'watch over . . . the rights and interests of the natives', become familiar with their customs, and arbitrate in disputes between Māori and non-Māori. Laws should be passed 'for preventing and punishing any wrongs to which their [Māori] persons or property may be exposed', and the protectors must be vested with legal power to intervene in matters concerning the rights and interests of 'the natives' as they might be affected by execution of the new laws. In criminal cases that might arise, Russell suggested that the protector should have a summary jurisdiction in matters concerning Europeans and Māori, with access at all times to courts of criminal justice, so that he might proceed with prosecutions. He should also deal with matters arising among Māori themselves, so far as this was compatible with their customs, 'not in themselves immoral, or unworthy of being respected'.[310] Subsequently, the Governor was instructed that a law should be passed constituting the protector as the advocate or attorney ex officio to represent Māori in all suits and prosecutions in which they might become parties in any of the ordinary courts.[311]

In general, there was lack of clarity over policy. Typically, officials assumed that Māori would sooner or later have to comply with British law, and would wish to do so. The question was how to manage that transition. Some settlers believed Māori should be compelled to comply through strict application of British law. Most officials held other views: some, that Māori should be left alone until they chose to assimilate; others, that Māori should be encouraged to assimilate – and to this end, some Māori laws and law enforcement should become part of the colony's legal system. Russell's subsequent instructions encouraged 'tolerance' of Māori law rather than its defence or protection. Professor Ward considered that Russell's December 1840 instructions therefore 'weakened the original intention [from Normanby's 1839 instructions to Hobson] to respect Maori custom' and 'favoured the speedier extension over the Maori' of the colony's laws.[312] As we will see throughout this report, Te Raki Māori did not find much support for tikanga in introduced law.

308. Ward, *A Show of Justice*, pp 37–38.
309. Dorsett, *Juridical Encounters*, p 66.
310. Russell to Hobson, 9 December 1840, BPP, vol 3, p 150.
311. Russell to Hobson, 28 January 1841, BPP, vol 3, p 174.
312. Ward, *A Show of Justice*, p 38.

By 1842, Lord Stanley, Russell's successor, endorsed the principle that the colony's laws should enshrine Māori values. If Māori were 'to be satisfied with our mode of administering justice, and to abandon their own,' he wrote, 'our legislation must be framed in some measure to meet their prejudices'. This meant, for example, that the colony's laws should impose significant punishments for desecration of wāhi tapu: 'We must satisfy the natives that what are considered grave offences by them will be punished by us or they will not be restrained from taking the law, or rather vengeance, into their own hands.'[313] But the colonial Government dragged its heels on giving any legal recognition to Māori custom. In May 1843, James Stephen wrote an irritated minute at the Colonial Office asking why the instruction to Hobson to issue an ordinance authorising the temporary protection of acceptable customs had not yet been delivered: 'I know not what hinders the enactment of such a law'.[314]

By this time, Stanley had already faced the doubts of the Attorney-General about the extent of Crown sovereignty in the context of the tribal conflicts in the Bay of Plenty. Despite his strong view that British sovereignty was unchallengable, Stanley nevertheless argued that Māori law should be recognised alongside English law. However, in 1843 he faced perhaps an even greater test following an open confrontation over disputed land at Wairau in the northern South Island. It involved a group comprising police constables and New Zealand Company officials – led by Captain Arthur Wakefield (Edward Gibbon Wakefield's brother) and the Nelson police magistrate Henry Thompson – and an armed party of Ngāti Toa led by Te Rauparaha and Te Rangihaeata. After Ngāti Toa symbolically burnt a surveyor's hut, the magistrate had been granted a warrant for the arrest of Te Rauparaha on a charge of arson, which the party was intent on executing. Between four and nine Māori and 10 settlers were killed during the fight, plus a further 12 settlers, including Arthur Wakefield and Thompson, were captured and killed as utu for the death of Te Rangihaeata's wife.[315]

Despite settler outrage, Stanley supported the new Governor, Robert FitzRoy, who held the settlers to be at fault, and decided to take no action against Ngāti Toa. Stanley still defended a policy of recognition of Māori law.[316] In November 1844, his response to the Wairau confrontation, dated 10 February 1844, was published in New Zealand newspapers. Stanley concluded that Thompson and his constables had provoked the attack by attempting to arrest Ngāti Toa leaders who had committed no offence. In his view, 'the natives were and had ever been the actual

313. Stanley, minute, 23 August 1842 (cited in Ward, *A Show of Justice*, p 63).

314. Stephen, minute, 19 May 1843 (cited in Ward, *A Show of Justice*, pp 62–63).

315. The dispute had been brewing for some time, as Ngāti Toa refused to allow Wairau to be included in the company's claimed land, and had sent several deputations to Captain Wakefield while waiting for the Spain Commission to report on the company's claim: Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 1, pp 195–197; see also Boast, 'Maori and the Law', p 137.

316. FitzRoy arrived in New Zealand in December 1843: Stanley to FitzRoy, 10 February 1844, BPP, vol 2, pp 171–174.

occupants of the soil . . . Consequently the attempted dispossession of them . . . without any process of law, was a lawless act, and the resistance was justifiable.'[317]

Stanley acknowledged that some settlers believed English law should apply to Māori–settler relations. Yet, on a strict application of English law, he said, the actions of Thompson and the settlers were 'manifestly illegal'. However, he cautioned against applying English law exactingly to Māori communities, even in cases of Māori–settler conflict. He agreed it was necessary to adhere 'as closely as possible to the general principles of English law' but he warned against any rigorous, technical application of the English legal code or judicial procedures against people who were unfamiliar with English laws, language, religion, and customs. Such an approach, in his view, was neither practicable nor just, because,

> on the grounds of equity and of prudence, the measure [issue of a warrant for arrest of the chiefs] was more clearly indefensible. Justice required that respect should be shown, not merely for the strict rights, but even for the prejudices and the natural feelings of these people, who were not only the ancient owners, but the original lords and sovereigns of the land.[318]

Stanley added that he would not direct any prosecution of the parties in the legal tribunals. This was precisely why the Crown had established a local legislative council, so that laws could be framed that were suitable to the colony's unique circumstances. Until such laws were drawn up, magistrates must apply the law with 'equity and prudence' to avoid further provocation or conflict. In this case, the magistrate had acted in a manner that was manifestly unwise and unjust. In a strong reassertion of the Colonial Office view that legal pluralism was perfectly acceptable, and that 'singular Crown sovereignty' might accommodate 'multiple jurisdictions,[319] Stanley continued:

> I know of no theoretical or practical difficulty in the maintenance, under the same Sovereign, of various codes of law for the Government of different races of men. In British India, in Ceylon, at the Cape of Good Hope, and in Canada, the Aboriginal and the European inhabitants live together on these terms. Native laws and native customs, when not abhorrent from the universal and permanent laws of God, are respected by English legislatures and by English courts.[320]

Stanley concluded by urging FitzRoy and his officials to act with 'conciliation, sincerity, and firmness', and so restore Māori confidence in the Crown.

Settlers greeted Stanley's despatch with considerable dismay. In the view of the *New Zealand Spectator*, for example, the Crown's policy was to 'leave the colonists

317. Stanley to FitzRoy, 10 February 1844, BPP, vol 2, p 172.
318. Stanley to FitzRoy, 10 February 1844, BPP, vol 2, pp 172, 173.
319. McHugh, brief of evidence (doc A21), p 78.
320. Stanley to FitzRoy, 10 February 1844, in 'Wairau: Lord Stanley's Despatch to Governor FitzRoy', *New Zealand Spectator and Cook's Strait Guardian*, 16 November 1844, p 4.

without any protection whatever against the natives', while doing little to ensure that settlers could 'obtain and cultivate lands, in the face of a whole race of Maories bent on obstructing them'.[321] As Dr McHugh suggested, local authorities were 'less tolerant' of accommodating customary law than imperial authorities.[322] It was Chief Protector George Clarke who came closest among New Zealand officials to recognising tikanga in the introduced legal system, and we discuss his views later (see section 4.4). We also note that the events at Wairau, and official British reaction to them, were to resonate subsequently through the relationship between the Crown, settler bodies, and Māori – including in Te Raki.

4.3.2.3.2 How far were Māori land and resource rights to be recognised?

We turn now to the question of British recognition of Māori authority and Māori land rights as Ministers and officials shaped early land and settlement policies for New Zealand. Land and resources were, of course, fundamental to Te Raki Māori communities and their exercise of tino rangatiratanga. Land was now also of central importance to the British authorities, who saw its control as essential for the future growth of a British colony in New Zealand.

Normanby's August 1839 instructions to Hobson acknowledged the importance of land to both Māori and to the Crown. He began with a reminder that Māori 'title to the soil and to the sovereignty of New Zealand is indisputable'. As we have seen, this reflected the established position of the British government that New Zealand remained independent – even as it stood poised for 'reluctant' intervention to negate that independence.[323] But their 'title to the soil' would soon appear to be less well established in British policy. Crown historian Dr Loveridge put that policy in an Australasian context: Māori were perceived, he argued, 'as being somewhat higher up the ladder of socio-cultural progress than the indigenous peoples of Australia'; for this reason, he explained, 'they were considered in many quarters to have rights of ownership to land which had to be recognised by the colonizing power'. Despite this, the British government was guided by the position in the Australian colonies, where the rights of Aboriginal peoples were not acknowledged, and the assumption of sovereignty by the Crown meant that 'all lands automatically became "waste lands of the Crown"', which it might dispose of as it wished. And it was decided, even before te Tiriti was signed, that New Zealand 'would be placed in exactly the same category as the Australian colonies once Britain became the sovereign power'; that is, in order to be recognisable in British law, by definition all titles would have to issue from the Crown.[324]

In the following sections, we discuss some of the key legal principles and policies that the Crown imported with its proclamations of sovereignty, and the

321. Editorial, *New Zealand Spectator and Cook's Strait Guardian*, 16 November 1844, p 2.

322. McHugh, brief of evidence (doc A21), p 77.

323. Normanby to Hobson, 14 August 1839 (Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 316–317).

324. Donald M Loveridge, '"An Object of the First Importance"': Land Rights, Land Claims and Colonization in New Zealand, 1839–1852' (commissioned research report, Wellington: Crown Law Office, 2004) (Wai 863 R01, doc A81), pp 24–26.

implications they had for Māori land and resource rights. British sovereignty has been described as establishing the Crown's power to 'make laws and to enforce them, and therefore the power to recognize existing rights or extinguish them or to create new ones'.[325] Its right of government gave the Crown the power to legislate in respect of land titles, and the administration, survey, and price of land. By the doctrine of pre-emption, the Crown also reserved to itself the sole right to extinguish Māori customary rights to land – a right it proclaimed even before it took steps to secure sovereignty. It was regarded from the beginning as essential to assuring the success of colonisation in New Zealand, and care was taken to secure Māori agreement to pre-emption in the English text of the Treaty (though not, it turned out, in the Māori text). It was also quickly enacted in the first colonial land ordinances, including the New Zealand Land Claims Ordinance 1840 and the New Zealand Land Claims Ordinance 1841.[326] Yet, in the early years of the colony, the application of the right in New Zealand would be debated in the British Colonial Office, and in New Zealand. As we will see, the Crown could waive pre-emption if it chose, and a pre-emption scheme was in fact put in place between 1844 and 1846 in favour of direct settler purchase from Māori, provided certain conditions were met.

Similarly, there was extensive British debate in this period over the extent of Māori customary rights in land: did tribes own all the land of New Zealand, or only certain lands which they occupied and 'used'? Would it be possible for the Crown to assume ownership of considerable tracts of 'unused' land at the outset (without buying it at all) as Crown demesne? For according to the doctrine of radical title, which the Crown imported when it assumed sovereignty, it has 'the paramount ownership of its territory' based on the feudal principle 'that the Crown is the exclusive source of title to land'.[327] And while it was bound to recognise Māori customary rights, these might be found to be limited, either in nature (mere occupancy) or in area, or both. As we will see, the Crown also considered that if such rights were found to have been extinguished by pre-treaty 'purchases' from Māori, but only part of the land involved in any transaction could be granted to the settler (because of statutory limits on awards), the remainder, or 'surplus', would be deemed to be Crown land.

Here we discuss in turn the doctrine of radical title, the Crown's sole right of pre-emption and its waiver, and early developments in Crown debate and policy on recognition of Māori customary rights.

325. *Oyekan v Adele* [1957] 1 WLR 876 (PC) at 880 (cited in Joseph, *Constitutional and Administrative Law*, p 47).

326. Section 2 of the Land Claims Ordinance 1841 stated 'that all unappropriated lands within . . . New Zealand, subject however to the rightful and necessary occupation and use thereof by the aboriginal inhabitants of the said Colony, are and remain Crown or domain lands of Her Majesty, Her heirs and successors, and that the sole and absolute right of pre-emption from the said aboriginal inhabitants vests in and can only be exercised by Her said Majesty, Her heirs and successors': Land Claims Ordinance 1841, BPP, vol 3, p 276; see also Gipps to Russell, 16 August 1840, BPP, vol 2, p 185.

327. Joseph, *Constitutional and Administrative Law*, p 47.

Early Crown Law and Policies affecting Māori Land: Key Terms

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

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

Surplus lands: When it established the Land Claims Commission, the Crown determined that it would limit the amount of land any individual settler could be granted. A scale of acres to be granted for money and goods expended was set with an upper limit of 2,560 acres, though this was later relaxed in some cases. If the Land Claims Commission determined that a settler had made a 'legitimate'

4.3.2.3.2.1 *Crown radical (paramount, or underlying) title and common-law aboriginal title*

In our inquiry, Crown counsel explained radical title in these terms: under the legal doctrine of radical title, the Crown 'acquired title to all land in New Zealand as a function of obtaining sovereignty in 1840'. But the Crown's title was considered to be 'burdened by, or subject to, customary title until customary title was extinguished'. When that happened, the Crown considered that Māori had no further legal claim to the land, and 'the Crown gained a full title'.[328]

Dr McHugh has explained that common law aboriginal title 'is concerned with the effect of Crown sovereignty upon the pre-existing property rights of the tribal inhabitants'.[329] To what extent did the introduced law (in all its forms) allow for the 'aboriginal' inhabitants to have their customary property rights recognised and enforced in the courts? The arrival of Crown sovereignty, he stated, could have led

328. Crown closing submissions: old land claims (#3.3.412), p 3.
329. P G McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford: Oxford University Press, 2011), p 1.

purchase of land in excess of what the settler was entitled to by law, the Crown claimed the 'surplus' for itself on the basis that customary Māori title had been extinguished by the original settler transaction. The land therefore belonged to the Crown because of its underlying radical title.

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

Right of pre-emption: Under the Crown's pre-emption policy, it had exclusive rights to conduct land transactions with Māori. Under the colony's laws, settlers could not buy or lease land directly from Māori. The policy had its origins in British colonial policy in North America. It recognised that under the common law, Māori rights to their land survived Crown sovereignty, but their rights were modified so that they could sell only to the Crown. The Crown could also control land titles in the new colony, through the issue of Crown grants. The policy could be used to protect Māori from uncontrolled land dealings, but also to ensure that the Crown controlled the land market and could fund the colony's development through profits from buying and selling Māori land.

Pre-emption waiver claims: During the mid-1840s, Governor FitzRoy issued regulations setting out the terms on which the Crown would waive pre-emption; this allowed settlers to purchase lands directly from Māori provided certain conditions were met, though only the Crown could issue title to the purchaser.

to one of two results; that is, the Crown's courts could have operated in accordance with one of two suppositions. The first was the suspension of all tribal property (in other words, non-recognition of the rights of indigenous owners). The second was some form of legal recognition in the courts of the new legal system. Under the common law native title, the proclamation of Crown sovereignty (sometimes called *imperium* – defined by McHugh as 'the self-claimed right to govern') did not simultaneously exclude pre-existing property rights (*dominium*).[330] 'Sovereignty and ownership', Dr McHugh said, 'were not to be conflated.' So the Crown 'technically' became the paramount owner of all the land within its new colony. Settlers could only acquire title to land from the Crown, but title held by tribes was recognised as surviving. Tribal owners could have their communal land rights recognised by the introduced common law legal system as a 'burden' (qualification) on the Crown's radical title. The Crown's title was not absolute, in other words.

330. Paul McHugh, 'Common Law Aboriginal Title in New Zealand after *Ngati Apa v Attorney-General* (2003)', in Richard Boast and Paul McHugh, *The Foreshore and Seabed: New Zealand Law Society Seminar* (Wellington: New Zealand Law Society, 2004), p 26.

Aboriginal title took the traditional association of tribal owners with their ancestral land and its resources out of what had become (with the arrival of British sovereignty) the legal cold, and gave them a place in the new justice system.[331]

But in fact, there were grave limits to the legal right of tribes themselves. It was reasoned at the time that, since tribal occupation did not rest on a Crown-derived basis and their land remained ungranted land, the tribe had no land rights of which a common law court might take cognisance. Tribal title could not be recognised or enforced. Dr McHugh's evidence was that this belief was rooted in the British view of Crown 'guardianship' of non-Christian peoples with whom it had relations in America, Asia, and more recently, Africa. The rising political influence of slavery abolitionists, humanitarians, and evangelicals was important in this development:

> By the commencement of Victoria's reign, it was understood both in the imperial and colonial spheres that tribes (like minors, the mentally deranged, and wards in their own spheres) did not have legal status as tribes. That is to say, tribes could not commence or maintain proceedings in protection of tribal rights, those to property especially. Rather . . . their legal protection lay in the guardianship of the Crown wrapped up in its prerogative position.[332]

McHugh has argued further – surveying the wider empire – that from the 1830s there emerged among authorities in Britain an unwillingness to recognise the legal status of traditional polities after the acquisition of Crown sovereignty.[333] The future of indigenous peoples lay in their securing the rights of specially protected British subjects, it was believed, rather than in recognition of the 'quasi-sovereignty' of those polities. The best way to recognise the rights of 'aboriginal' peoples was through the Crown's guardianship. This would give them the opportunity to shed their tribalism and enjoy the full political and constitutional advantages of British subjects. So juridical status was to be denied to tribes, and also to individuals claiming 'aboriginal' rights. Instead, tribally derived rights were to be protected through the office of a 'Protector'. Protectors became a feature of British colonial practice in Australia, New Zealand, British Guiana, and Canada; they were legally empowered to represent the rights of aboriginal subjects. Rather than their rights being entrusted to colonial legislatures (which London opposed steadfastly in this period), the trust would be exercised through the executive.[334]

In our view, the introduced law of aboriginal title was rooted in a completely different world view and legal tradition from those of Māori. As legal scholar and historian Professor Richard Boast noted in his evidence in the Tribunal's Muriwhenua inquiry, '[t]he Eurocentric basis of the aboriginal title doctrine is so

331. McHugh, *Aboriginal Title*, pp 2–3.
332. McHugh, brief of evidence (doc A21), p 18; see also McHugh, 'Common Law Aboriginal Title in New Zealand', p 27.
333. He points specifically to the Select Committee on Aborigines (1837) which made recommendations on the subject: McHugh, *Aboriginal Societies and the Common Law*, p 133.
334. McHugh, *Aboriginal Societies and the Common Law*, pp 134–135.

plain from Gipps' words as to scarcely require comment.'[335] Yet the key aspects of the doctrine were not explained to Te Raki rangatira before they signed te Tiriti, nor were they told how it might affect their land rights. But for the Crown, it was a short step from the guarantee in the Treaty text (in English) of Māori rights to their lands, forests, and fisheries – and the chiefs' 'cession' of sovereignty in that same text – to proclamations of British sovereignty and to the right to make unilateral decisions gravely curtailing the rights the Crown had guaranteed, without even discussion with the chiefs.

In te Tiriti, up front, Māori authority over their lands was to be protected. But through the back door came the Crown's assertion of paramount title to the land of New Zealand and a 'doctrine of aboriginal title' which placed Māori land rights in a contemporary foreign legal paradigm that made them vulnerable to alienation on the Crown's terms. As we have noted, the Crown's assertion of radical title enabled it to claim ownership of lands deemed to have been legitimately purchased from Māori, but which, under the existing statutory limits, could not all be granted to the original purchaser. The Crown was entitled to the 'surplus' lands because settler 'purchase' had extinguished its customary title (we discuss the nature of the Crown's surplus lands policy further in chapter 6).

This was a doctrine which the Crown (and the wider British community) stood to benefit from. As Lord Stanley explained to Governor FitzRoy in June 1843 when FitzRoy sought guidance on this issue:

> the purchaser is not the proprietor; and . . . the hypothesis being, that the claims of the aboriginal natives have been justly extinguished, they are no longer the proprietors. Hence the consequence seems immediately to follow, that the property in the excess is vested in the Sovereign, as representing and protecting the interests of society at large. In other words, such land would become available for the purposes of sale and settlement.[336]

Stanley did not mention the legal doctrine which underlay this conclusion, which was so convenient for British interests. But it is interesting that Stanley clearly appreciated that Māori might consider the 'excess' lands should be returned to them. He added that the 'natives', if in possession of any such lands, might seek their resumption, 'prompted by feelings [which are] entitled to respect'. In which case, his advice to FitzRoy was to deal with such requests with 'the utmost possible tenderness, and even to humour their wishes' insofar as this could be done without compromising the 'other and higher interests' over which he was required to watch, as Governor.[337] In other words, Stanley was alive to the possibility that

335. In Gipps's speech, he referred to the rights of a civilised power as opposed to the qualified rights of 'uncilised occupants of a country': R P Boast, 'Surplus Lands: Policy-making and Practice in the Nineteenth Century' (commissioned research report, Wellington: Waitangi Tribunal, 1992) (Wai 45 ROI, doc F16), p 72 n; see also Gipps, speech, 9 July 1840, BPP, vol 3, pp 185–187.

336. Stanley to FitzRoy, 26 June 1843, BPP, vol 2, p 188.

337. Stanley to FitzRoy, 26 June 1843, BPP, vol 2, p 188.

Māori wishes might readily be understood, and could therefore be met, so long as they were not incompatible with Crown interests.

4.3.2.3.2.2 *Crown pre-emption and its waiver*

The origins of pre-emption in British colonial policy have been outlined by historian Rose Daamen in her Rangahaua Whanui report, *The Crown's Right of Pre-emption and FitzRoy's Waiver Purchases*.[338] Drawing on the work of Dr McHugh and Professor Kent McNeil, she explained that the British did not employ pre-emption universally in their colonies, but adopted it, particularly in colonial North America, 'by choice, not law'; it became a 'settled basis of colonial relations with the Indian tribes' by the mid-eighteenth century.[339] Legislation followed, limiting private purchases from tribes – from which it is evident that the Crown's role was intended to be one of 'an "impartial" keeper of peace, intermediary between the races and protector of native peoples' rights to their land'. As she added, 'Of course, a paternalistic colonial power in favour of expansion could not be "impartial"'.[340]

Explanations for the Crown's assertion of a right of pre-emption in countries where it acquired sovereign title are both legal and historical.[341] In terms of the common law, if the Crown left the inhabitants in possession of their private property, and those rights survived the change in sovereignty, it was presumed by the doctrine of continuity that customary law still governed indigenous land rights, and that those rights might be alienable. Settlers, however, required a Crown-derived title subject to British law. The Crown, by assuming the sole right to extinguish native title, was able to ensure that British law applied to the title of the settlers, supplying them with a Crown grant which would ensure the recognition and enforcement of their title in the colonial courts. Thus, though the native title 'continued' as in the doctrine of continuity, it was modified by a restriction on the extinguishment of native title to the Crown alone.[342]

Alongside the legal explanations, historians have noted the importance of humanitarian arguments and economic motives for the Crown's assertion of a right of pre-emption. Daamen pointed particularly to the British humanitarian

338. Rose Daamen, *The Crown's Right of Pre-emption and FitzRoy's Waiver Purchases*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1998).

339. P G McHugh, 'The Aboriginal Rights of the New Zealand Maori at Common Law' (doctoral thesis, University of Cambridge, 1987), fol 202 (Daamen, *The Crown's Right of Pre-emption*, p 2).

340. Daamen, *The Crown's Right of Pre-emption*, pp 1–3.

341. McHugh has outlined the explanation given by Chief Justice Marshall, notably in *Johnson v M'Intosh*, of the origin of the principle: it lay in discovery, which established the title of the United States to its territory (and indeed of other European nations to theirs in the Americas) under the '*jus gentium*' (law of nations) – each asserting the exclusive right of the discoverer to appropriate the lands occupied by Indians. But why was it that the Indian title was regarded in America (as it had been previously under British colonial law) as inalienable other than to the Government? That rule –the rule of pre-emption – derived from the conquest of the Indian tribes as they ceded their land by treaty. The Indian inhabitants might continue to occupy their lands, but could not transfer the title to others. Conquered, and civilised peoples might retain the right to dispose of their property as they wished; uncivilised tribes could not: McHugh, *Aboriginal Societies and the Common Law*, pp 38–39.

342. Daamen, *The Crown's Right of Pre-emption*, pp 4–5.

movement and its concern for the welfare of indigenous peoples, which was 'at its height' in the 1830s. An 1837 report of a Committee of the House of Commons, charged with considering what practices should be adopted towards native inhabitants of British colonies, recognised their 'incontrovertible right' to their own soil. It believed that the duty of protecting native peoples belonged solely (and appropriately) to the executive government, since settler disputes with local tribes could not fairly be judged by a local settler legislature. And it suggested that private purchases by British subjects of native land in or adjacent to the 'the Crown's dominion' should be declared 'illegal and void', while if they tried to acquire land outside these categories, they should understand that they could expect no support in securing title to it.[343]

Humanitarian motives sat comfortably with the Crown's economic goals. In New Zealand, in particular, the increasing numbers of settlers and speculators 'buying' land by the late 1830s were a concern for the Colonial Office, and on top of this came the 'systematic colonisation' organised by the New Zealand Company, which intended to establish its own government in its first settlement.[344] Both these factors made it even more attractive to the Crown to secure the valuable monopoly provided by the sole right of pre-emption, and to control colonisation, the titling of land, and the pace of settlement. As Dr Loveridge put it, 'Many humanitarians, at this point, saw systematic colonization as the only hope for Maori survival.'[345]

Normanby first instructed Hobson to tackle the many claims arising from European 'purchases' of land from Māori – especially those involving enormous acreages. Therefore, on 30 January 1840, Hobson – following a similar proclamation issued in New South Wales by Gipps dated 14 January (see section 4.3.2.2) – proclaimed in the Bay of Islands that the Crown would not acknowledge any claim to land 'which is not derived from, or confirmed by, a grant to be made in Her Majesty's name'.[346] In his negotiations with the chiefs, Hobson was also instructed to induce them, if possible, to agree to cede land (with or without payment) in future only to the Crown of Great Britain, so that the Government might regulate the sale of 'unsettled lands'.[347]

The British government envisaged that the land market would be self-sustaining: on-selling of the first lands would fund further purchases as required. The Crown intended to assert monopoly control over the trade in land in order to produce a revenue that would above all fund British migration to the new colony and public works.[348] The prices to be paid to Māori were to be much lower than those at which the Government would resell the land to settlers.[349] 'Nor', Normanby argued, 'is there any real injustice in this inequality. To the natives or their chiefs

343. Daamen, *The Crown's Right of Pre-emption*, pp 6–7.
344. Daamen, *The Crown's Right of Pre-emption*, pp 7–9.
345. Loveridge, '"An Object of the First Importance"' (Wai 863 R01, doc A81), p 21.
346. Normanby to Hobson, 14 August 1839 (cited in Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 318–319).
347. Normanby to Hobson, 14 August 1839, BPP, vol 3, p 86.
348. Normanby to Hobson, 14 August 1839, BPP, vol 3, pp 86–87.
349. Normanby to Hobson, 14 August 1839, BPP, vol 3, pp 86–87.

much of the land of the country is of no actual use, and, in their hands, it possesses scarcely any exchangeable value.' Rather, Māori would benefit over time from the increased value of their land as British capital and settlers were introduced.[350] It was essential, the instructions said, that the Crown's land purchasing be done systematically so that land revenue was not squandered, emigration was not delayed, and land itself was not 'parcelled out amongst large landholders', thus remaining unprofitable for long periods because they could not make it productive. This modern 'Land Fund' model of systematic colonisation was to be adopted for New Zealand (we discuss the significance of the Crown's land fund model further in chapter 8).

In practice, this apparently simple model quickly unravelled. Almost from the outset, it was opposed by both settlers and many Māori in the northern part of the country. Settlers lobbied against the first New Zealand Land Claims Ordinance 1841 (this declared null and void all titles claimed by 'purchases or pretended purchases gifts or pretended gifts conveyances or pretended conveyances leases or pretended leases agreements or other titles' from chiefs or other Māori[351] – that is to say, any agreement of any kind between Māori and settlers for the use of Māori land or its resources) and they sought to win Māori support for a reversal of Crown policy by telling them that they were being denied their rights as British subjects to deal with their lands as they saw fit.

Some Te Raki Māori leaders expressed considerable frustration also over the Crown's pre-emption policy; that is, its sole right to enter into land transactions with Māori. As we found in our stage 1 report, this policy had not been clearly explained to Māori; indeed, the words of te Tiriti (in te reo) did not even clearly convey that the Crown would have a right of first refusal, though Henry Williams later said that he had explained pre-emption in those terms.[352] As several technical witnesses explained, pre-treaty land transactions had been a source of significant income for Te Raki Māori and had established ongoing economic relationships between Māori and settlers. From 1840, the Crown prohibited these private transactions but lacked the capital to acquire land for itself. As a result, the market stalled, and an important source of economic return and beneficial relationships dried up.[353]

By 1844, the waiver of pre-emption was being seriously considered. In the *Hauraki* report, the Tribunal has pointed out that by that time, there was also growing support for 'direct purchase' from Māori in official circles. No 'surplus' lands had been yet identified, and there were only limited successful Crown

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

351. Land Claims Ordinance 1841, BPP, vol 3, p 276.

352. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 519; see also Bruce Stirling and Richard Towers, '"Not with the Sword but with the Pen": The Taking of the Northland Old Land Claims' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2007) (doc A9), pp 439–440.

353. Nicholas Bayley, 'Aspects of Maori Economic Development and Capability in the Te Paparahi o Te Raki Inquiry Region from 1840 to c2000' (commissioned research report, Wellington: Waitangi Tribunal, 2013) (doc E41), p 50; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 312–313.

purchases of land for on-sale; nor were there sufficient funds to finance government and further land purchase for colonisation. In fiscal crisis and faced with mounting criticism from both Māori and Pākehā, allowing 'direct purchase of Maori land by settlers seemed to offer a way out'.[354] The newly appointed Governor of New Zealand, Robert FitzRoy, anticipating that he might need to act on the issue of Crown land purchase, sought guidance from the Colonial Office and Lord Stanley before his departure and raised the possibility of waiving the Crown's pre-emption 'in certain cases' under 'defined restrictions' (he also proposed the return of surplus land).[355] FitzRoy expressed concern that the Crown's use of its power of pre-emption to pay only low prices for Māori land was undermining their trust and holding up the progress of the colony. He suggested to Stanley:

> Existing and threatening difficulties may be obviated by a cautious use of such a power as that of allowing individuals or companies to purchase land from . . . [Māori] . . . who will not sell land to Government at a low valuation, seeing, as they do, that it is re-sold for a high price . . . Some powerful tribes are said to have already combined to refuse to sell land to the Government, and such combination is likely to be extended while . . . [Māori] . . . look upon the Government as opposed to their interest, seeking only its own advantage.[356]

The Colonial Office remained concerned, however, that relinquishing pre-emption would be a departure not only from the terms of the treaty but also the principles outlined by Normanby that informed the Crown's purchase policy intended to limit its impact on Māori. The land and emigration commissioners, who reviewed official colonial correspondence on land matters, advised against adopting FitzRoy's proposal, believing it would mean that the Crown would become 'mixed-up' with purchases undertaken by individuals, and that any deviation from the treaty (a 'compact which it would seem undesirable to depart from unless on some very strong reason') would raise questions of 'good faith' and 'must greatly enhance the responsibility of Govt for any unforeseen ill-consequences to the Natives'.[357] Stanley presumably did not entirely endorse this assessment but authorised FitzRoy to make any recommendation regarding pre-emption he considered expedient after inquiry. According to Daamen, Stanley's major concern was for the impact of the Governor's proposal on the land fund and the colonial project.[358] He instructed FitzRoy that he was to keep two objects in mind should he consider it

354. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 1, pp 109–110.

355. FitzRoy to Stanley, 16 May 1843, BPP, vol 2, pp 387, 388.

356. FitzRoy to Stanley, 16 May 1843, BPP, vol 2, pp 387–388. He was not alone in this view. Shortland as Acting Governor also thought that 'The Government, by becoming a purchaser of land, is placed in a position which tends to weaken its influence and lower its dignity in the eyes of the natives generally': Shortland to Stanley, 30 October 1843, BPP, vol 2, p 340.

357. Report of colonial land and emigration commissioners, attached to FitzRoy to Stanley, 16 May 1843 (cited in Daamen, *The Crown's Right of Pre-emption*', pp 59, 80).

358. Stanley to FitzRoy, 26 June 1843, BPP, vol 2, pp 389–390; Daamen, *The Crown's Right of Pre-emption*, pp 60–61.

advisable to waive the Crown's right: settlers were to be prevented from acquiring land from Māori at a cheaper rate than they would from the Government; and a contribution should be paid by the purchaser to the emigration fund.[359]

As we will see, the Crown's right of pre-emption was immediately a public issue when FitzRoy arrived in Auckland. Both Māori leaders and settlers raised it in their addresses to the Governor, who responded positively, indicating that he had been authorised to investigate new arrangements for land purchase. We consider this issue and FitzRoy's waiver scheme further in chapter 6, see section 6.6.

4.3.2.3.2.3 *Crown policy: How were Māori land rights to be defined, and could the Crown assert a right to demesne lands?*

Radical title was a given to the British authorities. But while Māori customary rights were recognised as surviving proclamations of sovereignty over New Zealand, questions remained: how were customary rights to be understood and defined? And how extensive were they? This was the subject of disagreement both among British policy makers and with the New Zealand Company supporters. Although the company was not involved directly in the history of the north, its views were often influential in Britain as well as New Zealand, and policy makers had to consider and respond to them. A key question following the signing of the treaty was how to identify lands that were not considered subject to Māori ownership. This was important both to the Colonial Office and to the New Zealand Company, which was anxious for such areas to be transferred without delay to it by Crown grant, and then to its settlers. If Māori could be confined to lands that were cultivated (for example, kūmara gardens), their proprietary needs and rights would be more restricted.

We found the work of legal scholar Professor Mark Hickford helpful in considering the context in which the British imperial policy on Māori property rights was formulated during this period. Hickford pointed to two sources: stadial history, the view that history proceeded in stages from 'savagery' to 'civilisation', each stage distinguished by predominant modes of subsistence (hunting and gathering, pastoralism, agriculture, and commerce); and *ius gentium*, a law of 'civilised' nations, and their relations with each other and with those who were considered 'not civilised'. Cultivation or the planting of crops was the common factor in gauging the quality of occupation.[360] The New Zealand Company found support for its position on Māori land rights in a popular interpretation of stadial *ius gentium* sources, what has come to be known as the 'waste lands' theory. Waste lands theory was derived from the works of Swiss jurist Emmerich de Vattel, who argued that the cultivation of land was 'an obligation imposed upon man by nature', and those who 'disdain' it, 'fail in their duty to themselves' (we discussed Vattel's influence on

359. Stanley to FitzRoy, 26 June 1843, BPP, vol 2, pp 389–390.

360. Hickford stated that the law of nations was predominantly described in texts such as those of Hugo Grotius, Emerich de Vattel, James Mill, and others: Mark Hickford, '"Decidedly the Most Interesting savages on the Globe": An Approach to the Intellectual History of Maori Property Rights, 1837–52', *History of Political Thought*, vol 27, no 1, 2006, pp 122–125, 130, 133–134; see also McHugh, *Aboriginal Societies and the Common Law*, pp 121–122.

British imperial policy in our stage 1 report).[361] Vattel's principles were popularised in Britain during the nineteenth century by Dr Thomas Arnold, the headmaster of Rugby School. Arnold advocated that within the British Empire, indigenous peoples were only guaranteed rights in the lands they occupied or cultivated. All other lands were to be deemed 'waste' or 'wild' lands, and following the Crown's assertion of its sovereignty, would become its demesne.[362]

On the other hand, the Colonial Office policy makers, Hickford argued, resisted being boxed in to a fixed definition of the proprietary rights of Māori. As we discussed in our stage 1 report, a number of prominent officials at the Colonial Office, such as Lord Glenelg (Normanby's predecessor as Secretary of State) and the James Stephen (Permanent Under-Secretary from 1836 to 1847), had strong connections with humanitarian and missionary groups like the Aborigines' Protection Society and the Church Missionary Society.[363] Prior to the signing of the treaty, they had opposed the colonising aims of the New Zealand Company, and were emboldened by the report of the 1837 House of Commons Select Committee on Aborigines which had concluded that the British government had 'solemnly recognized' Māori 'title to the soil'.[364] James Stephen distinguished Māori as having a settled form of government, who had 'divided and appropriated the whole territory amongst them'.[365] He distanced himself, according to Hickford, from *Johnson v M'Intosh*, the decision of the chief justice of the United States, John Marshall, which he regarded as proving that a grant from an Indian tribe of lands in the State of Ohio would confer no valid title whereas a grant from the United States would. To Stephen, it showed that 'the whole Territory over which those tribes wandered was to be regarded as the property of the British Crown in right of discovery and of conquest – and that the Indians were mere proprietors on sufferance'.[366]

Far better, Stephen argued, that Māori should have the protection of British law in a Crown Colony, and eventually gain the full rights of British subjects, than to be 'denied tribe members status as citizens of the republic and left . . . as a collectivity described as "domestic dependent nations"'.[367] His focus was on Crown control of the process of acquiring land through transactions with Māori, in parallel with a long process of gathering information about Māori tenure, and commis-

361. Normanby to Hobson, 14 August 1839, BPP, vol 3, p 85; Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 45–47.

362. Bernard Cadogan, '*A Terrible and Fatal Man*': *Sir George Grey and the British Southern Hemisphere*, Treaty Research Series (Wellington: Treaty of Waitangi Research Unit, 2014), p 165.

363. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 299; see also McHugh, *Aboriginal Societies and the Common Law*, pp 122–123; Loveridge, '"An Object of the First Importance"' (Wai 863 R01, doc A81), p 18.

364. Normanby to Hobson, 14 August 1839, BPP, vol 3, p 85; Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 333.

365. Hickford, '"Decidedly the Most Interesting Savages"', pp 123, 153.

366. Stephen to Vernon Smith, 28 July 1840 (cited in Mark Hickford, *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford: Oxford University Press, 2011), p 125); McHugh (doc A21), p 75.

367. McHugh, brief of evidence (doc A21), p 91; see also Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 327.

sioners investigating direct purchases from Māori by settlers. Through a system of imperial land management, districts could be opened to sale in an orderly fashion.

Lord Normanby's 1839 instructions to Hobson reflected the Colonial Office's position at that time. He recognised that even 'unoccupied' lands belonged to Māori, though he thought they were of little value to them. However, Normanby believed that if private land speculation was allowed to continue, these rights would become 'precarious', and the Crown would be unable to provide any 'securities against abuse'.[368] His instructions devoted considerable attention to the acquisition, titling, and management of Māori land. He gave specific directions about the conduct of transactions with Māori (see chapter 8). Purchases were to be conducted 'on the same principles of sincerity, justice, and good faith, as must govern your transactions with them for the recognition of Her Majesty's Sovereignty in the Islands'.[369]

By the time Lord Russell issued his instructions to Hobson in December 1840, the Colonial Office's position on the management of New Zealand lands was evolving – though it does not seem to have been unanimous. Russell was preoccupied with the sale and settlement of 'waste lands' – lands that the Crown might control from the outset because they belonged neither to Māori nor to the settlers who would eventually receive grants for their pre-treaty purchases which were deemed to be valid. The tension between Māori rights and authority, and the rights the Crown now assumed it had, was very evident in the final part of Russell's instructions, which returned to the need to separate public land from the land claimed by private individuals (as a result of 'contracts or grants said to have been made by the native chiefs'; that is, old land claims) by means of an investigative commission. Once this was done, and it was clear which lands were still retained by the 'aborigines', the land remaining would be deemed Crown lands, and would then be surveyed and sold.[370]

The Queen's November 1840 instructions to her new Governor on these points, sent at the same time, were detailed. The Governor was to have a survey made of all lands in the colony, so that the whole country was divided into districts, counties (each of some 40 miles square),[371] hundreds (each of some 100 square miles), towns, townships, and parishes (each of some 25 square miles).[372] The Surveyor-General was to report what lands should be reserved in each of the new divisions for public roads, and for the sites of towns, villages, churches, cemeteries,

368. Normanby to Hobson, 14 August 1839, BPP, vol 3, p 86.

369. Normanby to Hobson, 14 August 1839, BPP, vol 3, p 87 (cited in Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 319).

370. Russell to Hobson, 9 December 1840, BPP, vol 3, p 152; Hickford noted that Russell was a student of Dugald Stewart at Edinburgh University from 1809 to 1812. Stewart was among those whose works constituted the 'Scottish Enlightenment' literature of the eighteenth century in which stadial theory was described: Hickford, 'Decidedly the Most Interesting Savages', pp 124, 127.

371. Note that a mile square refers to a square region with each side having the specified length; thus 40 miles square = 40 x 40, = 1,600 square miles.

372. Loveridge noted that '[t]hese survey instructions made no distinction between Crown lands and Maori customary lands: all were apparently to be encompassed by the national surveys': Loveridge, '"An Object of the First Importance"' (Wai 863 R01, doc A81), p 48.

landing places on the sea coast or by navigable streams, or any other reservations for public use. Such parcels of land should be marked on charts appended to the Surveyor-General's reports, and must not be granted or occupied by any private person. The Charter that accompanied Russell's instructions for the erection of the separate colony and its government purported to give Hobson the power to make and execute 'grants of waste land' to the Crown or private persons, under the seal of the colony.[373] All waste and uncleared lands which remained to the Crown after such reservations had been made should be sold to the public (who could make payment either in New Zealand or in the United Kingdom) at a uniform price per acre. A later despatch clarified that when any Crown purchase of land from Māori was made, a sum of 15 to 20 per cent of the purchase money should be transferred to the protectorate, to pay for its costs, as well as for any charges authorised by the Governor for Māori health, civilisation, education, and religious care.[374]

Māori land rights were not entirely forgotten in the midst of this assertion of Crown rights over the lands of the colony, and its preoccupation with settling and selling them. The Charter and the Queen's instructions had both stressed that Māori rights to the 'occupation or enjoyment' of their lands should not be infringed by any of the Government's surveying or administrative activities.[375] We note in particular the phrase 'occupation or enjoyment' – an expression that had little relation to Māori customary rights.[376] Nor, as Loveridge pointed out, was any definition of 'enjoyment' offered.[377] The implication of these instructions, the historian Dr Vincent O'Malley argued, was that lands that were deemed to be unused or unoccupied 'could be assumed to form part of the royal demesne, available for onsale to incoming settlers'.[378] Dr Loveridge contended that the only way in which Russell's instructions can be understood is if they did propose that the Crown could directly broker the sale of unused lands to settlers.[379] He pointed to a note Russell wrote on 24 December 1840 in which he seems to imply that only lands 'now occupied & cultivated by Maori'[380] would be left in their possession, and that 'all unused and unsold lands would become the property of the Crown'. Loveridge noted that neither in the December instructions to Hobson nor in his later note was there any reference to past or future purchasing of Māori land by the Crown.

373. Charter for erecting the Colony of New Zealand, 16 November 1840, BPP, vol 3, p 154.
374. Russell to Hobson, 28 January 1841, BPP, vol 3, p 174.
375. Queen's Instructions to Hobson, 5 December 1840, BPP, vol 3, p 161.
376. The New Zealand Company took heart from the use of the phrase 'actual occupation and enjoyment' in the Letters Patent. For if Maori owned only gardens and dwelling places, the Company might well expect to take possession of vast tracts of New Zealand land which were unowned by Maori. It would use the term in defence of its purchases in discussions with the Colonial Office throughout the 1840s: Hickford, 'Decidedly the Most Interesting Savages', pp 135–137.
377. Loveridge, '"An Object of the First Importance"' (Wai 863 R01, doc A81), p 52.
378. Vincent O'Malley, 'Northland Crown Purchases, 1840–1865' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2006) (doc A6), p 30.
379. Loveridge, '"An Object of the First Importance"' (Wai 863 R01, doc A81), p 55.
380. Russell, note, 24 December 1840 (Loveridge, '"An Object of the First Importance"' (Wai 863 R01, doc A81), p 53).

Reserves were not land returned to Māori out of a sale to the Crown, but were permanent reserves made for Māori *before* sales of Māori lands to settlers began.[381]

In our view, Crown purchase was not referred to because Russell was not contemplating purchase from Māori. The Crown would sell lands that he referred to as 'public' (Crown demesne) lands, and would set apart 15 per cent of all the purchase money to be applied for the benefit of Māori. His note produced a strong, if diplomatic reaction from the Permanent Under-Secretary at the Colonial Office, Stephen who 'chose to believe' that Russell had simply forgotten to mention that the lands sold to settlers would 'first be purchased from Maori', and recast the Minister's proposals in terms of a 'purchase' model.[382] Stephen, a strong believer in the treaty land guarantee, was 'firmly convinced of "the great cardinal principle, that the lands are not ours, but – that we have no title to them except such as we derive from purchase"'.[383]

Russell did not respond directly to Stephen's criticism of the 'omissions' or 'contradictions' in his 1840 instructions. He simply issued further instructions on 28 January 1841 confirming that the 'territorial rights of the natives, as owners of the soil, must be recognized and respected'.[384] Here, for the first time, Russell mentioned purchase of Māori land by the Crown, reiterating the Crown's sole right of pre-emption. That right was also to be reasserted in colonial legislation, so that any conveyance by any chief or Māori individual to any person 'of European birth or descent' would be deemed absolutely invalid.[385] Māori might sell, but only to the Crown. Russell did not directly address the matter of whether lands deemed unoccupied or unutilised could be claimed as the Crown's demesne,[386] but emphasised that provision was now to be made for recording lands that the British considered essential to Māori well-being. These lands were to be marked out precisely on the general maps and surveys of the colony. Decisions as to inalienable tracts of land to be retained by Māori were to be a matter for the Surveyor-General and the Protector of Aborigines, with final approval to be given by the Governor with the advice of the Executive Council.[387] Though Russell did not clarify his views on Māori land rights at the time, he would later reflect (after leaving office) that he had not considered that 'any claim could be set up by the natives to the millions of acres of land which are to be found in New Zealand neither occupied nor cultivated, nor, in any fair sense, owned by any individual'.[388]

It is telling that as the New Zealand Company argued for the policy outcomes it sought from 1840, 'many of these conversations were internal to British political

381. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), p 53.
382. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), pp 54–55.
383. Stephen, minute to Vernon Smith, 28 December 1840 (cited in Adams, *Fatal Necessity*, p 181).
384. Russell to Hobson, 28 January 1841, BPP, vol 3, p 174.
385. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), p 57.
386. Loveridge, 'An Object of the First Importance' (Wai 863 ROI, doc A81), p 56.
387. Russell to Hobson, 28 January 1841, BPP, vol 3, p 174 (Vincent O'Malley, supporting papers (doc A6(a)), vol 24, p 8068.
388. Russell to Hobson, 29 June 1844, BPP, vol 2, p 412 (O'Malley, supporting papers (doc A6(a)), vol 24, p 8054).

agitation, directed to an intra-European audience and not shared with Maori'.[389] Hickford has pointed to the failure of both the Colonial Office and the company to try to understand the nature of Māori land rights or how their political relationships worked. And there was no conversational engagement with Māori at all.[390] Despite the emphasis of the treaty on Māori property rights, Māori were not even apprised of the far-reaching plans of British policy makers for dividing the land of New Zealand. Phrases such as 'occupation or enjoyment' (or more commonly, 'occupation and enjoyment') were used to read down Māori rights, and again, the emphasis was on protection of these limited rights, as the British defined them.[391] Officials did not consider the implications of these policies for the authority of Māori communities over their lands and resources.

But that did not mean they did not impact Māori. By 1844, the debate on the extent of Māori land rights was coming to a head in London. During his period as Secretary of State, Lord Stanley (1841 to 1845) had to cope with the growing unease in London, spearheaded by supporters of the New Zealand Company, about the investigation of company land titles in New Zealand by the Land Claims Commission headed in central New Zealand by William Spain. News of the conflict in Wairau between an armed party of Ngāti Toa, police constables, and New Zealand Company officers reached London in December 1843.[392] The solution the company proposed was a Crown declaration of ownership over unused lands, and it directly appealed to the British Parliament for an inquiry into 'the whole New Zealand question'.[393] This request was granted, and a select committee was appointed in April 1844 to inquire into 'the State of the Colony of New Zealand, and into the Proceedings of the New Zealand Company'.[394]

The select committee's report was of course not binding on the Colonial Office, but as Lord Stanley well knew, it would nevertheless carry weight. The committee's report is perhaps best known for its concluding resolutions and its condemnation of the treaty, in particular its guarantee of Māori lands and property. The third of the resolutions read:

> That the acknowledgment by the local authorities of a right of property on the part of the Natives of New Zealand, in all wild lands in those Islands, after the sovereignty had been assumed by Her Majesty, was not essential to the true construction of the Treaty of Waitangi, and was an error which has been productive of very injurious consequences.[395]

389. Hickford, 'Decidedly the Most Interesting Savages', p 137.
390. Hickford, *Lords of the Land*, p 107.
391. . The Company argued for policy outcomes on Māori property rights through the lens of stadial history and ius gentium combined: Hickford, '"Decidedly the Most Interesting Savages', pp 135–137.
392. Loveridge, 'An Object of the First Importance' (Wai 863 RO1, doc A81), pp 196–197.
393. Loveridge, 'An Object of the First Importance' (Wai 863 RO1, doc A81), pp 200–201.
394. Loveridge, 'An Object of the First Importance' (Wai 863 RO1, doc A81), p 201.
395. Report from the Select Committee on New Zealand, 1844, BPP, vol 2, p 13.

The committee was critical of the treaty's wording, especially its guarantee to Māori of 'possession of all lands held by them individually or collectively'. It would have been better, it said,

> if no formal treaty whatever had been made, since it is clear that the natives were incapable of comprehending the real force and meaning of such a transaction; and it therefore amounted to little more than a legal fiction, though it has already in practice proved to be a very inconvenient one, and is likely to be still more so hereafter.

The committee considered that the sovereignty over the North Island

> might have been at once assumed, without this mere nominal treaty, on the ground of prior discovery, and on that of the absolute necessity of establishing the authority of the British Crown for the protection of the natives themselves, when so large a number of British subjects had irregularly settled themselves in these islands.[396]

The root of the committee's criticism of the terms of the treaty lay, it emphasised, in its 'stipulations . . . with respect to the right of property in land'. It was these, and the subsequent proceedings of the Government, which had 'firmly established in the minds of the natives notions . . . which they had then but very recently been taught to entertain, of their having a proprietory title of great value to land not actually occupied'. It should have been assumed at once, in accordance with the principles of colonial law (and indeed with the Charter of December 1840 and Lord Russell's instructions to the first Governor) that 'all unoccupied land . . . [belonged] to the Crown as a right inherent in the sovereignty'. Such a policy would have made the proceedings of the Land Claims Commission (who were investigating the validity of pre-treaty transactions) much more straightforward, and it would have been much easier to give settlers 'quiet possession of the land they required'.[397]

Lord Stanley, responding to the select committee's report in a despatch to Governor FitzRoy, noted that the committee had acknowledged that it might be difficult to change policies that the Crown had already embarked on, and had refrained from recommending that the Governor be instructed at once to assert the rights of the Crown 'as they believe them to exist'. Stanley made it clear that he did not consider Māori rights could be restricted to 'lands actually occupied for cultivation', because this was simply 'irreconcilable with the large words of the treaty of Waitangi' in article 2 (he also quoted the English version); nor was it compatible with Normanby's instructions to Hobson. And it was inconsistent with the practice of the tribes 'who, after cultivating, and of course exhausting, a given spot for a series of years, desert it for another within the limits of the recognized property of the tribe'.[398] The results of proceeding with the policy seemed fraught

396. Report from the Select Committee on New Zealand, 1844, BPP, vol 2, p 5.
397. Report from the Select Committee on New Zealand, 1844, BPP, vol 2, pp 5–7.
398. Stanley to FitzRoy, 13 August 1844, BPP, vol 4, pp 145–147.

with danger to relations between the two races, and he could not, he said, 'take on myself the responsibility of prescribing to you a course which, I believe, would neither be consistent with justice, good faith, humanity or policy'.[399] However, Stanley was also of the opinion that on his arrival in New Zealand, FitzRoy would find that 'there were considerable tracts of country to which no tribe could establish a *bonâ fide* title; and still more extensive districts, to which by personal communication with the chiefs, you would obtain a title on easy terms'.[400] While Stanley considered the committee's views inpracticable, he did not fully accept the premise that Māori could claim ownership of all lands in New Zealand.

As it happened, Lord Howick, who had chaired the committee, became the third Earl Grey in 1845, and then Secretary of State for War and the Colonies. From mid-1846, the New Zealand Company's argument concerning the limits of Māori property received – briefly – a favourable reception. We return to this change in policy and to the long shadow cast by these debates, and to Earl Grey's policy decisions, in later chapters.

4.3.2.3.3 Conclusion: What was the extent of Crown provision for continuing exercise of tino rangatiratanga of hapū and iwi?

In all these respects – the nature of the new governance system; the introduction of a new legal system, and the secondary and temporary role envisaged for Māori law; and the re-conception by the British authorities of Māori land rights to limit them so that both Crown and settler needs for extensive tracts of land might take precedence – the importance of these early instructions and policies cannot be overstated. The assumptions on which they were based included the superiority of British institutions and the importance of the needs of settlers who were now beginning to arrive in New Zealand in growing numbers. These assumptions also drove the policies of the colonial Government, as we will see in the next section and in later chapters of this report. Despite the promises in te Tiriti, there was little provision for Te Raki Māori communities to exercise tino rangatiratanga. There were some promising signs: the evident commitment by some Secretaries of State and by Colonial Office staff to the treaty land guarantees, and a willingness to provide for recognition of tikanga, at least in the short term and insofar as it was understood in London. But such official attitudes to both the treaty and Māori law were offset by more negative reactions. The influence of the New Zealand Company in and on the British Parliament kept the interests of settlers well publicised, and growing Māori opposition to the exercise of kāwanatanga (notably in the far north, but elsewhere as well) raised British fears of a rocky road ahead.

Professor Ward, contemplating the beginnings of British government policy for Māori, took a bleak view. The most serious flaw in policy, he argued, was not lack of idealism, nor what he described as its

399. Stanley to FitzRoy, 13 August 1844, BPP, vol 4, p150.
400. Stanley to FitzRoy, 13 Augsut 1844, BPP, vol 4, p147.

> Eurocentrism and assumptions of Maori weakness and submissiveness to paternal direction; the Maori themselves could soon remedy that. Its most serious flaw was that it was emasculated by European attitudes of racial or cultural superiority, and by pandering to settler prejudices, which denied the Maori real participation in the European order except at a menial level.[401]

Māori were in no way inclined to accept subordination but were willing to engage with the new order on their own terms:

> State-building did have a chance of Maori co-operation. A form of government closely regulating settlement and promptly involving Maori leaders in political and judicial institutions and in the police power which would support them, stood a good chance of acceptance. Unfortunately nothing so subtle was planned in Downing Street.[402]

It was not a promising start.

4.3.3 Conclusions and treaty findings: Did the Crown breach the treaty by proclaiming its sovereignty, and establishing a Crown Colony government with authority over the whole of New Zealand?

We note again the acknowledgement of the importance officially attached to the consent of the rangatira to a 'cession', as the Secretary of State put it. In effect, Russell said, the Crown's title, its sovereignty, rested on the treaty signed at Waitangi and elsewhere. Yet, as the British reaction to the arguments of New Zealand Attorney-General Swainson about the incompleteness of Māori consent showed, the treaty had served its purpose and was not to be called on once the acquisition of sovereignty had been completed. After all, as Dr Palmer pointed out, this acknowledgement that the basis of British sovereignty lay in the treaty was not mentioned in the charter erecting a government in New Zealand, or in the official instructions sent to the first Governor. These were the instruments issued under the Royal prerogative for the government of New Zealand by the British Crown. And it is clear that the treaty was ultimately irrelevant to the process when it came to the next stage of asserting the Crown's authority over New Zealand. Constitutionally, the exercise of the prerogative was purely a matter for the sovereign. And on that basis only, the Crown issued instructions for the establishment of a colonial Government in New Zealand, and the Governor oversaw that establishment on the ground. But there are larger issues here.

Dr Palmer has referred to the British acquisition of sovereignty as 'a fact of raw political power', and it is hard to disagree with this assessment.[403] We cannot find that the Crown officials who proclaimed sovereignty and began to establish Crown Colony government genuinely believed that Māori had understood and consented

401. Ward, *A Show of Justice*, p 39.
402. Ward, *A Show of Justice*, p 39.
403. Palmer, *The Treaty of Waitangi*, p 177.

to the full implications of British sovereignty. Māori were not part of the processes at all, and these constitutional steps did not reflect what the rangatira had agreed to. They are processes which must be seen in the broader context of the imperial acquisition of territory and the establishment of settler societies whose success was grounded, it has been argued, 'on the appropriation of indigenous lands and resources, subordination of indigenous peoples, and the perpetuation of racist myths'.[404]

Some legal experts, mindful of this context, have recently challenged the legality and the legitimacy of the British assertion of sovereignty and its processes, though they reach differing conclusions. We refer here first to the views of constitutional theorist Emeritus Professor F M (Jock) Brookfield. He argued in his 1999 study *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* that the Crown's taking of power in New Zealand was 'at least in part, unlawful in relation to the Maori legal orders', which were customary in nature and lacked the organs of government, the executive, legislative, and judicial branches.[405] His discussion is a wide-ranging one set, he explains, in the context of a consideration of 'the legitimacy of legal systems or orders established by revolution, especially in the case of the revolutionary conquests of Western expansion and colonization'.[406] In Professor Brookfield's view, the Crown assumed sovereignty over the polities of Māori iwi and hapū through a 'revolutionary seizure of power'.[407] He explained his definition of revolution as

> the overthrow and replacement of any kind of legal order, or other constitutional change to it – whether or not brought about by violence (internally or externally directed) – which takes place contrary to any limitation or rule of change belonging to that legal order.[408]

Thus, the Crown's assumption of sovereignty began with the British proclamations of sovereignty of May 1840 over New Zealand.[409] It was revolutionary in relation to iwi and hapū, he said, to the extent that 'the power asserted and seized by the Crown exceeded what was ceded' by the treaty.[410] Brookfield argued that the Crown's seizure of power was manifested, in the case of groups that did not sign te

404. Roger Maaka and Augie Fleras, *The Politics of Indigeneity: Challenging the State in Canada and Aotearoa New Zealand* (Dunedin: University of Otago Press, 2005), p 40.

405. F. M. Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation*, revised ed (Auckland: Auckland University Press, 2006), p 91.

406. Brookfield, *Waitangi and Indigenous Rights*, p 11.

407. In our inquiry, the Crown (in answer to Tribunal questions) challenged what it called Professor Brookfield's 'new' definition of revolution, noting that he himself clarified that his definition is broader than most standard definitions, according to which the concept of revolution requires the use of force', Counsel submitted that according to Brookfield's definition, 'virtually any conceivable form of colonial government would have been "revolutionary" regardless of what protections were put in place for indigenous peoples': Crown memorandum (#3.2.2681(a), pp 5, 14.

408. Brookfield, *Waitangi and Indigenous Rights*, pp 13–14.

409. Brookfield, *Waitangi and Indigenous Rights*, p 85.

410. Brookfield, *Waitangi and Indigenous Rights*, pp 95, 105.

Tiriti and who had ceded nothing, 'as a conquest by Queen Victoria's very different polity'; and for those that did sign, 'either as [a conquest] or as a revolutionary enlargement of power'.[411] We add that in the case of Ngāpuhi, while they had signed te Tiriti, they had ceded nothing.

In support of his view, Brookfield drew attention to the fact that Attorney-General William Swainson realised that there was a discrepancy between the Crown's claim of authority over the whole country and 'what it could properly claim under the Treaty of Waitangi', given the number of non-signatories.[412] We have discussed Swainson's argument in section 4.3.2.1 and the strongly worded rejection of it by the Secretary of State and his Under-Secretary, Sir James Stephen. There might be questions about the justice and the morality of the acts of state by which the Crown had asserted sovereignty but, in the words of Stanley, Her Majesty had been advised to pursue a course, 'and [she] has pursued it'.[413]

Considering the Colonial Office response to Swainson, Brookfield observed:

> One should note carefully what the Secretary and Under-Secretary were in effect saying. The Queen on the advice of her ministers had asserted her sovereignty over the whole of New Zealand by acts of state that were revolutionary . . . And, as with all revolutions, whatever ideological justification the revolutionaries may claim, the revolution must rest finally upon its success, upon what is 'done', rather than what is just or moral or legal (since the revolution is by definition illegal, in this case in relation to the customary legal orders of Maori).[414]

Brookfield noted problems with official British assumptions that the passage of time would cure any defects in the Crown's procedures. For decades after the 1840s, he wrote, the 'revolution was far from completely effective throughout the country'; there continued in parts of New Zealand the customary legal orders of Māori and also more developed Māori orders.[415]

Claimant counsel Janet Mason underlined Brookfield's distinction between the legality and legitimacy of a regime:

> Revolutionary legality, Brookfield states, relates to the test of success and effectiveness of a government. Legitimacy, on the other hand, requires considerations of morality and justice, and these considerations may still deny full legitimacy to a regime that may be judicially recognised as 'legal' because it passes that limited but sufficient test.[416]

411. Brookfield, *Waitangi and Indigenous Rights*, p 15.
412. Brookfield, *Waitangi and Indigenous Rights*, pp 108–109.
413. Stanley to Shortland, 21 June 1843, BPP, vol 2, p 475.
414. Brookfield, *Waitangi and Indigenous Rights*, p 109.
415. Brookfield, *Waitangi and Indigenous Rights*, p 109.
416. Claimant closing submissions (#3.3.228), p 62.

But ultimately, in Brookfield's view, a revolutionary regime, whether established legally or not, could become legitimate by enduring and becoming the dominant constitutional arrangement.[417]

Dr Palmer appeared to agree with Brookfield that sovereignty had been acquired by the Crown as time passed, due to this shift in power dynamics.[418] Realities on the ground, in particular the significant growth in the settler population over the next 30 years, coupled with the British government's policies shifting 'away from the humanitarian ideals of the 1830s towards the interests of colonisation in the second half of the 1840s', resulted in a fundamental change to 'the reality of the New Zealand constitution' such that the treaty 'provided no safeguard for Māori'.[419]

Claimant counsel Jason Pou argued against the approaches of Professor Brookfield and Dr Palmer. He submitted that Brookfield's conclusion – that the Crown's sovereignty had become legitimate because time had passed and that Māori had effectively acquiesced to the Crown's assumption of sovereignty – was 'merely another attempt to manipulate facts to impute consent where none exists'; or indeed, that the Crown's assumption of sovereignty had to be based 'upon a consent that is deemed largely irrelevant within the acquisition [of sovereignty] itself'.[420] Instead, Mr Pou argued, the Crown 'wrested sovereignty' by deliberately concealing its true intentions and simply imposing its authority 'in a way that was inconsistent with [te Tiriti]'.[421] In our view, that particular point is consistent with Brookfield's own interpretation of a British 'seizure of power' in 1840 by one people over the territory of another.

Likewise, legal expert Moana Jackson has argued that the 'rationalisations' of the British Crown in relation to he Whakaputanga and te Tiriti, as well as the moves to annex the territory of hapū and iwi, derived from a 'jurisprudence of oppression', 'privileging the rights and authority of those who belong to what one jurist called the "charmed circle" of European States'. The term 'annexation', he said, 'was just the 19th century euphemism for their assumed right [of the British Crown] to dispossess'.[422] In his evidence presented to us, Mr Jackson was critical of the approach of jurists who see the legal history of imperialism as a 'reasoned debate about points of jurisprudence'; rather, it was a 'race-based discourse [which] positioned Indigenous Peoples as objects who could and should be dispossessed'. He cited Chief of the James Bay Cree nation, Dr Ted Moses, who has argued that 'the question that most trouble[d] colonisers [was] "How can a thief go about establishing legal and legitimate possession of his stolen spoils?"' 'This', Jackson suggested, 'is the difficulty – no matter what the constitutional laws, jurisprudence or other legal trappings a State might assume, this fact stares us in the face.'[423]

417. Brookfield, *Waitangi and Indigenous Rights*, pp 109, 136.
418. Palmer, *The Treaty of Waitangi*, pp 80–81.
419. Palmer, *The Treaty of Waitangi*, p 81.
420. Closing submissions for Wai549, Wai 1526, Wai 1728, and Wai 1513 (#3.3.297(a)), pp 20–21.
421. Closing submissions for Wai549, Wai 1526, Wai 1728, and Wai 1513 (#3.3.297(a)), p 21.
422. Moana Jackson, transcript 4.1.4, Whitiora Marae, pp 160–161.
423. Jackson, transcript 4.1.4, Whitiora Marae, p 160.

Jackson argued further that the British Crown justified its 'annexation', or dispossesion, in various ways. Among these justifications, he singled out the doctrine of discovery, and the notion that the imperium it erected in New Zealand had to be exercised 'beneficently': 'the presumption that there was an "absence of any other legal system that might appropriately apply to British subjects"',[424] as well as 'associated perceptions about the limitations of indigenous legal and political capacity'. As we have seen in chapter 2, Jackson based his criticism of colonising assumptions and actions in a discussion of tikanga and its guidelines which 'formed part of a values-laden jurisprudence upon which decisions were made to settle disputes, regulate trade, ensure peace after war and reconcile all of the competing interests in human existence'.[425] Likewise, he discussed mana as a 'concept of power', a 'culturally and tikanga-specific understanding of political authority'. Mana denotes an 'absolute authority . . . because it was absolutely the prerogative of Iwi and Hapu'; each polity exercised its own mana.[426]

Jackson considered the Crown's emphasis on securing Māori consent to the treaty, and that it 'was "a valid instrument of cession" and that "the basis of Crown sovereignty lay in Maori consent"'.[427] It was his view that, in constitutional terms, the notion of consent was crucial to the Crown; it reinforced its belief in its own 'beneficence' and gave legitimacy to the imperium it would then erect in New Zealand 'by assuming it could govern with the consent of Iwi and Hapu'.[428] Yet the assumption that iwi and hapū would give away their 'site and concept of power' was, in his view 'another race-based assumption [which] flew in the face of all political realities':[429] as he pointed out, when has any polity in peace time voluntarily ceded its authority to another?[430] Jackson also cautioned against acceptance of the 'doctrine of a benevolent protection':

> The very doctrine . . . contains some internal inconsistencies, hypocrisies even. The first is the notion that the bad faith and dishonourable process of one people colonising another could ever be one of good faith and honour. Dispossession is dispossession whether it is carried out at the point of a gun or with a benevolent promise. There can be no such thing as a humane or benevolent colonisation. The second is that it is premised on all of the racist dualities about the inferiority of Indigenous Peoples and the consequent assumption that they lacked the capacity to look after and protect themselves.[431]

We might add that one does not have to look far in the writings of British authorities at that time for evidence of such assumptions.

424. McHugh, brief of evidence (doc A21), p 91 (cited in Jackson, brief of evidence (doc D2), p 21).
425. Moana Jackson, brief of evidence (doc D2), p 7.
426. Jackson, brief of evidence (doc D2), pp 11–13.
427. McHugh (doc A21), p 73 (cited in Jackson, brief of evidence (doc D2), pp 21–22).
428. Jackson, brief of evidence (doc D2), p 28.
429. Jackson, brief of evidence (doc D2), pp 28–29.
430. Jackson, brief of evidence (doc D2), p 29.
431. Jackson, transcript 4.1.4, Whitiora Marae, p 164.

Jackson's basic concern was the presentation of 'erecting the imperium . . . as a reasoned and considered attempt to abide by "the law" in order to "exercise a lawful authority in those islands" through "the voluntary cession of it by the Chiefs in whom it is at present vested"'.[432] Colonisation, he argued in effect, must not be lost sight of, for it 'required the diminishment of a law and authority already in place'. Its 'violence and inherent injustice' must not be minimised.[433] In sum, Jackson noted the somewhat arbitrary basis for the Crown's claims of legal sovereignty, as officials 'debate[d] about what rights the discovered peoples might have in the new jurisdiction they were apparently under' and agonised over the 'rituals' required to make the claims of their own country legitimate:

> What was never discussed in all the legal debate was the legitimacy of the right itself – it was simply accepted as a legal fact. What was also never acknowledged was the application of any indigenous jurisdiction that might be in place or whether in fact it would recognise that the mere waving of a flag on one of its beaches was a surrender of its authority to complete strangers.
>
> Instead the doctrine became a given assuming that indigenous lands could be taken, even when it was clear that others were already there and even though it would have been illegitimate (and probably a cause for war) if for example Hobson had raised a flag on the beach at Calais and declared British sovereignty over France. In its 19th century manifestation it was an essentially racist assertion of the will to dispossess, and its proclamation by Hobson gave the British Crown the reassurance that its authority would apply simply because it said it would.[434]

In short, if imperial expansion and colonisation are not accepted as part of the natural order of things, it is possible to take a quite different view of the kinds of debates the British authorities had among themselves, and with other imperial powers.

Counsel for Ngāti Hine, Michael Doogan, also stressed the importance of not losing sight of Ngāpuhi views of the betrayal of the treaty: 'It was a Treaty of Waitangi, not a "proclamation" of Waitangi.'[435] Yet Hobson's proclamations of sovereignty were contrary to that treaty because the Crown had not obtained Māori consent for the power it intended to exercise. The result was that the 'British asserted its sovereignty over New Zealand, and usurped Māori mana or rangatiratanga, by a species of political fraud.'[436]

Much hangs on whether the proclamations of sovereignty were issued in good faith. We have asked whether, in light of Hobson's understanding of what Te Raki rangatira had consented to when they signed te Tiriti, it was reasonable for him to

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432. Jackson, brief of evidence (doc D2), p 31.
433. Jackson, brief of evidence (doc D2), p 31.
434. Jackson, brief of evidence (doc D2), p 23.
435. Claimant submissions in reply for Wai 49 and Wai 682 (#3.3.40, p 2),
436. Michael Doogan, transcript 4.1.5, Otiria Marae, p 272. Mr Doogan (now Judge Doogan) was counsel for Ngati Hine in stage 1 of our inquiry: claimant submissions in reply for Wai 49 and Wai 682 (#3.3.40), p 14.

proclaim British sovereignty over New Zealand and proceed to establish Crown Colony government over the whole of New Zealand. We have some difficulty with Dr McHugh's argument that Hobson had done what was required of him to gain Māori consent, and had thus 'discharged his office'.[437] Certainly, that was how Hobson presented the matter to the Colonial Office. In his initial report to Gipps he stressed the number of signatures he had secured at the Bay of Islands and in Hokianga (52 in the Bay Islands and 'upwards of 56' in Hokianga, including it seems at least some of those signatories who had tried, and failed, to withdraw their names the following day).[438] It was not clear in his account that there were largeparts of the country from which he had not received reports at all. Hobson did not send a subsequent despatch until 15 October 1840, which was more of a covering letter, and made little comment on the detailed reports he enclosed from his treaty-bearers.[439] However, in the meantime Hobson's May proclamations had been approved by the Crown and were notified in the London Gazette on 2 October 1840, almost two weeks before Hobson's despatch was written, and months before it would arrive in London.[440] It seems that Hobson's May 1840 despatch, which claimed the 'universal adherence of the native chiefs to the Treaty of Waitangi', was sufficient for the British government to conclude that Hobson had passed its self-imposed test.[441] But that cannot be the end of the matter when the representative of the Crown, newly arrived in New Zealand to negotiate a treaty at Waitangi, was silent on many of the key issues that he should have put to the rangatira.

In particular, we have concluded, he should have been clear about the kind of government the Crown intended to establish, the kinds of powers it expected to exercise, the nature of the legal system it would introduce, and how it would conduct its relations with Te Raki rangatira on a day-to-day basis. Given the importance Hobson attached to securing the signatures of rangatira who had put their names to He Whakaputanga, he should have indicated to Ngāpuhi how the Crown saw the treaty agreement in relation to the Declaration of Independence. And he should have spoken of the government's plans to send large numbers of British colonists to New Zealand, to settle in different parts of the country, and to buy land and build towns.

Ngāpuhi, after all, had hosted hundreds of settlers who had settled on their lands and often had close relations with their communities; they had developed

437. McHugh, transcript 4.1.4, Whitiora Marae, pp 544–545.

438. Hobson to Gipps, 17 February, BPP, vol 3, p 133; Hobson to Bunbury, 25 April 1840, BPP, vol 3, p 139.

439. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 389; Orange, *The Treaty of Waitangi*, p 85. Hobson to the Secretary of State, 15 October 1840, BPP, vol 3, pp 220–234.

440. McHugh (doc A21), p 71.

441. Hobson to Russell, 25 May 1840, BPP, vol 3, p 138. Russell replied to Hobson's May despatch on 10 November 1840, notifying Hobson that he had inserted the proclamations in the London *Gazette*, and that he howould soon transmit Letters Patent under the Great Seal, constituting New Zealand a separate government, as well as his own commission as first Governor: Russell to Hobson, 10 November 1840, BPP, vol 3, p 141.

their economy and engaged in trade extending to Australia. It should have been possible for Hobson to discuss with them the future of their relationship with the British.

It seems however that Hobson did not get beyond his key messages of goodwill, the Queen's protection, and guarantees of Ngāpuhi authority and independence.[442] The processes by which the Crown would assert sovereignty, and the immediate consequences of that act, the establishment of its own institutions of government, were not explained to the rangatira. Hobson knew that he had not done so. Above all, despite all the British emphasis on the importance of securing a 'cession of sovereignty' from Māori, and despite the emphasis on a cession in the May proclamations, that had not been explained at Waitangi either. As a result, Māori assumptions and understandings of how their authority would be exercised once the treaty agreement had been signed were very different from those of the British Crown. Though they had reservations about the treaty, they accepted it on the basis on the relationship they had developed, as they understood it, with the British monarch, and with their settlers and their missionaries. They certainly thought they understood the relationship they would have with the Kawana; that he and they would be equal. But because Hobson failed to make the actual terms of the treaty in the English text clear, they did not in fact understand British plans. The 'deliberate act and cession of the chiefs' which Lord John Russell spoke of after the event as the foundation of the Crown's authority in the colony had not occurred in Te Raki, and that must be taken into account in any consideration of the Crown's actions after 6 February.[443] On the basis of all the evidence we had heard, we concluded in our Stage 1 report that the Crown did not acquire sovereignty through an informed cession.[444]

Two and a half years later, the Colonial Office found that it had been somewhat ill-informed about Māori adherence to the treaty, as it faced embarrassing questions from the new New Zealand Attorney-General as to the extent of its sovereignty. Swainson's view was that British sovereignty had been acquired over only a portion of New Zealand, and that only those who had acknowledged the Queen's authority could be considered British subjects. It is clear from Colonial Office minutes that this was not only irritating but a cause of some compunction. Stephen expostulated to his colleagues at the effrontery of a 'junior' official, but he made a remarkable statement to G W Hope as he passed judgement on Attorney-General Swainson's arguments:

> Admit, if it must be so – that this [the Queen's formal and solemn act in publicly asserting her sovereignty over the whole of New Zealand] was ill-advised – unjust – a breach of faith – and so on, yet who can gainsay that such are the claims of the Queen and of the Nation for whom HM acts.[445]

442. Waitangi Tribunal *He Whakaputanga me te Tiriti*, Wai 1040, vol 2, p 528.
443. Russell to Hobson, 9 December 1840, BPP, vol 3, p 149.
444. Waitangi Tribunal *He Whakaputanga me te Tiriti*, Wai 1040, vol 2, p 529.
445. Stephen to Hope, 19 May 1843 (cited in McHugh (doc A21), pp 75–77 n 204).

That was a statement from London that seemed to admit to some doubt as to the wisdom of the course the Government had pursued. But it was a statement made privately, inside the walls of the Colonial Office. Publicly the Government refused to consider, once the deed was done, whether there was any alternative to insisting that the acts of state by which the Crown had asserted its sovereignty were incontrovertible.

The treaty was thus considered a source of British title to New Zealand by the British government, but not – as it gazetted the proclamations, instructed the new Governor– as an agreement with the signatory chiefs that gave rise to continuing commitments on the part of each party. There had been no opportunity, it seems, to consider the terms or the significance of the treaty.

It is perhaps not surprising, therefore, that the Crown failed to make adequate provision for Te Raki Māori to exercise tino rangatiratanga, despite the guarantees given in the treaty. The initial imperial instructions saw no place for Māori in the Crown Colony system of governance; no more than a secondary, temporary role for Māori law; and a reduction of Māori land and resource rights to mere 'occupation and enjoyment' within limits to be defined by British officials. They were based on assumptions of the superiority of British institutions and the importance of the needs of the settlers, and later we will consider the influence of these assumptions on the policies of the colonial Government. It seems to us however, that the reach of the proclamations was immense. Professor Ward, contemplating the impending impact of British imperialism in his seminal work *A Show of Justice*, was critical of the policy of 'hasty and wholesale assimilation' adopted by the authorities at the time Hobson's instructions were drafted. In the rush, he wrote, Māori were left 'exposed to the impositions of state power without any share in the exercise of state power'. And the measures 'intended to avert the danger of collision between them and the settlers went far towards inviting collision between them and the state'.[446] We agree with this assessment.

Accordingly. we find that the Crown acted inconsistently with the guarantees in article 2 of te Tiriti and in breach of te mātāpono o te tino rangatiratanga and te mātāpono o te houruatanga (the principle of partnership) by:

- Proclaiming sovereignty over the northern island of New Zealand and over all New Zealand in May 1840 by virtue of cession by the chiefs, and publishing and thereby confirming the proclamations in October 1840, despite the fact that this was not what Te Raki rangatira had agreed to or expected; nor did the proclamations reflect the treaty agreement reached between Te Raki rangatira and the Crown's representative about their respective spheres of authority.
- Subsequently appointing Hobson as Governor and instructing him to establish Crown Colony government in New Zealand, on the basis of the incomplete and therefore misleading information he supplied about the extent of Māori consent, without having considered the terms and significance of the

446. Ward, *A Show of Justice*, pp 39–40.

treaty, in particular the text in te reo, and its obligations to Te Raki Māori from the outset.

- Undermining Te Raki Māori tino rangatiratanga and authority over their land by asserting radical (paramount) title over all the land of New Zealand, without explaining, discussing, or securing the consent of Te Raki Māori to this aspect of British colonial law, despite the control it gave the Crown over Māori land, and more especially the ultimate disposal of lands transacted pre-treaty with settlers.
- Further undermining Te Raki Māori authority over their land by asserting its sole right of pre-emption, which was not clearly expressed in either the te reo text of te Tiriti nor in the oral debate; the Crown was anxious to secure this right so it could fund and control British colonisation, and its failure to convey its intentions on a matter of great importance to hapū used to conducting their own transactions with settlers was not in good faith.
- Failing to acknowledge the significance of the treaty and of Te Raki Māori agreement to it in any of the Crown's acts of state asserting sovereignty over New Zealand.

These actions, in the absence of informed Te Raki Māori consent to the Crown's plans for the governance of New Zealand, were also inconsistent with the Crown's duty of good faith conduct, and thus breached te mātāpono o te houruatanga me te mātāpono o te whakaaronui tetahi ki tetahi/the principles of partnership and of mutual recognition and respect.

4.4 To What Extent Did the Crown Assert its Effective Authority over Te Raki in the Years 1840–44?

4.4.1 Introduction

In this section, we consider how Te Raki Māori experienced the Crown's authority in operation in this district in the years immediately following the signing of the treaty. As we have seen, the Crown's policies were focused at the outset on bringing New Zealand under British sovereignty, erecting a functional Government, and establishing processes for land settlement and revenue gathering, while also protecting Māori in possession of their lands and resources in accordance with developing Crown views of the extent of those rights. In all of these policies, the Crown showed little regard for Māori views about land ownership or for Māori understandings of te Tiriti.

Claimants told us that, having proclaimed sovereignty without the consent of Te Raki Māori, the Crown then made a series of attempts to assert its effective authority over them. Those steps included: establishing courts and Government that purported to have jurisdiction over Māori; enacting laws and ordinances that applied to Māori; arresting and imprisoning rangatira (Kihi in 1840 and Maketū in 1842); warning rangatira against conducting taua muru; asserting Crown authority over the timber trade, for example, by prohibiting the cutting of kauri; imposing customs duties and prohibiting Te Raki Māori from charging anchorage fees; moving the capital from the Bay of Islands to Auckland; and asserting Crown

authority over land, through its policies on 'waste' or unoccupied Māori lands, pre-emption, old land claims, and 'surplus' lands from those claims.

In addition, claimants said, the Crown failed to address settler transgressions against tikanga Māori (for example, breaches of rāhui) and sometimes intervened when Māori attempted to enforce their laws.[447] Claimants acknowledged that, during these early years, the Crown did not succeed in establishing de facto (effective) authority over the whole district, but did take steps to assert that authority in ways that breached the treaty.[448] The Crown's actions created conflict with Te Raki Māori, creating the conditions in which the Northern War would break out in 1845.[449]

Crown counsel submitted that, although English law applied in New Zealand from 14 January 1840 (and New South Wales law from 16 June 1840 at the latest), the Crown, 'with few exceptions', did not impose English law on Te Raki Māori during the 1840s and 1850s.[450] Counsel noted that Britain did not expect to 'instantaneously' apply its laws to Māori,[451] but rather provided for Māori customs (with some exceptions) to be defended or tolerated.[452] Counsel cited evidence from historian Dr Grant Phillipson that the Crown's authority 'rested very lightly' on Ngāpuhi during those early years, with Māori law applying to Māori and non-Māori alike. This was particularly true after the capital was moved to Auckland in 1841.[453] In general, the Crown 'respected the role that Māori law and custom played'.[454]

Crown counsel submitted that, on the rare occasions when Te Raki Māori were tried in the colony's courts – notably the cases of Kihi and Maketū – this occurred

447. Claimant closing submissions (#3.3.219), pp 21–22, 24; claimant closing submissions (#3.3.220), pp 10–11; closing submissions for Wai 1477 (#3.3.338), pp 31–34; closing submissions for Wai 1477 and others (#3.3.338(a)), pp 30–32; closing submissions for Wai 1354 (#3.3.292(a)), p 17; closing submissions for Wai 2377 (#3.3.333(a)), pp 27, 32–34; submissions in reply for Wai 2382 (#3.3.553), pp 26–28); closing submissions for Wai 2022 (#3.3.331), p 52; closing submissions for Wai 1514 (#3.3.357), pp 53–54.

448. Submissions in reply for Wai 2382 (#3.3.553), pp 26–28; closing submissions for Wai 1477 (#3.3.338(a)), pp 21, 24–25, 27; claimant closing submissions (#3.3.221), pp 86–87; claimant closing submissions (#3.3.228), pp 26–27; submissions in reply (#3.3.501), pp 39–40; closing submissions for Hokianga (#3.3.297(a)), pp 31–33.

449. Claimant closing submissions (#3.3.219), pp 21–23; claimant closing submissions (#3.3.220), pp 10–11; closing submissions for Wai 1477 and others (#3.3.338(a)), pp 27, 30–32; closing submissions for Wai 1477 and others (#3.3.338), pp 33–34; closing submissions for Wai 1354 (#3.3.292(a)), p 17; closing submissions for Wai 2377 (#3.3.333(a)), pp 27, 32–34.

450. An ordinance of New South Wales declared that the laws and ordinances of New South Wales applied to New Zealand as from 16 June 1840. The Crown further stated that the English Laws Application Act 1858 declared that the laws of England as existing on 14 January 1840 were deemed to have been in force from that day on: Crown closing submissions (#3.3.402), pp 4, 6.

451. Crown closing submissions (#3.3.402), p 46.

452. Crown closing submissions (#3.3.402), p 45.

453. Grant Phillipson, 'Bay of Islands Maori and the Crown, 1793–1853' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2005) (doc A1), p 321 (cited in Crown closing submissions (#3.3.402), pp 48–49).

454. Crown closing submissions (#3.3.402), p 59.

respectfully and with the consent of Te Raki rangatira.[455] With reference to economic impacts, the Crown submitted that it did not prohibit the cutting of kauri in 1841, but only the theft of kauri.[456] Nor did it prohibit the charging of anchorage fees, though it did impose its own customs duties.[457] Counsel submitted that moving the capital to Auckland was not a breach of the Crown–Ngāpuhi relationship, nor of any promise made at Waitangi.[458] The Crown did begin to apply English law to Te Raki Māori 'in a gradual way' from 1844.[459] The Native Exemption Ordinance 1844 provided for English law to be applied through the cooperation of rangatira; the law 'was not imposed as such on Māori communities'.[460] Nonetheless, Crown counsel acknowledged that by mid-1844, 'a number of issues' were causing Te Raki rangatira concern, including the customs duties, the removal of the capital, the general economic conditions, and concerns over land. The Crown acknowledged that these issues had affected the district's economy.[461]

In this section, we will consider the on-the-ground relationship between Te Raki Māori and the Crown, with particular reference to the Crown's attempts to apply criminal law to Māori and to control land, resources, and trading relationships. To a significant degree, the evidence is focused on the Bay of Islands and Hokianga, where settlers had arrived in the greatest numbers and the impacts of the Crown's actions were most felt. In other parts of this district, there were relatively few settlers in the early 1840s and, in general, the Crown made very few attempts to impose its authority. Nonetheless, some Crown actions had significant impacts – for example, on kauri trade in Whangaroa, as we will see.

4.4.2 The Tribunal's analysis

4.4.2.1 *Did the Crown attempt to enforce its laws against Te Raki Māori in the years immediately after te Tiriti was signed, and if so, how did they respond?*

When Te Raki rangatira signed te Tiriti, officials promised that they would remain 'perfectly independent' and retain their full rights as rangatira.[462] One of the fundamental roles of rangatira was management of disputes, both within the hapū and in relation to other groups.[463] Nothing in the treaty debates suggested that would change with respect to disputes among Māori. Indeed, as we found in our stage 1 report, the treaty debates barely touched on questions of law enforcement among Māori. Clearly however, the Governor was to exercise authority over settlers, and this inevitably involved the enforcement of laws that would keep the peace and protect Māori. Where Māori and settler communities came into con-

455. Crown closing submissions (#3.3.402), pp 49, 52–53, 55.
456. Crown closing submissions (#3.3.402), pp 55–57.
457. Crown closing submissions (#3.3.403), pp 56–57.
458. Crown closing submissions (#3.3.402), pp 57–58.
459. Crown closing submissions (#3.3.402), p 59.
460. Crown closing submissions (#3.3.402), pp 60–61.
461. Crown closing submissions (#3.3.402), pp 65–66; Crown closing submissions (#3.3.403), pp 53, 56.
462. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 356, 467, 526–528.
463. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 30.

flict, negotiation would be required. We also explained in our stage 1 report that rangatira likely saw Hobson as an enhanced British Resident: that is, someone they could turn to in the event of disputes, but who would otherwise leave them to manage their own relationships with settlers.[464]

Nonetheless, as discussed in section 4.3, officials presumed that the Crown had acquired sovereignty and that Māori were therefore (at least in theory) subject to English criminal law. The Crown's policy on enforcement of that law was inconsistent during these early years. Official instructions provided that Māori could (with some exceptions) continue to live according to their own customs but provided little guidance on what that would mean in practice, or on how Māori–settler disputes should be resolved. The colonial Government made few attempts to incorporate Māori values into the law or protect Māori legal principles such as tapu. When it did develop policies or local laws, it did so without reference to Māori. Yet, despite regarding itself as sovereign, the Crown in practice lacked sufficient policing or military power to enforce its laws against Māori communities, except on rare occasions when rangatira chose to cooperate. For the most part, Māori in Te Raki therefore remained self-governing despite the adherence of officials to the legal theory of Crown sovereignty.

4.4.2.1.1 Appointment of magistrates and protectors

Even before the Crown had entered negotiations over te Tiriti, it was making preparations to establish a fledgling legal system in New Zealand. During Hobson's stopover in Sydney in January 1840, he was furnished with (in the words of historian Dame Claudia Orange) 'an ill-chosen assortment of local men who were to form the nucleus of a New Zealand civil service'. Alongside a Treasurer, a Surveyor, and a Colonial Secretary, the former Royal Navy commander Willoughby Shortland was appointed as police magistrate. A sergeant 'and three troopers of the New South Wales mounted police' were also added.[465] They were followed in September 1840 by three land commissioners, Mathew Richmond, Edward Godfrey and Francis Fisher, appointed to inquire into pre-treaty land claims.[466]

After arriving in New Zealand, Shortland established an office in Kororāreka, though by mid-February his jurisdiction was extended to cover the entire 'Northern district'.[467] Hobson initially used the troopers as an escort and to conduct mounted patrols, first in the Bay of Islands, and then beyond, moving from settlement to settlement in the north.[468] Their importance decreased, however, once troops from the 80th Regiment landed in April 1840 – comprising, according to their commanding officer, Major Thomas Bunbury, 'one field-officer, one

464. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 524–525, 526.

465. Orange, *The Treaty of Waitangi*, p 33.

466. See Rosemarie V Tonk, 'The First New Zealand Land Commissions' (masters thesis, University of Canterbury, 1986), fols 29, 31, 37, 52; Stirling and Towers, 'Not With the Sword But With the Pen' (doc A9), p 252; Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 127.

467. Richard S Hill, *Policing the Colonial Frontier: The Theory and Practice of Coercive Social and Racial Control in New Zealand, 1767–1867* (Wellington: Government Printer, 1986), p 131.

468. Hill, *Policing the Colonial Frontier*, vol 1, part 1, pp 121–130.

captain, two subalterns, four sergeants, two drummers, and eighty rank and file.'[469] This was sufficient to swell the Bay of Islands Pākehā population and create pressure on Hobson to find somewhere to house them. By the middle of the year, Hobson had secured the appointment of several more police magistrates, including William Symonds and Thomas Beckham. In September 1840, Shortland was transferred to Auckland and replaced by Arthur McDonogh.[470]

The police magistrates had authority over the discipline and organisation of their forces, and their arming. Beckham, who was initially based at Hokianga before moving to the Bay of Islands, was considered competent; he engaged constables and, by October 1840, had asserted Crown authority over the clusters of Pākehā settlement along the Hokianga River. His force consisted of a chief constable, two constables, and two boatmen; they were armed with muskets, cutlasses, and pistols. At the time, there were some 200 Europeans in the area and an estimated 5,000 Māori. Beckham established good relations with the local rangatira before being transferred by Hobson to the key position at Kororāreka (then a town of approximately 1,000 people) and Ōkiato (now known as Old Russell).[471] McDonogh, a less competent character, succeeded him at Hokianga. Hobson had also to find police magistrates for Auckland, the New Zealand Company settlements further south, and Akaroa.[472]

Normanby's instructions to Hobson had emphasised the importance of controlling settler communities, and thereby keeping peace between settlers and Māori, who were – for the time being, and with some exceptions (discussed later) – to be left alone to live according to their own customs.[473] Whereas British officials regarded this as a significant, albeit temporary, concession to Māori custom, we note that Māori had not consented to any interference beyond what was necessary to control settlers and so prevent breaches of the peace.[474]

Hobson's initial instructions to Shortland emphasised the importance of addressing Māori–settler tensions. The Governor specified that police were to act as 'mediators' between the two peoples, and to exercise discretion in applying English and New South Wales laws and standards to Māori. They were to settle disputes among Māori 'according to their own Usages and Customs'; and the mounted police were instructed not to arrest Māori themselves but to work through chiefs.[475] The implicit assumption was that the laws of England and New South Wales applied to Māori, even if they could not be enforced, and this indeed

469. Thomas Bunbury, *Reminiscences of a Veteran: Being Personal and Military Adventures in Portugal, Spain, France, Malta, New South Wales, Norfolk Island, New Zealand, Andaman Islands, and India*, 3 vols (London: Charles J Skeet, 1861), vol 3, p 53.

470. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 324; see also Grant Phillipson, answers to questions for clarification (doc A1(e)), p 2; Hill, *Policing the Colonial Frontier*, vol 1, part 1, pp 130, 134, 148.

471. Hill, *Policing the Colonial Frontier*, vol 1, part 1, pp 148–149.

472. Hill, *Policing the Colonial Frontier*, vol 1, part 1, pp 142, 155.

473. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 316.

474. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 526.

475. Hill, *Policing the Colonial Frontier*, vol 1, part 1, p 152.

was the case under English law once sovereignty was proclaimed in May 1840, despite the fact it did not match Māori understanding of treaty guarantees.[476] Nonetheless, in April 1840 Hobson wrote an open letter to Māori chiefs assuring them that he would 'ever strive to assure unto you the customs and all the possessions belonging to Maoris'.[477] The Crown's own stance in this respect was somewhat ambiguous.

Hobson had been instructed to appoint an official who would 'watch over the interests of the aborigines as their protector', with a particular focus on ensuring that Māori retained sufficient lands for their current and future needs.[478] Accordingly, in May 1840 Hobson appointed George Clarke senior as Chief Protector of Aborigines. Clarke, a lay missionary, was instructed to assure Māori 'that their native customs and habits would not be infringed, except in cases that are opposed to the principles of humanity and morals'.[479] As Professor Ward observed in *A Show of Justice*, 'it was precisely this power to permit or to forbid that the chiefs had not conceded to the British'.[480] Lord Russell's December 1840 instructions provided additional guidance about the role of the protector, as discussed in section 4.3.[481] During 1841 and 1842, several sub-protectors were appointed to assist Clarke, including Henry Tacy Kemp, appointed in February 1842 with responsibility for the northern district.[482]

4.4.2.1.2 The arrest of Kihi

In practice, the Crown made some initial attempts to assert police powers over Māori, but Māori appear to have complied only on rare occasions and for reasons that were consistent with tikanga. The first significant test for the new constabulary occurred in April 1840. A visiting Tauranga Māori named Kihi was alleged to have killed a shepherd (Patrick Rooney) working on one of the mission farms at Puketona (Waimate). Williams's sons apprehended Kihi and delivered him to Kororāreka, where he was brought to trial before the Bench of Magistrates and indicted.[483] As the trial began, a party of some 300 armed Māori under Te Haratua (Ngāti Kawa) descended on the town. They marched to the Anglican church where the trial was taking place (it being the only building big enough), performed a

476. Ward, *A Show of Justice*, p 46; McHugh, brief of evidence (doc A21), pp 77, 96–97.
477. Hobson to New Zealand chiefs, 27 April 1840 (cited in Ward, *A Show of Justice*, p 45).
478. Normanby to Hobson, 14 August 1839 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 270).
479. Clarke to colonial secretary, 31 July 1843, BPP, vol 2, p 349; Ward, *A Show of Justice*, p 45.
480. Ward, *A Show of Justice*, p 45. In this inquiry, Professor Ward gave evidence that some rangatira, at least, had expected the Governor to keep peace between Māori, though it was not clear how this might occur. Professor Ward also noted that, prior to the treaty signings, Britain's main focus was on control of Pākehā, and it was only later that imperial or colonial officials gave serious consideration to questions about whether or how the Crown's laws related to tikanga Māori: Alan Ward, brief of evidence, 17 December 2009 (doc A19), pp 80–84, 106–107.
481. Russell to Hobson, 9 December 1840, BPP, vol 3, p 150.
482. Carol Yeo, 'Ideals, Policy and Practice: The New Zealand Protectorate of Aborigines 1840–1846' (masters thesis, Massey University, 2001), p 28; see also pp 24, 29–30.
483. Ward described this as the 'preliminary hearing of charges': Ward, *Show of Justice*, p 47.

haka, and (in Henry Williams's account) 'demanded that the prisoner should be handed over to them, that they might despatch him at once, Haratua expressing his indignation that the shepherd employed by his own pakehas should have been so brutally murdered'.[484] Other accounts said that Te Haratua refused to allow the principal witness, a woman from his hapū, to give evidence unless her relative could also appear in court bearing arms, presumably to protect her.[485]

A standoff ensued, during which Shortland and some of the Kororāreka settlers armed themselves, refusing to give up Kihi or allow Te Haratua's party into the court. According to a visiting doctor, '[w]e were all of one opinion, that it was a critical moment, and that it was our duty to maintain the integrity of the first British Court of justice held in New Zealand and not to condescend to parley with armed Men endeavouring to intimidate us'.[486] Shortland called for backup from the 80th Regiment, which had just arrived in the Bay of Islands from Sydney, and the regiment quickly armed themselves and landed. In military officers' accounts, the appearance of 80 soldiers in various states of dress so cowed the much larger Māori party that they immediately agreed to leave the town, allowing Kihi's trial to proceed.[487] The outcome was cause for much self-congratulation among members of the newly arrived military, and among settlers. The *New Zealand Spectator* saw the episode as proof that, within 'a very few minutes' the military had 'proved . . . that English law ruled the land'.[488] Bunbury went so far as to assert that Māori were so impressed by the soldiers' appearance that their mere presence was sufficient 'for the four years that I remained in the country to keep [Māori] in subjection'.[489]

Henry Williams gave a very different account, in which his son Edward had negotiated with Te Haratua outside the church, and Te Haratua agreed to leave and allow the trial to go ahead so long as Kihi was shot. After hearing that soldiers were on the way, Te Haratua decided to wait around and see what would happen. Shortland, in a panic, then threatened to fire on the Māori, and Edward Williams had to intervene again, explaining to Te Haratua that Shortland's ignorance of Māori customs had led him to misunderstand proceedings. To ensure that no shots were fired, Edward Williams remained with Te Haratua's party until they left. Henry Williams concluded: 'Had a trigger been pulled on this occasion,

484. Carleton, *The Life of Henry Williams*, vol 1, p 21.

485. There are several accounts of this incident, with some critical differences between them: Bunbury, *Reminiscences of a Veteran*, pp 54–55; Best, *The Journal of Ensign Best*, pp 217–218; Carleton, *The Life of Henry Williams*, vol 2, pp 21–22; Dr John Johnson, Journal: 17 March to 28 April (cited in Best, *The Journal of Ensign Best*, Appendix 3, pp 407–408). Bunbury said the trial was for theft of a blanket, whereas the other accounts make clear it was for murder. In other details, including timing of troops arriving in the Bay of Islands and landing in Kororāreka, the troops' movements, Te Haratua's refusal to give up the witness, amongst many more, the accounts all agree. Based on Bunbury's account Alan Ward described them as two separate incidents: Ward, *A Show of Justice*, p 47.

486. Johnson, journal (cited in Best, *The Journal of Ensign Best*, appendix 3, pp 407–408).

487. Bunbury, *Reminiscences of a Veteran*, pp 54–55; Best, *The Journal of Ensign Best*, pp 217–218.

488. 'Colonial News', *New Zealand Gazette and Wellington Spectator*, 13 June 1840, p 2.

489. Bunbury, *Reminiscences of a Veteran*, pp 54–55.

this would have been the beginning and the end of the Colony of New Zealand.'[490] Henry Williams's stark comment reflects his understanding of where the power lay in the Bay of Islands, notwithstanding the arrival of the Crown and its small detachment of troops.

The historian Ralph Johnson, in his evidence about the Northern War, suggested that Te Haratua allowed the trial to go ahead because the victim had been Pākehā. Had the perpetrator and victim been Māori, 'then the take [matter] would certainly have been dealt with according to tikanga.'[491] We agree, and we also note that Te Haratua's actions amounted to a public assertion of mana over the fledgling Government's judicial process: he halted proceedings, then consented to their continuing so long as Kihi met a fate that he regarded as tika (just).[492] In fact, Kihi became ill and was released into the care of the CMS mission, then died before he could be tried in the Supreme Court. Hobson had been anxious about how to try Kihi; there was no local court of criminal jurisdiction according to Shaunnagh Dorsett, until the Court of Petty Sessions which did not sit until September 1841 – 17 months later. Nor had an Attorney-General been appointed, and there were no lawyers to defend the accused. The most appropriate court would have been the Supreme Court of New South Wales.[493] Hobson also feared, evidently on the basis of news from Tauranga, that Kihi's people might 'seek revenge' on the settler community there, and urged Major Bunbury, who was departing on HMS *Herald* to seek signatures on the treaty further south, to visit Tauranga first and investigate the matter urgently, so that 'so dreadful a calamity' might be averted. Ultimately however, the tensions died down.[494]

Nonetheless, the incident – and the arrival of British soldiers – appears to have caused disquiet among Te Raki leaders. During the same month (April), a delegation of Māori from Kaikohe, Taiāmai, Waimate, and Waitangi visited the Governor, expressing misgivings about te Tiriti. Their concerns were with the arrival of soldiers, and also with the Crown's prohibition on private land arrangements. According to the diary of John Johnson, the rangatira told Hobson:

> Our hearts are dark and gloomy from what Pakehas have told us, they say 'that the Missionaries first come to pave the way for the English who have sent the governor here, that Soldiers will follow and then he will take away your lands and shoot you, which is easy as the Missionaries by making you Christian have unfitted you for defending yourselves'.

490. Carleton, *The Life of Henry Williams*, pp 21–22.
491. Johnson, 'The Northern War' (doc A5), p 55; see also Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 322.
492. Williams appears to have seen Te Haratua's actions in these terms, recounting that Te Haratua's party only withdrew after having 'made a display of their zeal': Carleton, *The Life of Henry Williams*, pp 21–22.
493. Shaunnagh Dorsett, *Juridical Encounters*, pp 99–100.
494. Ward, *A Show of Justice*, p 47; Hobson to Bunbury, 25 April 1842, BPP, vol 3, p 140.

Hobson, in response, said that settlers were spreading these rumours because they were no longer able to buy Māori land. Johnson's diary continued:

> He told them that he was commanded by the Queen to prevent them from selling all their lands to White men, instead of coming to take them away the Queen would only buy such lands from them as they did not require and that they would see that what he said was true.
>
> They [the chiefs] listened with great attention and one chief rising expressed his belief in what the governor said in a grave and impressive manner and ended by saying that 'Our hearts are made light by the words of the 'Kawana'.[495]

Later the same evening, Tāmati Waka Nene visited the Governor, saying that 'wicked men' had been telling him that 'the English will plant themselves around the native . . . and then sweep us away'. Nene said he would not believe those men, and would instead trust Hobson's word and that of English gentlemen (presumably a reference to the missionaries and other Crown allies, such as the former Resident James Busby and the trader James Reddy Clendon). Nene continued, 'all mouths are open against me, accusing me of having brought the English here, but I care not, I know they are come for our own good'. Hobson again emphasised the protective intent behind the treaty.[496]

The chiefs visited Hobson again the next day, alleging that 'it was the intention of the English to exterminate them all'. Hobson, in response, said Britain had enough ships and men to kill them all and take New Zealand by force if that was its wish; instead, he had come to New Zealand 'with only one servant and a friend'. Hōne Heke then stood and said he and his people would die before a hair was touched on the Governor's head, and Nene similarly gave an assurance that he and his people would surround the Governor if anyone dared to attack.[497]

These early exchanges were important in several respects. First, they demonstrated that Māori continued to harbour significant concerns about the treaty relationship. Before signing te Tiriti, they had expressed considerable suspicion about the Crown's intentions, and had sought and received assurances that their authority and lands would be protected.[498] On those occasions, their doubts had also been encouraged by Pākehā who told them the Crown intended to exercise authority over them.[499] As he had at the treaty signings, Hobson assured the rangatira of the Crown's protective intent, and the rangatira were satisfied.[500] As Ralph Johnson noted, Te Raki leaders were expressing renewed concerns '[b]efore the Governor had even begun to act'. Hobson had not yet proclaimed sovereignty, let alone attempted to exercise sovereign power over Māori.[501]

495. John Johnson, journal, 7 April 1840 (cited in Johnson, 'The Northern War' (doc A5), pp 48–49).
496. John Johnson, journal, 7 April 1840 (cited in Johnson, 'The Northern War' (doc A5), p 50).
497. John Johnson, journal, 8 April 1840 (cited in Johnson, 'The Northern War' (doc A5), p 50).
498. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 520, 528.
499. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 377, 384–385.
500. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 520, 528.
501. Johnson, 'The Northern War' (doc A5), pp 50–51.

Clearly, the arrival of troops was a significant catalyst for Māori leaders' concerns. As discussed in our stage 1 report, since the early nineteenth century Ngāpuhi leaders had feared that Britain, or some other European power, would invade their territories and kill or enslave them, as had happened in other territories.[502] Indeed, Ngāpuhi tradition is that King George IV assured Hongi Hika in 1820 that this would not occur; that Britain would not send soldiers, lest Māori be deprived of their country.[503]

Māori concerns about the treaty appear to have had an impact – the Mangakāhia leaders Te Tirarau, Parore Te Āwhā, and Mate were invited to the Bay of Islands in April to sign te Tiriti, but did not appear.[504] Indeed, a rumour circulated that some rangatira who had not signed te Tiriti – led by Kawiti of Ngāti Hine and also including some Hokianga rangatira – were planning to force the Governor to abandon New Zealand. The Governor was also aware of these rumours, and resolved to have Kawiti and others involved 'closely watched'.[505] This threat appears to have been related to a local land dispute between Taiāmai Māori and the Williams family. When Māori began to build a pā on Lake Ōwhareiti, Williams's sons threatened to burn it down, on grounds that the land was part of the vast Pākaraka estate that the family claimed to have purchased during the 1830s. In response, the hapū concerned threatened to shoot the Williams family and reclaim possession of the entire estate and the Waimate mission station.[506] The incident illustrates the conflicting expectations of Māori and settlers over the future of pre-treaty land arrangements: Pākehā expected the Crown to enforce their understanding, and Māori expected theirs to prevail. We will consider this issue in chapter 6.

On 27 April, Hobson responded to Te Raki leaders' concerns with a circular letter in which he urged them not to listen to the words of 'Pakeha kino'. Those Pākehā were encouraging them to become hostile to 'te Rangatiratanga o te Kuini' (the Queen's authority; capitals in original), and were telling them: 'E tangohia o koutou wenua, a ka takahia rawatia o koutou rangatiratanga, me o koutou ritenga tika.' According to the historian Lindsay Buick, the English text was: 'Your lands will be wrested from you; that your original customs will be trampled down and abolished.'[507]

These statements were false, Hobson said; he had told the truth at Waitangi and Māngungu: 'ka tohe tonu te Kawana ki te wakau i nga tikanga, me nga taonga katoa o nga tangata maori; a ka tohe hoki te Kawana kia mau ai te rongo, te atawai, me nga ahuwenuatanga, i tenei wenua.' (According to Buick: 'the Governor will ever strive to assure unto you the customs and all the possessions belonging

502. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 89–90, 100, 116.
503. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 100.
504. Paul Thomas, 'The Crown and Maori in the Northern Wairoa, 1840–1865' (commissioned research report, Wellington: Crown Forestry Rental Trust, 1999) (doc E40), p 59.
505. Hobson to Gipps, 5 May 1840 (cited in Phillipa Wyatt, 'The Old Land Claims and the Concept of "Sale": A Case Study' (MA thesis, University of Auckland, 1991) (doc E15), p 203).
506. Wyatt, 'Old Land Claims' (doc E15), p 203.
507. Hobson to rangatira, 27 April 1840 (cited in Buick, *The Treaty of Waitangi*, p 191; Ward, brief of evidence (doc A19), pp 91–92).

to the Maori. The Governor will also do his utmost towards the maintenance of peace and goodwill and industry in this country').[508] We point out that the use of 'rangatiratanga', 'tikanga', and 'ritenga tika' in this letter mean that Māori were likely to have understood it as an assurance that the Governor would preserve their authority and laws, as well as their lands and other property; it was, therefore, consistent with northern Māori understanding of te Tiriti.

In Mr Johnson's view, it was striking that the term 'te Rangatiratanga o te Kuini' was used to signify the Queen's authority: 'It is little surprise then that Northern Maori saw the guarantee of "te tino Rangatiratanga" in Te Tiriti at the same time as a confirmation of their own chiefly authority and sovereignty.'[509] In our stage 1 report, we saw that it became a common pattern in the early 1840s for Crown officials to refer to themselves using the terms 'rangatira' and 'rangatiratanga', appropriating for themselves the power that Māori had in fact retained.[510]

We note that this exchange occurred before Kawiti or Te Tirarau had signed te Tiriti, and before the Kaitāia signing.[511] Notwithstanding Hobson's efforts, Te Raki Māori continued to express concerns, and these were not confined to the Bay of Islands and Hokianga. In June 1840, the Whangaroa missionary James Shepherd observed:

> A Governor has arrived. . . . Soldiers have arrived, prisoners are taken, murders and thefts having been committed and what was never before witnessed by the poor heathen, they have seen their own countryman tried and committed to death. The natives, at least some of them, have looked upon the soldiers with a jealous eye indeed, they have expressed a decided wish that the Governor would withdraw.[512]

A few days after Shepherd made these comments, an American sailor started a fight at Pōmare II's Ōtuihu pā,[513] and threatened to burn it down. In retaliation, Pōmare's people seized two of the Americans' boats. The sailor escaped with a minor injury, running away and raising the alarm with a false claim that Māori had killed a dozen of his colleagues and imprisoned others. Hobson sent a navy vessel. While its commanding officer, Captain Lockhart, was negotiating for the release of the boats, some of the seamen fired on Māori who were defending the pā. No one was hurt and, remarkably, Pōmare's people did not retaliate, instead allowing the seamen and whalers to depart with the boats. Hobson became acutely

508. Hobson to rangatira, 27 April 1840 (cited in Phil Parkinson and Penny Griffith, *Books in Māori 1815–1900/Ngā Tānga reo Māori: An Annotated Bibliography/Ngā Kohikohinga me ōna Whakamārama* (Auckland: Reed Books, 2004), p 80; Buick, *The Treaty of Waitangi*, p 12 (Ward, brief of evidence (doc A19), pp 91–92)).

509. Johnson, 'The Northern War' (doc A5), p 51.

510. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 394.

511. Claudia Orange, *The Treaty of Waitangi*, pp 393, 400.

512. James Shepherd to William Jowett, 12 June 1840 (cited in Tony Walzl, 'Mana Whenua Report' (commissioned research report, Whangārei: Tai Tokerau District Māori Council, 2012) (doc E34), p 447).

513. This was presumably Ōtuihu where Pōmare frequently hosted visiting whalers, though Hobson identified it only as a pā on the Kawakawa River.

aware that the whalers had been in the wrong, and feared that by sending his small navy contingent, he might have antagonised one of the region's most powerful and well-connected chiefs.[514]

The following morning, Pōmare visited Hobson, and – much to the Governor's relief – expressed gratitude that the navy had prevented the whalers' attempt to set the pā on fire. Hobson, in his report on the incident, explained that he sent soldiers only to keep the peace, and he asked Pōmare to send for assistance whenever any similar incident occurred. Pōmare, in turn, 'promised [that] if I would keep the white men in order he would answer for the natives'. On one or two occasions in the weeks afterwards, Pōmare sent for soldiers to deal with unruly whalers, giving them generous food and lodgings.[515] This arrangement, it seems to us, was a significant example of Māori understanding of the treaty partnership: the Crown would control its people and prevent them from antagonising Māori; Māori would answer for their own; and any overlap would be resolved through negotiation.

In reporting on this incident, however, Hobson sought to present it as an expression of British power and Māori acquiescence. It showed, he informed Gipps, that Pōmare 'has a proper respect for our power', an outcome that would be felt throughout the country, given the chief's significant connections with leading rangatira at Cook Strait, Hauraki, and Kaipara. Hobson acknowledged 'the very frail tenure by which peace is maintained with the native population', in which '[a] mere drunken brawl might have involved us in a war with half the country'. It had been 'a dangerous experiment' to send in the navy, yet he had done so on the basis that inaction would have been 'criminal' if the reports of whalers being killed had been true. The outcome, he believed, would 'greatly tend to strengthen the influence of Government'.[516] That may have been so, though in our view, it also demonstrated that any influence the Government might exercise at that time would require the ongoing consent of powerful Te Raki rangatira. Indeed, despite his protestations to the contrary, Hobson was aware of this. He reported:

> The inference to be drawn from these occurrences is that an augmentation of the military is absolutely necessary; it must never be overlooked that the native population are a warlike race, well armed, and ever ready to use those arms on the slightest provocation.[517]

According to Dr Phillipson, the Governor's experience with Pōmare caused him to rethink his approach to Māori–settler disputes. From that time, he relied on

514. Hobson to Gipps, 15 June 1840 (O'Malley, supporting papers (doc A6(a)), vol 16, pp 5274–5275).
515. Hobson to Gipps, 15 June 1840 (O'Malley, supporting papers (doc A6(a)), vol 16, pp 5274–5275).
516. Hobson to Gipps, 15 June 1840 (O'Malley, supporting papers (doc A6(a)), vol 16, pp 5274–5275). Arapeta Hamilton of Ngāti Manu elaborated on Pōmare's intertribal connections: he was related through marriage to Te Heuheu of Ngāti Tūwharetoa, and to Ngāti Raukawa, thereby connecting him to Tainui iwi in Hauraki, Waikato, Te Rohe Pōtae, and Cook Strait. He also had a close relationship with Te Hapuku of Ngāti Kahungunu: Arapeta Hamilton (doc F12(a)), p 12.
517. Hobson to Gipps, 15 June 1840 (O'Malley, supporting papers (doc A6(a)), vol 16, p 5275).

negotiation and persuasion rather than military force or police presence.[518] Indeed, by that time the Governor was realising that he had his hands full attempting to govern the district's Pākehā residents, who till then had been answerable only to rangatira. As Phillipson explained:

> The CMS clergyman, Robert Burrows, stated that an 'attempt was made to establish law and order, which only partially succeeded'. Many attempts to arrest Pakeha failed, if they were able to obtain shelter at a Maori settlement, although ship captains were able to retrieve runaway sailors by paying Maori a bounty for them. There were frequent drunken quarrels but 'the magistrate very wisely did not encourage the interference of the policeman in every case, but the combatants were either left to fight it out, or some person or persons of influence managed to put a stop to the quarrel'. The magistrate's court was not always an orderly affair, and 'nor were all the decisions strictly according to English law or justice'. And this was just for the Queen's Pakeha subjects.[519]

In August 1840, the tension between colonial law and chiefly authority flared up again, when Hōne Heke and his followers conducted a muru against the settler George Black. As we discussed in chapter 3, muru were a process for peaceful dispute resolution, usually by the removal of goods. They were much loathed by settlers, who called them 'stripping parties' and regarded them as a form of theft. As such, the continued conduct of muru was a measure of the relative power of Māori and settlers, as well as their accommodations to each other's values.[520] In response to Heke's muru, Hobson did not send soldiers or police but wrote a letter to Heke expressing his displeasure and appending a list of the goods that had been taken. If the reports he had heard were true, Hobson said, this was 'a very grievous offence indeed' ('Ka tahi ano te he waka hara'). As Governor, he asked Heke to return all the property. He concluded his letter: 'Na te mea kei au kei te kawana te ritenga mo nga tuturanga o te Pakeha o te tangata Maori ano hoki' ('because I, the governor (I am the person), having the power for the wrongs both of Europeans and natives').[521]

As Dr Phillipson noted, though Hobson was claiming to have the power, the most he could do was request that Heke return the property, and then only if Heke

518. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 322.

519. Robert Burrows, *Extracts from a Diary kept by the Rev R Burrows during Heke's War in the North in 1845* (1886; repr Christchurch: Kiwi Publishers, 1996), p 4 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 322–323).

520. See Vincent O'Malley and John Hutton, 'The Nature and Extent of Contact and Adaptation in Northland, c 1769–1840' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2007) (doc A11), pp 235–238; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 48, 51, 75–76, 81–83, 92; O'Malley, 'Northland Crown Purchases, 1840–1865' (doc A6), pp 68–71. We discussed these mutual adjustments and accommodations in our stage 1 report: see Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 241–242, 253–254.

521. Hobson to Hone Heke, translated by Henry Tacy Kemp, 24 August 1840, BPP, vol 3, p 239; see also Johnson, 'The Northern War' (doc A5), p 56; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 323.

acknowledged that a wrong had been committed. There was 'no thought of a court inquiry or compulsion'.[522] Hobson sent a copy of the letter to London as an example of how he had been attempting to adjust quarrels – and also of his powerlessness without additional troops. It was this situation that prompted him to propose the appointment of sub-protectors to mediate between settlers and Māori, enforcement of English law not being a realistic option.[523] Hobson received yet another lesson in this powerlessness in October, when the Government attempted to construct a customs house at Kororāreka. A delegation of local rangatira complained that it was being built on an urupā, and the Government responded 'immediately' by starting to 'pull down the timbers'. When the job was not completed, Māori returned themselves and finished the demolition.[524]

Even Hobson's more conciliatory approach does not appear to have satisfied Te Raki leaders. On the contrary, from about this time there appears to have been a marked increase in their concerns about settler behaviour and the Crown's intentions for their lands and authority. In September 1840, the missionary Richard Davis wrote to the Church Missionary Society in London, reporting that the number of Māori–settler disputes was increasing; that 'some of the settlers give the Natives much trouble', and this was causing 'much excitement and distrust' among Māori. Notably, the missionaries were being regularly called on to keep the peace, as Māori distrust extended to the Crown. There was 'much thoughtfulness and concern' among Māori 'as to what the measures of Government may lead to'.[525] The same month, Hobson issued another proclamation aimed at calming Te Raki leaders' concerns, which he blamed on 'Pakehas (white people) who dislike this our Government'. Hobson promised to protect Māori and to be a guardian; and he also promised, once more, that the Crown would not take Māori lands or other properties.[526]

Yet Māori continued to express suspicion. In October, the Waimate missionary Richard Taylor reported to the CMS: 'I am sorry to say the Natives appear to have no confidence in the good intentions of the government. They have been and shall continue to be very unsettled in this part.'[527] A few weeks later, another missionary, John King, reported: 'The natives have no idea of being governed and the thought is repugnant to their feelings of independence and it fills some of them with savage anger.'[528] At Māngungu, the Wesleyan missionary John Hobbs told his superiors that there was 'considerable dissatisfaction' among Māori, largely because they

522. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 323.
523. Hobson to Secretary of State for the Colonies, 15 October 1840, BPP, vol 3, p 235.
524. *New Zealand Advertiser and Bay of Islands Gazette*, 8 October 1840 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 68).
525. Davis to Secretaries of the CMS, 10 September 1840 (as cited in Walzl, 'Mana Whenua Report' (doc E34), p 446).
526. Proclamation, 8 September 1840 (cited in Wyatt, 'Old Land Claims' (doc E15), p 209).
527. Taylor to Sowell, 5 October 1840 (cited in Merata Kawharu, 'Te Tiriti and its Northern Context' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2008) (doc A20), p 177).
528. John King to Secretary, CMS, 20 October 1840 (cited in Merata Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 177).

could not understand the Government's motives or intentions.[529] In December 1840, James Buller, also of the Wesleyan mission, recorded that 'Tirarau [leader of Te Parawhau] angrily declared he believed warnings, originating from the Bay of Islands, that "the designs of the Government respecting them are not good" and that the Government wanted to kill the chiefs and take their slaves'.[530] In February, another Waimate missionary reported that there was 'much uneasiness' among Māori.[531] In March 1841, Hokianga leaders formed a 'Native Committee' aimed at securing Māori lands and authority, which they believed to be under threat from the Government.[532] By April 1841, Te Tirarau declared he was expecting 'a serious fight', and that the Governor was gathering troops in Auckland so he could attack Māori.[533]

Many factors contributed to this unease among the district's Māori leaders. On the one hand, they were expressing prospective concerns about the Crown's intentions, based on the arrival of soldiers in their district, along with their understanding of how colonial authorities had operated in New South Wales and in the Pacific. Hobson's decision to move the capital to Auckland (discussed in section 4.4.) had cut off lines of communication and created fertile ground for rumours to spread. On the other hand, Māori concerns reflected actions that the Crown had already taken – not only with respect to dispute resolution but also trade and land, as we will see. As Paul Thomas observed in his evidence about the northern Wairoa rohe, from the end of 1840 the Governor was absent from the district, and the Crown's actions otherwise 'impacted negatively rather than positively on the lives of local Maori'.[534]

In March 1841, another case highlighted the Crown's relative powerlessness with respect to conflict within Māori communities. McDonogh (the Hokianga police magistrate) reported that there was great tension, which could erupt into war. Two months earlier, a Māori man had been killed, and utu had been exacted by his kin, who 'without reference to any legal authority', killed four individuals of the other hapū and took two prisoners. McDonogh attempted to mediate, with assistance from the missionaries. He visited the hapū concerned and wrote letters appealing for peace, but to little avail. The 'weaker' hapū was willing to follow his advice, but the stronger was not. McDonogh noted that his effectiveness was hampered by the lack of an interpreter. He appealed for one to be appointed urgently, though, as with most other things at the time, the fate of his request came down to money.

529. Hobbs to General Secretaries, WMS, 26 January 1841 (cited in Walzl, 'Mana Whenua Report' (doc E34), p 426).

530. James Buller, journal, 4 December 1840 (cited in Thomas, 'The Crown and Maori in Northern Wairoa' (doc E40), p 61).

531. Richard Davis to Secretary, CMS, 7 February 1842 (cited in Walzl, 'Mana Whenua Report' (doc E34), p 426).

532. Hobbs, journal, March 1841 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 211).

533. James Buller, journal, 20 April 1841 (cited in Thomas, 'The Crown and Maori in Northern Wairoa' (doc E40), p 62).

534. Thomas, 'The Crown and Maori in Northern Wairoa' (doc E40), p 60.

Hobson approved it, but said the person selected must be able to fill some other office, such as clerk of the bench, if the expense was to be justified. In making his appeal, McDonogh emphasised that Māori 'rely much [on] the advice and protection of Government'.[535] It appears to us that this was overstating things: it was only the weaker hapū that had sought protection, and then it treated the magistrate as a potential ally, not as a higher authority who could enforce law over Māori.

On occasions, the Government's constables did help to decrease tensions between Pākehā and Māori; for example, by impounding stock which destroyed Māori crops. Police magistrates were similarly conscious of a need to protect Māori from bad characters, especially whalers and sealers, and from excessive supplies of alcohol.[536] In Professor Ward's view, during these early years, while Māori were frequently willing to accept Crown officials acting as meditators in Māori–settler disputes, they did not see themselves as submitting to officials' authority. Instead, official intervention became a new option for dispute resolution, alongside more traditional methods. Furthermore, Māori expected officials to respect Māori values even though these were not recognised in English law. Māori would not hesitate to enforce their own laws against settlers 'if no official were handy or if he failed to give satisfaction'.[537] Historians in this inquiry told us that the Crown intervened in conflicts involving Māori on very few occasions during the early 1840s – a point we will return to later. As Dr Phillipson explained: '[t]o a significant extent, Māori law and Māori sanctions applied not only to *Māori* communities in the north . . . but also continued to apply to Māori–settler interactions during the 1840s' (emphasis in original).[538]

4.4.2.1.3 Maketū's conviction and execution

The most significant exception to this general rule occurred with the trial of a young Bay of Islands Māori, Maketū Wharetotara (also known as Wiremu Kingi Maketū), under the new colonial legal system.[539] Maketū, aged 16, had been employed by the Roberton family on their farm at Motuarohia, an island off Te Rāwhiti. Bullied or provoked by the Robertons' servant, Thomas Bull, Maketū was said to have snapped, killing Bull, Mrs Roberton, her children, and Isabella Brind (the granddaughter of Rewa, rangatira of Ngāi Tāwake and Te Patukeha).[540] This incident occurred on 20 November 1841. Maketū, the son of Ruhe, an important Ngāti Rangi chief, was found soon afterwards with goods from the Roberton family in his possession. Maketū's people refused to give him up to the Crown, and the police magistrate Beckham was unwilling to compel them to do so, fearing

535. McDonogh to Lieutenant Governor Hobson, 7 March 1841 (O'Malley, supporting papers (doc A6(a)), vol 1, pp 13–16). McDonogh gave no details about who was involved in this dispute.

536. Hill, *Policing the Colonial Frontier*, vol 1, part 1, p 152.

537. Ward, *A Show of Justice*, p 52.

538. Phillipson, answers to questions for clarification (doc A1(e)), p 3.

539. Claimant closing submissions (#3.3.221(e)), p 7; closing submissions for Wai 1477 and others (#3.3.338(a)), p 11; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 323.

540. Hill, *Policing the Colonial Frontier*, vol 1, part 1, p 214; Carleton, *The Life of Henry Williams*, vol 2, p 35; Johnson, 'The Northern War' (doc A5), p 56.

he would antagonise Maketū's people and provoke a major conflict. The historian Richard Hill has suggested that Beckham was ignorant of currents within Ngāpuhi, and not very active in finding them out, which earned him a strong rebuke from Hobson.[541]

In the immediate aftermath, settlers feared that Rewa would himself despatch Maketū as utu for the death of his grandchild, potentially sparking another Bay of Islands war. But a hui was called on Motuarohia on 24 November, attended by some 300 Māori. There, Ruhe was persuaded to give up his son for trial (according to Mr Johnson, Crown officials attended this hui and attempted to bribe the rangatira with blankets and other goods).[542] Maketū is said to have confessed to the murders the day before to a Kororāreka land speculator, Thomas Spicer, who was part of the jury empanelled by the coroner for an inquest, also conducted on 24 November.[543] Maketū was then sent to Auckland by sea and held in custody. He was tried in the Supreme Court in Auckland on 1 March 1842. This was only the court's second trial, it having been officially opened the previous day. Many Māori were present, including some called to give evidence, and George Clarke junior (a sub-protector, and the son of Chief Protector George Clarke) interpreted proceedings.[544] Maketū was found guilty and sentenced to death by hanging, and was executed on 7 March.[545]

According to the Ngāti Rāhiri kuia Emma Gibbs-Smith, 'Our kōrero is that Maketū did not kill the Robertons or Rewa's grand-daughter; Thomas Bull did it.' As she tells it, Maketū cared deeply for the children, and killed Bull as utu after discovering the crimes.[546] Richard Witehira of Te Patukeha also referred to this tradition, and recalled his elders weeping after hearing stories that Maketū had committed the murders.[547] Dr Phillipson did not know whether there were other oral histories; he did question why (as we will see) Ngāpuhi leaders subsequently acknowledged Maketū's guilt.[548] Colonial officials, and missionaries such as Henry Williams, saw the arrest and execution as a significant breakthrough in their attempts to assert the Crown's authority over Māori. Indeed, Hobson wrote to thank Ngāpuhi for their cooperation with the Crown.[549]

Historians have tended to see it differently, pointing out that the Crown had been powerless to arrest Maketū, who had been given up only with Ngāpuhi

541. Hill, *Policing the Colonial Frontier*, vol 1, part 1, pp 214–215.

542. Carleton, *The Life of Henry Williams*, vol 2, pp 36–40; Grant Phillipson, 'Responses to Post-Hearing Questions' (doc A1(g)), pp 11–12.

543. Phillipson, 'Responses to Post-Hearing Questions' (doc A1(g)), pp 11–12.

544. Dr Phillipson stated that two protectors, one of them the Chief Protector, interpreted 'for Maketū' at the trial, but he was not sure of the role of the protectorate in respect of a criminal trial: Phillipson, 'Responses to Post-Hearing Questions' (doc A1(g)), p 16; see also 'Opening of the Supreme Court', *New Zealand Herald and Auckland Gazette*, 2 March 1842, p 3.

545. Vincent O'Malley, 'English Law and the Māori Response: A Case Study from the Runanga System in Northland, 1861–65', JPS, vol 116, no 1, 2007, p 10.

546. Emma Gibbs-Smith, brief of evidence (doc W32), pp 17–18.

547. Richard Witehira, transcript 4.1.7, Waitaha Events Centre, Waitangi, p 292.

548. Phillipson, 'Responses to Post-Hearing Questions' (doc A1(g)), pp 13–14.

549. Ward, *A Show of Justice*, p 53; Johnson, 'The Northern War' (doc A5), p 58.

consent. Dr Phillipson concluded that the case was 'an unusual [one] in which, for reasons of their own, Ngāpuhi allowed the trial of Maketū to occur'. He did not accept that English law had been *imposed* on Ngāpuhi in this instance; rather, Ruhe had given up his son to save him from death at Rewa's hands.[550] Professor Ward suggested that Rewa's people might have taken wider vengeance on Ruhe's people, and that Maketū was given up 'to avoid a greater calamity'.[551] Mr Johnson was too of this view, noting that Ngāpuhi had made the decision in order to avoid a renewed outbreak of inter-hapū conflict similar to the so-called Girls' War of 1830 (discussed in chapter 3).[552] Mr Johnson also observed that, because the victims were Pākehā and Māori, Ngāpuhi had common cause with the Crown, joining Rewa in seeking justice or utu.[553] Kihi's victim had been Pākehā, and indeed this was true in all cases of Māori tried in the Supreme Court in the early years of the colony.[554] Furthermore, in the case of Maketū, several historians have noted that Ngāpuhi shared the Pākehā view that the crimes were particularly horrific.[555] Indeed, Hobson reported to his superiors in London that had Maketū's offence 'been less atrocious, or had his guilt not been so clearly established, I feel convinced that we should have had a severe struggle to carry the law into execution'.[556]

In our inquiry, Crown counsel agreed with Dr Phillipson that the Maketū case was an 'important exception' to the continuing application of Māori law to Māori–settler interactions during the 1840s. Counsel submitted that the case 'showed that when British criminal law was applied to Māori in Northland', it was applied 'respectfully' and 'through the involvement of rangatira'. Counsel submitted: 'It shows how rangatiratanga and kawanatanga could operate well together, particularly in disputes involving Māori and settlers.'[557] On the face of it, this might seem to be the case, though we note that the Crown regarded itself as having the legal authority to act without Ngāpuhi consent; it took the course it did, of negotiating with rangatira, because at that point it lacked the practical authority.

Although Ruhe had been persuaded to give up his son, the decision remained controversial among Ngāpuhi. Some leaders continued to believe that Maketū should have been dealt with according to Ngāpuhi law.[558] Some also resented the fact that Maketū had been taken so quickly to Auckland and were offended by the public nature of his trial and execution, which Hobson acknowledged was

550. Phillipson, 'Responses to Post-Hearing Questions' (doc A1(g)), pp 6–7.

551. Ward, *A Show of Justice*, p 53; see also O'Malley, 'Northland Crown Purchases' (doc A6), pp 63–64.

552. Johnson, 'The Northern War' (doc A5), p 57.

553. Johnson, 'The Northern War' (doc A5), pp 56, 59; see also Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 109–110.

554. Emmet Maclaurin, 'The Application of British Criminal Law Towards Māori During the Early Colonial Period', LLB (Hons) dissertation, University of Otago, 2015, p 30.

555. For example, see Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 324; O'Malley, 'Northland Crown Purchases' (doc A6), p 64.

556. Hobson to Principal Secretary of State for the Colonies, 16 December 1841, BPP, vol 3, p 542.

557. Crown closing submissions: political engagement (#3.3.402), p 55.

558. Johnson, 'The Northern War' (doc A5), pp 57–58, 60–61; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 323–324.

'considered a degradation on the whole aboriginal race'.[559] Beckham reported that Maketū had managed to smuggle letters out of his cell, urging that Hobson be murdered and British troops attacked. His relatives held a meeting at Kawakawa in early December where they resolved to 'revenge themselves, and wage war with the Europeans'.[560] Hobson took these threats seriously, remaining 'on my guard' while expressing fear for 'unprotected' officials in the Bay of Islands.[561]

In response to the rising tensions, Tāmati Waka Nene and several other senior rangatira (including Pōmare, Waikato, Rewa, and notably, Ruhe himself) approached Henry Williams, seeking to reassure settlers and prevent any further violence. Williams and the rangatira called a hui at Paihia on 16 December 1841, and more than 1,000 Ngāpuhi attended, from the Bay of Islands, Hokianga, and Whangaroa. The rangatira passed a series of resolutions which (in translation) disapproved of 'the murders of Maketu'; declared that he acted alone with no forewarning; and further declared 'that they have no thought of rising to massacre the Europeans', and were 'sorry' that this rumour had been spread and caused alarm. They strongly opposed the return of Maketū to the Bay of Islands.[562]

Ngāpuhi leaders sent a series of letters to the Governor condemning of the murders, asserting that Maketū had acted alone, and denying any intention to kill Europeans. One of the letters was signed by Pōmare, Kawiti, Ruhe, Paratene, and Tāmati Waka Nene – the first four of whom were southern Bay of Islands leaders.[563] Another was signed by 19 rangatira from the northern Bay of Islands and Whangaroa, including Manu (Rewa), Te Kēmara, Whai, Tohu, Tāreha, Te Hira Pure, Te Huarahi, and others.[564] A third letter, signed by Tāmati Waka Nene, said his people had met at Māngungu, and he had also spoken with rangatira from throughout the Bay of Islands and Whangaroa, securing their agreement to leave Maketū to the Crown.[565]

Two of these letters were subsequently printed in *The Maori Messenger: Te Karere o Nui Tireni*,[566] a new Māori-language gazette which the Government decided (on the advice of George Clarke senior) to start publishing at this time.

559. Hobson to Principal Secretary of State for the Colonies, 16 December 1841 (Crown document bank (doc w48), pp 139–140); see also O'Malley, 'Northland Crown Purchases' (doc A6), p 64; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 323.

560. Thomas Beckham to Colonial Secretary, 3 December 1841 (cited in Johnson, 'The Northern War' (doc A5), p 58).

561. Hobson to Secretary of State for the Colonies, 16 December 1841 (cited in Crown document bank (doc w48), p 140).

562. Henry Williams to George Clarke, 20 December 1841 (cited in Carleton, *The Life of Henry Williams*, vol 2, p 41); see also Phillipson, 'Responses to Post-hearing questions' (doc A1(g)), p 7.

563. Untitled, *Maori Messenger: Te Karere Maori*, 1 January 1842, p 2.

564. *New Zealand Herald and Auckland Gazette*, 19 January 1842, p 2; Carleton, *The Life of Henry Williams*, vol 2, p 43.

565. Untitled, *Maori Messenger: Te Karere Maori*, 1 January 1842, p 3.

566. Phillipson, 'Responses to Post-Hearing Questions' (doc A1(g)), pp 16–19; Carleton (*The Life of Henry Williams*, vol 2, p 43) recorded that one of the letters was signed by 19 rangatira including Te Kēmara of Waitangi, Hāre Hongi Hika of Whangaroa, Manu (Rewa) of Te Rāwhiti, Tāreha, and others. Another letter was signed by Ruhe, Pōmare, Tāmati Waka Nene, and others.

The first issue focused almost entirely on the murders.[567] One leader who did not support leaving Maketū to the Crown was Hōne Heke; according to the settler Hugh Carleton, Heke attended the Paihia hui and 'tried to excite the assembled natives to rise against the English, telling them that they would all be seized as Maketu had been'. Such was Heke's 'violent spirit', Carleton wrote, that Rewa, Ururoa, and many other rangatira left the meeting and armed themselves, fearing an attack.[568] George Clarke junior, who was the translator at Maketū's trial, later wrote that Heke's anger had arisen because under Māori law, 'a man's own tribesmen [should be] the judges of his crime, and the executioners of his sentence'.[569]

Soon after the meeting of 16 December, Kororāreka residents wrote to the Governor referring to a 'general disaffection' among Ngāpuhi, albeit caused less by the Maketū affair than by the Crown's interference in their trading relationships and lands – matters we will return to in section 4.4.2.2. The settlers argued that Maketū's arrest and other Crown actions had created a general fear among Ngāpuhi that the Crown meant to assume power over them and deny their rights, leading some to a view that they needed to repel the Pākehā population and 'recover their independence'.[570]

Henry Williams expressed similar concerns in a letter to James Busby a few months later. He noted that the Maketū affair had been resolved through the colony's legal system only because Rewa's grandchild had been among the victims, and therefore Rewa had sided with the Crown; otherwise, the result would have been different. More generally, all Ngāpuhi leaders continued to express distrust in the Government and its intentions towards Māori and their possessions.[571] 'In regard to British law', Williams continued, 'the natives do not yet consider that it applies to them.'[572]

Likewise, George Clarke senior wrote in his half-year report that there was 'a general notion prevalent among the chiefs who signed the Treaty' that 'in ceding the Sovereignty they reserved to themselves the right of adjudicating according to Native custom in matters purely native', while surrendering rights only in respect of intra-Pākehā and Pākehā–Māori disputes. Clarke said he had sought to correct this view, while acknowledging that English law 'can scarcely be expected' to operate among Māori.[573] In September 1844, when Governor FitzRoy met Ngāpuhi leaders in a major hui at Waimate (see also chapter 5), the Hokianga leader Taonui

567. O'Malley, 'Northland Crown Purchases' (doc A6), pp 64–65; Johnson, 'The Northern War' (doc A5), p 59 n

568. Carleton, *The Life of Henry Williams*, vol 2, app, pp xx–xxi.

569. George Clarke, *Notes on Early Life in New Zealand* (Hobart: Walch and Sons, 1903), p 68 (cited in claimant closing submissions (#3.3.219), p 20).

570. Kororāreka residents to Governor, 18 December 1841 (cited in Johnson, 'The Northern War' (doc A5), pp 58–59).

571. Carleton, *The Life of Henry Williams*, vol 2, app, pp xxi–xxii; Johnson, 'The Northern War' (doc A5), p 59.

572. Henry Williams to James Busby, 20 April 1842 (cited in Johnson, 'The Northern War' (doc A5), p 60).

573. George Clarke, 'The Chief Protector's Report for the Half-year ending 30 April 1842', pp 113, 115 (cited in Johnson, 'The Northern War' (doc A5), p 61).

referred to Maketū's execution as a case of 'life for life'; that is, the Crown was entitled to utu under its own system for the deaths of settlers.[574] As we will see later, after Maketū's execution Te Raki Māori acted as if they retained rights to resolve disputes not only among themselves but also with settlers; they left the Crown to govern settlers where their own interests were not affected.

We are not convinced that English law was applied with total respect or care in Maketū's case, even allowing for the standards of the time. Governor Hobson was clearly anxious to assure the Secretary of State that proper processes had been followed, that Māori had accepted the outcome of the trial, and that justice had been seen to be done; he reported the whole matter in at least three despatches to the Colonial Office.[575] But Dr Phillipson expressed reservations about the conduct of the trial and its handling of the evidence. With respect to the evidence against Maketū, Dr Phillipson noted that Spicer's understanding of the Māori language was poor, and that there were discrepancies in the chronology and manner by which Spicer was supposed to have obtained Maketū's confession. In Dr Phillipson's view, Maketū's guilt was established not by the evidence heard in court, but by the actions of Ngāpuhi in handing him over for trial.[576]

Dr Phillipson also raised significant procedural concerns about the trial. He noted that Maketū was not tried by a jury of his peers, since the Juries Ordinance 1841 did not provide for Māori as well as Pākehā jurors in cases where both races were involved.[577] He noted also that Maketū's counsel, C B Brewer, was appointed only an hour before the trial began, though Maketū had been in custody for three months; that the lawyer had not had an opportunity to read any of the depositions, or to speak with his client, or to call witnesses. Furthermore, Brewer's client could not speak English and had no knowledge of English law.[578] Dr Phillipson also pointed out that the court's jurisdiction had been questioned. According to the brief account in the *New Zealand Herald*, Brewer argued that the court could not hear the case against Maketū as his client 'was not aware of the British laws' or of the nature of the crime he was alleged to have committed.[579] *Te Karere Maori*

574. 'Successful and Amicable Settlement of the Native Disturbance at the Bay of Islands', *Daily Southern Cross*, 7 September 1844, p 2.

575. Hobson to Principal Secretary of State, 16 December 1841, 12 March 1842, 14 March 1842, BPP, vol 3, pp 541–542, 542–544, 546–547.

576. Phillipson, 'Responses to Post-Hearing Questions' (doc A1(g)), pp 11, 13, 16. In closing submissions, Maketū's counsel noted that there was no evidence against his client other than the confessions, which Spicer had obtained by repeatedly badgering Maketū asking if he was the murderer: 'Supreme Court', *New Zealand Herald and Auckland Gazette*, 5 March 1842, p 2.

577. The Jury Ordinance was passed by the Governor, with the advice and consent of the Legislative Council, on 23 December 1841. It provided that every man (with a number of exemptions for those in particular occupations) between the ages of 21 and 60, who had 'to his own use a freehold estate in lands and tenements within the colony' should be qualified and liable to serve as a juror.

578. Phillipson, 'Responses to Post-Hearing Questions' (doc A1(g)), pp 7–16. Joseph stated that the right of appeal to the Privy Council had 'extended to New Zealand in 1840 as a superior jurisdiction to superintend local judicial developments' in the colony: Joseph, *Constitutional and Administrative Law*, p 889.

579. 'Opening of the Supreme Court', *New Zealand Herald and Auckland Gazette*, 2 March 1842, p 3.

published a fuller account, in Māori, which quoted Brewer as asking: 'e tika ana ranei kia wakawakia tenei tangata e tatou, he tangata maori Hoki? "a, e mohio ranei ia ki te ritenga o te ture o Ingarani?"' ('is it right for him to be judged by us, as he is a Maori? and, does he even know the requirements of the laws of England?')[580] According to the *New Zealand Herald*:

> The Attorney-General replied by saying that, Mr Brewer's objection could not hold good as, from the moment the Proclamation was read, every person on these Islands was amenable to the law of England; but should Mr Brewer's objection hold good, three-fourths of the people of England were ignorant of the law.[581]

The trial judge, Chief Justice William Martin, then confirmed his view that Maketū was subject to English law.[582] *Te Karere Maori* quoted the exchange as follows:

> Ka wakatika te Kai Korero mo te Kuini, ka ki atu, 'Ae ra, e tika ana kia wakawakia, ta te mea, kua korerotia nuitia te pukapuka o te Kuini, e mea ana, kia kotahi tonu te ritenga mo nga tangata katoa o tenei motu, ahakoa pakeha, ahakoa tangata maori.' Ka ki atu te Tino Kai Wakawa ka mea, he pono, e tika ana kia wakawakia.[583]

> The Queens representative then stood up and said, 'yes, it is right that he be judged, as the Queens book has been widely discussed, which says, that there should be one rule for all people of this land, whether Maori or Pakeha.' The Chief Judge then spoke, he said that was true and it is right for him to be judged.[584]

In his closing submission, Brewer raised the point again, arguing that this was the first case in which a Māori had faced a full trial before the colony's courts, and that his ignorance of English law should at least be considered as a mitigating factor during sentencing.[585] Counsel for Emma Gibbs-Smith and several other claimants questioned the use of the term 'te pukapuka o te Kuini' ('the Queen's book') in *Te Karere Maori*, with reference to Hobson's proclamations of sovereignty. 'In legal, technical terms, there is no such document', counsel submitted. 'The phrase is too colloquial for it to have been used in legal submission by an Attorney-General.'[586]

580. 'Ko te Wak[a]wakanga o Maketu', *Maori Messenger: Te Karere Maori*, 1 April 1842, p 13. Translations are from '*R v Maketu*', New Zealand's Lost Cases Project, Victoria University of Wellington (documents for cross-examination of Dr Phillipson (doc Y1), p 12).

581. 'Opening of the Supreme Court', *New Zealand Herald and Auckland Gazette*, 2 March 1842, p 3.

582. 'Opening of the Supreme Court', *New Zealand Herald and Auckland Gazette*, 2 March 1842, p 3.

583. 'Ko te Wak[a]wakanga o Maketu', *Maori Messenger: Te Karere Maori*, 1 April 1842, p 13.

584. '*R v Maketu*', New Zealand's Lost Cases Project, Victoria University of Wellington (documents for cross-examination of Dr Phillipson (doc Y1), p 12).

585. 'Supreme Court', *New Zealand Herald*, 5 March 1842, p 2.

586. Supplementary closing submissions for Wai 1477 and others (#3.3.338(a)), p 13.

It was counsel's submission that Swainson 'did not refer to "the Queen's book" but in fact referred to Hobson's proclamations as the reason why Maketū was amenable to the court's jurisdiction and the laws of England. This was obvious from the *Herald* account of the proceedings.[587] Rather, he suggested, it was George Clarke senior and his team of editors who inserted the phrase 'the Queen's Book' in the Government publication *Te Karere* to avoid alarming their Māori readers by reference to the proclamations rather than the treaty.[588] Crown officials, they argued, had not discussed the proclamations with Te Raki Māori either before or after they were issued, and so, in its account of the trial for Māori, the Crown deliberately suppressed reference to them and to their legal effect. Any official acknowledgement 'that the source of the Supreme Court's jurisdiction to hear Maketū's case stemmed from Hobson's Proclamations, and not from te Tiriti o Waitangi, could have caused the extreme tension in the north' at a time when tensions were already very high.[589]

In further criticism of the trial's conduct, Dr Phillipson noted that proceedings moved with considerable haste. Maketū pleaded innocence, yet the jury took only a few minutes to decide his guilt. Although there was the 'theoretical' possibility of an appeal to the Privy Council, this was removed by the speedy passing of a death sentence, and by Maketū's execution days later.[590] We add that the Governor might also have granted Maketū a free or a conditional pardon.[591] In Dr Phillipson's view, the trial of a young Māori for a capital crime was an event 'of great significance' in terms of Māori willingness to adhere to English law: 'It follows that particular care would likely have been taken to ensure that the trial exemplified British justice, especially in terms of fairness. Yet this does not seem to have happened.'[592] This was also the view of the Ngāti Rāhiri claimant Emma Gibbs-Smith: 'Maketū never received a fair trial. . . . It was all a jack-up so that the Crown could impose its criminal law and authority on the Māori people of the north, even over a 16 year old child.'[593]

The Crown did not respond to this point, and we did not hear detailed evidence about the standards of fairness that applied to colonial trials at the time. We note that the English court system has evolved, and that trials in the 1840s were conducted much more rapidly and with less emphasis on procedural fairness – including rights to defence – than in modern times. As the legal historian Douglas Hay has observed, the right to defence counsel had only recently been

587. Counsel cited the *Herald* account as given in Guy Lennard's biography of Sir William Martin: supplementary closing submissions for Wai 1477 and others (#3.3.338(a)), p 15.

588. Supplementary closing submissions for Wai 1477 and others (#3.3.338(a)), pp 13–15.

589. Closing submissions for Wai 1477 and others (#3.3.338(a)), p 14.

590. Phillipson, 'Responses to Post-Hearing Questions' (doc A1(g)), pp 7–16.

591. This power was granted to the Governor of New Zealand by the Queen in the Charter (16 November 1840). In the Royal Instructions of 5 December 1840, further instructions were laid out for the grant of a pardon or reprieve in the case of persons condemned to death by any court: BPP, vol 3, pp 154, 163–164.

592. Phillipson, 'Responses to Post-Hearing Questions' (doc A1(g)), p 14.

593. Emma Gibbs-Smith, brief of evidence (doc W32), p 20.

enshrined in English statute, and nineteenth century trials were sometimes conducted 'with amazing speed' and with very little detailed consideration of the evidence.[594] Nonetheless, we agree with Dr Phillipson that the trial was scarcely a fine example of British justice, and cannot have encouraged Ngāpuhi to submit to the colony's laws. Indeed, Ms Gibbs-Smith told us that, following Maketū's execution, 'all the rangatira got together and vowed to never give another man up to the Pākehā again.' This was a saying that Ngāpuhi had passed down through generations: 'I even remember my mother saying it to us kids, "Never again do we give up our people. Never again."'[595]

4.4.2.1.4 Continued enforcement of Māori law over Māori and settlers

The case of Maketū was to be the last occasion for some years on which the Crown attempted to arrest or imprison any Te Raki rangatira. As Dr Phillipson observed, the removal of the capital (and the 80th Regiment) to Auckland in mid-1841 took the heat out of questions of relative authority, allowing Ngāpuhi, for the most part, to manage Māori–Māori and also Māori–settler conflicts with minimal Crown intervention other than occasional attempts at mediation. The 'face of the Government in the north was now the Police Magistrate [Beckham], the gaoler, a few police, and the protector [Kemp]'.[596] With this very limited official presence, 'the 12,000 Nga Puhi were not in any immediate danger of being actively governed'.[597] On the contrary, the protectorate 'did nothing more than try to mediate disputes'.[598] Beckham, similarly, 'did not try to overreach himself', for the most part leaving Māori–settler disputes to rangatira and missionaries.[599]

As a result, Dr Phillipson noted, Māori were largely able to deal with those disputes as they had before the arrival of Hobson's officials. In pre-treaty times, they had already made accommodations for Pākehā 'so as not to inconvenience Europeans to the point where they felt compelled to leave or stop visiting', and these accommodations carried on after 1840 as Māori continued to enforce their laws with an eye on trade.[600] Phillipson saw such accommodations as examples of Māori and settlers meeting on a 'middle ground', where they continued to view interactions through their own cultural lens, while 'adjust[ing] their differences

594. Douglas Hay, 'Crime and Justice in Eighteenth and Nineteenth Century England', in *Crime and Justice*, vol 2 (1980), p 53.
595. Emma Gibbs-Smith, brief of evidence (doc w32), p 21.
596. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 324; see also p 343.
597. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 321.
598. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 324. Phillipson provided very little evidence of Kemp successfully mediating in any disputes during the 1840s; he did act as a translator and advisor to the Land Claims Commission which considered his father's claims among others, unsuccessfully attempt to dissuade Hōne Heke from his first flagstaff attack, and play a small but critical role in escalating Crown–Māori tensions and bringing Ngāti Hine into the Northern War: Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 144, 329–330, 344.
599. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 324.
600. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 81.

through what amounts to a process of creative, and often expedient misunderstandings'. This point is discussed in more detail in chapter 6.[601]

These misunderstandings can clearly be seen in Pākehā responses to the Māori system of law and authority, based on mana, tapu, and utu, enforced through mechanisms such as rāhui (temporary bans on the use of places or resources) and muru.[602] Many longer-term settlers had come to reluctantly accept occasional muru as a price of their residence among Māori, and had learned to negotiate voluntary adjustments in order to prevent conflict. Māori, in turn, had chosen to make some allowances in order to facilitate trade and good relations; for example, by turning a blind eye to minor transgressions, or enforcing utu against Pākehā with more lenience.[603] In this, Dr Phillipson observed, Māori adoption of Christianity was a significant influence.[604] From 1840, many settlers – particularly the more recent arrivals – expected the Crown to intervene in cases of muru and enforce English law, but in practice, muru continued well after 1840, and 'customary law and fundamental Maori values continued alongside (or as part of) Maori Christianity'.[605]

We have already discussed Heke's August 1840 muru of George Black.[606] Another significant muru occurred in the northern Kaipara district in early 1842. The Tribunal has already considered the events in *The Kaipara Report* (2006), but we mention them here as an example of the Crown's early attempts to enforce its authority over Māori. During the latter months of 1841, the leaders of Te Parawhau and Te Uri o Hau became aware that a Kaipara trader, Thomas Forsaith, had a skull on display in his general store. Believing that Forsaith had looted an urupā and was trading in kōiwi (human remains), they raided and destroyed his store, taking the skull to give it a proper burial. George Clarke senior, who was sent to investigate, accepted Forsaith's claim that his wife had found the skull beside a river. The protector therefore pressed Te Tirarau and other leaders to give up a large area of land at Te Kōpuru, estimated in 1919 to contain between 9,000 to 10,000 acres, as compensation.[607]

601. Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650–1815* (Cambridge: Cambridge University Press, 1991), p x; (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 76).

602. For discussion of mana, tapu, and utu, see Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 22–25, 263.

603. See O'Malley and Hutton, 'The Nature and Extent of Contact and Adaptation in Northland' (doc A11), pp 235–238; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 48, 51, 75–76, 81–82, 92; O'Malley, 'Northland Crown Purchases' (doc A6), pp 68–71.

604. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 82.

605. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 83.

606. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 322–323.

607. Waitangi Tribunal, *The Kaipara Report*, Wai 674, pp 86–92; Garry Hooker, 'Maori, the Crown and the Northern Wairoa District – a Te Roroa Perspective' (commissioned research report, Wellington: Waitangi Tribunal, 2000) (Wai 674 R01, doc L2), pp 80–95. Other accounts are given in Tony Walzl, 'Mana Whenua Report' (doc E34), pp 272–274; Paul Thomas, 'The Crown and Maori in Northern Wairoa' (doc E40), p 53; O'Malley, 'Northland Crown Purchases' (doc A6), pp 70–71; Bruce Stirling, 'From Busby to Bledisloe: A History of the Waitangi Lands' (commissioned research report, Waitangi: Waitangi Marae Trustees and the James Henare Maori Research Centre, 2016) (doc

Te Tirarau is recorded as responding that the Governor 'would have no land . . . until he first killed them and their children'.[608] But he soon relented, apparently because Clarke threatened military action.[609] Clarke later acknowledged to Hobson that he had misgivings about Forsaith's actions.[610] Te Roroa historian Garry Hooker also recorded a later account from the missionary James Buller, that Māori had been 'duped' by Forsaith's false accounts.[611] Nonetheless, the land was taken, the Crown keeping most of it while granting a small portion to Forsaith as compensation. Forsaith took the land as scrip and departed for Auckland, where he was soon appointed as a sub-protector.[612] Mr Hooker also observed that the Crown had taken land that did not in fact belong to Te Parawhau, but rather to Te Roroa hapū Ngāti Whiu and Ngāti Kawa.[613] *The Kaipara Report* found the Crown's handling of this incident to be in breach of the treaty.[614]

For Te Parawhau and other Mangakāhia tribes, Clarke's intervention was their first – highly unfortunate – direct contact with the Crown's authority. The Crown had almost entirely ignored the Mangakāhia district after Te Tirarau and other rangatira signed te Tiriti in May 1840. Its only tangible impact had been to prohibit private land arrangements and invalidate those already in place – thereby discouraging the trade that Te Tirarau and others were attempting to build in a district that still had only a few dozen permanent settlers. By April 1841, Te Tirarau was threatening violence against the Crown, angered by the negative impacts of these land decisions. In Paul Thomas's view, Clarke's approach to the Forsaith muru the following year created a risk of major conflict between the Crown and Te Parawhau, defused only because Te Tirarau did not wish at this point 'to destroy the nascent relationship with the Crown and endanger the prospect of further European settlement'.[615]

Clarke's uncompromising approach appears to have been guided by Hobson, who wanted to stamp out muru altogether and, according to Professor Ward,

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W5), p 92; Johnson, 'The Northern War' (doc A5), p 85. Hooker named the leaders of the muru as Te Tirarau, Paikea, Te Wheinga, Waiata, and Haro. Parore Te Āwhā chose not to take part.

608. Clarke to Hobson, 15 March 1842 (cited in Thomas, 'The Crown and Maori in Northern Wairoa' (doc E40), p 60).

609. Waitangi Tribunal, *The Kaipara Report*, Wai 874, p 88; Hooker, 'Maori, the Crown and the Northern Wairoa District' (Wai 674 ROI, doc L2), pp 85–86.

610. Hooker, 'Maori, the Crown and the Northern Wairoa District' (Wai 674 ROI, doc L2), p 82.

611. Buller, 'Rough Notes of my Visit to Kaipara, Mangahai, Waipu, Whangarei, Mangapai, Wairoa' (cited in Hooker, 'Maori, the Crown and the Northern Wairoa District' (Wai 674 ROI, doc L2), p 95).

612. Waitangi Tribunal, *The Kaipara Report*, Wai 874, pp 89–91. In 1845, Forsaith investigated a muru in Wairarapa, requiring the chief Te Weretā to forfeit land as compensation. The Waitangi Tribunal found that this response was unfair, disproportionate, discriminatory, and in breach of the treaty: Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 864, vol 3, p 1046.

613. Hooker, 'Maori, the Crown, and the Northern Wairoa District' (Wai 674 ROI, doc L2), pp 78–80, 86–90, 95.

614. Waitangi Tribunal, *The Kaipara Report*, Wai 874, pp 100–101.

615. Thomas, 'The Crown and Maori in Northern Wairoa' (doc E40), pp 60–62.

sought to have Te Tirarau arrested.[616] In an initial report to London, the Governor expressed his

> great regret . . . that I have not sufficient power to demand and enforce the abolition of these practices, as it generally happens that the violence of the natives is not directed against the individual person who has committed the aggression, but against every unprotected white settler in the neighbourhood.[617]

We observe that in the case of Forsaith, this was patently untrue; and indeed it is generally untrue for the muru discussed in this chapter. Furthermore, it demonstrates Hobson's failure to understand taua muru as a mechanism for adjusting disputes in accordance with tikanga. Hobson also reported that settlers' rights were being 'frequently invaded' and needed greater support, and to this end he wrote to Lord Stanley: 'I am sure your Lordship will admit of the necessity that exists for placing a stronger force of military in this country.'[618]

Ralph Johnson noted that Governor Hobson sent 'numerous' requests for additional troops, with the clear intention that they would be used to control Māori as well as settlers.[619] In 1839, he had responded to his instructions by asking for armed forces, or at least equipment for a local militia, as the presence of such forces 'would check any disposition to revolt, and . . . enable me to forbid in a firmer tone those inhuman practices I have been ordered to restrain'.[620] After receiving a small detachment from the 80th Regiment, he continued to seek a larger force. As noted earlier, he made additional requests in June 1840 after the outbreak of fighting between visiting whalers and Ngāti Manu, and again in October 1840 after Heke's muru on George Black.[621] On those occasions, and again in his response to the muru on Forsaith, he had made clear that his intention was to use soldiers against Māori where he deemed it necessary, and to protect settlers even when they had transgressed against Māori law. In Professor Ward's view, this 'illustrated the dangerous tendency, endemic in imperial situations, for officials to look to a narrow and highly provocative military solution, in a complex problem of intercultural relations'.[622]

Stanley's response to Hobson's latest request arrived in October 1842. Stanley expressed serious misgivings about the Forsaith case, noting that the muru was not unprovoked, and that the cession of land was punitive and 'of too questionable a propriety to be often repeated'. Further confisations of land were likely to escalate conflict between Māori and Pākehā, with 'most dangerous consequences

616. Ward, *A Show of Justice*, p 58.
617. Hobson to Secretary of State for the Colonies, 12 March 1842 (Crown document bank (doc w48), pp 141–142).
618. Hobson to Stanley, 29 March 1842 (cited in Johnson, 'The Northern War' (doc a5), p 85).
619. Johnson, 'The Northern War' (doc a5), p 86.
620. Hobson to Under Secretary of the Colonial Department, August 1839, BPP, vol 3, p 92.
621. Hobson to Secretary of State for the Colonies, 15 October 1840, BPP, vol 3, p 235.
622. Ward, *A Show of Justice*, p 58.

. . . to the happiness of the Natives, and to the future peace of the colony.'[623] Stanley also recommended that the colony establish legal protections for Māori, in particular by imposing severe penalties on settlers who desecrated wāhi tapu. By giving Māori recourse under the colony's laws, he observed, they would be more inclined to trust the Crown's authority and feel less need to take matters into their own hands.[624] Hobson's calls for additional troops appear to have gone unheeded for the time being, though a small detachment from the 96th Regiment was sent in 1843.[625]

In the absence of sufficient troops to control Māori communities, Hobson and his officials had little option but to tolerate the practice of muru, at least for the time being.[626] A few months after the Forsaith incident, George Clarke senior was called to Whāngārei after settlers there complained of another muru by Te Tirarau and his people. Clarke reported that Te Parawhau had gone to visit tribal urupā near the present-day Whāngārei city centre, and had discovered that William Carruth and several other settlers were occupying the site and had desecrated it. Adding to the insult, the occupied land was part of a disputed pre-treaty transaction with Gilbert Mair (see chapter 6), who had asserted rights over far more land than he had been granted and had never completed the agreed payment. As Clarke explained, the hapū had resolved to remove the bones of their ancestors to another site, while also claiming modest utu for the settlers' transgressions.[627]

Te Parawhau 'quietly' visited the settlers, 'and respectfully ask[ed] them for a payment for their profanation and for their daring trespasses, concluding that they would take only what was given them'. Having explained their intentions, the Māori asked what the settlers had to offer, then 'pointed out what they wanted, and took what was given them, expressing their satisfaction'. The taua continued from house to house 'holding out no threats'. Having received 'a small equivalent' of what they were entitled to, they departed, 'unconscious of having violated any Law of Equity, Human or Divine and considering the Europeans under great obligation to them for the very quiet way in which they had disposed of the case'.[628] In

623. Stanley to Hobson, 27 October 1842 (cited in Stirling, 'From Busby to Bledisloe' (doc w5), p 93).

624. Waitangi Tribunal, *The Kaipara Report*, Wai 874, p 91.

625. See 'Proceedings of Government Officials in the Straits', *Nelson Examiner and New Zealand Chronicle*, 23 December 1843, p 6. The 80th Regiment returned to New South Wales in April 1844 and was replaced by another detachment from the 96th, numbering 150. Larger forces (from the 58th, 96th, and 99th Regiments) were sent in August 1844 in response to Heke's first attack on the Kororāreka flagstaff. Regarding the 96th Regiment in 1843, see 'Proceedings of Government Officials in the Straits', *Nelson Examiner and New Zealand Chronicle*, 23 December 1843, p 6. Regarding the 96th Regiment in 1844, see 'We should never bark when we cannot bite', *Nelson Examiner and New Zealand Chronicle*, 20 April 1844, p 26 and 'Shipping List', *Daily Southern Cross*, 20 April 1844, p 2; Johnson, 'The Northern War' (doc A5), pp 112–113, 165–166; 'Regiments That Have Been Amalgamated', in *An Encyclopaedia of New Zealand*, ed A H McLintock, http://www.TeAra.govt.nz/en/1966/british-troops-in-new-zealand/page-2, accessed 12 April 2021.

626. Phillipson, 'Responses to Post-Hearing Questions' (doc A1(g)), p 2.

627. O'Malley, 'Northland Crown Purchases' (doc A6), pp 68–69.

628. Clarke to Colonial Secretary, 23 May 1842 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), pp 70–71).

effect, on this occasion Clarke's response amounted to official acknowledgment that Māori laws could be justifiably enforced against settlers, and that Māori themselves could do the enforcement. Indeed, Clarke's view was that the conduct of the muru reflected 'very great credit' on the Māori, and very little on the settlers who had swindled Te Parawhau out of their land.[629]

Carruth himself remonstrated with one of the Te Parawhau leaders 'for allowing his pakeha to be robbed', and was told that the incident was justified, and indeed was an honour for the Pākehā.[630] There were numerous other instances of Te Tirarau asserting mana over settlers. In May 1842, in response to an insult by the missionary James Buller, the rangatira enforced a temporary boycott of church services.[631] Paul Thomas observed that Mangakāhia rangatira had a well-deserved reputation for encouraging settlement, but 'could be harsh if they believed their authority was being challenged or settlers were not living up to their expectations'.[632]

From about this time, there were numerous instances of the Chief Protector and other officials, or missionaries, negotiating the payment of utu as a means of settling Māori –settler conflicts, and accepting that Māori had rights to enforce the law of tapu and other customary laws.[633] One significant and seemingly precedent-setting incident occurred early in 1842.[634] Hōne Heke and Taihara wrote to Bishop Selwyn, on 6 February, asking that he investigate Pākehā who were shooting protected birds near his kāinga at Lake Ōmāpere:

> Mau e Titiro iho te haerenga mai o nga Pakeha ki te pupuhi i nga manu o taku kainga, Omapere, no te mea, he mana kei runga i aua manu no to matou kingi i mua hei ingoa no to matou matua aua manu. He mea tapatapa. Tahae ake ano te tangata i aua manu, maru ake te tukituki.
>
> I tawahi ko ta koutou nei rahui he mea tuhituhi ki te reta koutou nei rahui, tahae kau te Pakeha. Ka mau te ture ko to matou tikanga he mea tapatapa tahae kau ka maru te tukituki.

> I wish for you to investigate the excursions of the Europeans, to shoot the birds of my village, Omapere, because we have the rights over those birds, a chant has been recited over them so that should anyone stake those birds, they will die for their sin.

629. Clarke to Colonial Secretary, 23 May 1842 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 71).

630. A M Rust, *Whangarei and Districts' Early Reminiscences* (Whāngārei: Mirror, 1936), p 61 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 69).

631. Thomas, 'The Crown and Maori in Northern Wairoa' (doc E40), pp 52–53.

632. Thomas, 'The Crown and Maori in Northern Wairoa' (doc E40), p 52.

633. Phillipson, 'Responses to Post-Hearing Questions' (doc A1(g)), p 2.

634. The formula for compensation Bishop Selwyn agreed upon to resolve this incident – of four times the market value of the ducks that were shot – was subsequently used in later incidents involving rāhui, and later enshrined in the Native Exemption Ordinance 1844, s 7.

> Overseas, your territorial boundaries are written on paper and can be easily stolen by the European. It is our custom to adhere to the rules. A chant is recited, then should anything be stolen, the consequence is death.[635]

Heke and Taihara said it was the third letter they had sent to the missionaries – to Selwyn, the Reverend Richard Taylor, and the mission farmer Richard Davis.

> Mau e wakarite tenei hara, ki te kahore, ka haere atu ahau ano, he tahae i [te] po. Me homai he whakamarie moku. Ka mutu ka tae te marietanga. Ki te kahore, e kore e mutu i utua.
>
> It is for you to rectify this wrong, if you do not, I will go myself, as a thief in the night, to gain satisfaction for myself. Once done harmony will reign. If not revenge will never end.[636]

As the anthropologist Dr Merata Kawharu noted, Heke was frustrated that his authority over his land and his resources was being flouted; and that the Crown 'was not keeping its Treaty obligation to protect local Maori from the illegitimate actions of settlers'. The problem did not go away, and in 1843 a taua visited Selwyn demanding compensation after some of the mission's young men had shot ducks that were protected by tapu. The bishop wrote of this incident: 'Of course I refused to recognise their heathen customs, but finding that the "tapu" meant no more than our English word "preserve, 'I confessed that the young men had done wrong in poaching.' In accordance with scripture, he paid four times the market value of the ducks, sufficient utu to resolve the grievance.[637] Dr Phillipson saw this as an example of 'both sides were making adjustments to keep the relationship working'.[638]

In March 1844 there was a further repetition of Pākehā duck shooting at 'a tapu swamp' at Lake Ōmāpere, where several wild ducks were shot.[639] Heke arrived with a taua and demanded utu for the breach of the rāhui. George Bennett, the British military engineer who recorded the incident, stated that the British involved, including missionaries, met with Heke and asked whether they wished

635. Hone Heke to Selwyn, 6 February 1842 (cited in Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 180). Dr Kawharu did not identify the translator. Johnson provided an alternative translation of this paragraph, by Dr Jane McRae: 'This is another letter for you [asking] you to consider the Pakeha who came to shoot the birds in my settlement of Omapere, because there is authority [mana] over those birds from our previous king and those birds are in the name of our elder so they are sacred, and if a person steals those birds again, there will be killing': Johnson, 'The Northern War' (doc A5), p 62.

636. Hone Heke to Selwyn, 6 February 1842 (cited in Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 180).

637. H W Tucker, *Memoir of the Life and Episcopate of George Augustus Selwyn*, 2 vols (London: William Wells Gardner, 1879), vol 1, p 150. Selwyn relied on the New Testament parable of the tax collector Zaccheus, who upon meeting Jesus promised that if he had cheated anyone, he would pay back four times the amount.

638. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 76.

639. Johnson, 'The Northern War' (doc A5), p 89.

to have the matter dealt with by the magistrate at Kororāreka, their own (Māori) laws, 'or by the new ritenga of the New Testament'. Heke apparently chose the New Testament – presumably meaning he would receive four times the market value – and Bishop Selwyn immediately handed over the payment. Bennett recorded that Heke's group 'were not well pleased but thinking the decision just they said no more'.[640] So both sides continued to make accommodations; in Heke's case, despite his irritation that his rāhui continued to be ignored. As Mr Johnson noted, it is interesting that Heke approached the leader of the missionaries, rather than the colonial authorities.[641] It is clear that Heke felt strongly about the shooting of protected birds – as he had previously explained, breaching rāhui was a capital offence among Māori. He might also have found the involvement of missionaries especially irritating, given their knowledge of tikanga. He spelt out for Selwyn how he saw the relationship between tikanga and introduced English law:

> I tawahi ko ta koutou nei rahui he mea tuhituhi ki te reta koutou nei rahui. Tahae kau te Pakeha, Ka mau te ture ko to matou tikanga. He mea tapataopa tahae kau ka maru te Tukituki.
>
> Your prohibition is written in letters, and [with] your prohibitions if a Pakeha just steals, the law binds him. Our custom is from naming some things as sacred, and if there is stealing, there is killing.[642]

Dr Phillipson noted that Māori laws were not enforced only in cases of transgressions against tapu. Other breaches of tikanga could also lead to muru or other enforcement action. For example, Te Raki Māori sometimes conducted muru against Pākehā who occupied disputed lands or failed to respect traditional gift-giving arrangements.[643] Prior to 1840, settlers who occupied Māori lands also took on obligations to their host hapū, which included regular gift-giving. After the signing of te Tiriti, there was a widespread expectation among Pākehā that they would be freed of these customary practices and could instead occupy their lands as freehold, whereas Māori continued to view the relationships in reciprocal terms (see chapter 6). According to Phillipson, this cultural difference was behind many of the muru that occurred in the first few years of the 1840s. 'A lot of what was seen as robbing or pillaging was actually attempts to restore the balance', he wrote. 'Those who were not generous or hoarded wealth could expect a visit from a taua muru', even if such actions were 'anathema to Pakeha and could not be pushed too far'.[644]

Heke explained the process after he was accused of raiding settlers' homes at Mangonui and Taipa during a conflict between Ngāpuhi and Te Rarawa in 1843.

640. George Bennett, 'Journal, 1838–1845' (cited in Johnson, 'The Northern War' (doc A5), p 89).
641. Johnson, 'The Northern War' (doc A5), p 62.
642. Heke ki te Pihopa Selwyn, 6 Pepuere 1842 (cited in Johnson, 'The Northern War' (doc A5), pp 63–64). Translation by Dr Jane McRae.
643. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 69, 312, 324.
644. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 312.

'It was through me that the [settlers'] houses of Mongonui and Taipa were saved', Heke told the Chief Protector. In return, 'I only asked them for potatoes for my tribe, and they gave me some . . . had they been withheld I should have been angry'.[645] As this example shows, Māori–settler relationships involved ongoing reciprocal obligations; enforcement mechanisms were threatened or used when the relationship fell out of balance. Dr Phillipson observed that even into the 1850s and beyond, disputes were typically adjusted through 'negotiations and ceremonial confrontations' between the affected parties; where settlers were involved, they might represent themselves, but it remained common for their host hapū to adjust matters on their behalf. Indeed, the resident magistrate was heavily reliant on Māori resolving disputes in this way.[646]

Notwithstanding continued Māori authority over their own affairs, some Te Raki leaders remained concerned about the Crown's long-term intentions.[647] Settler transgressions against Māori law were a factor in this, though scholars such as Dr Phillipson and Mr Johnson pointed to other factors, such as the Crown's handling of old land claims, the removal of the capital to Auckland, and Crown interference in Ngāpuhi trading relationships as more significant in raising tensions and eroding trust (we discuss these factors in section 4.4.2.2).[648] According to Johnson, the number of muru increased after 1840 because the settler population was growing and beginning to operate 'according to rules and laws in competition with those of local chiefly authority'.[649]

During 1844, there was a significant escalation in Crown and settler responses to muru, which in turn led to an increase in tensions in the north. Whereas Pākehā had previously complied, albeit reluctantly, with muru, they began to demand that the Crown take action to protect their properties, while also (in Mr Johnson's words) describing muru in 'in vivid terms that encouraged the belief that [they] were incidences of free-ranging violence and lawlessness'.[650] The colonial Government, responding to this pressure, began to escalate matters by calling for troop reinforcements and sending in armed forces.[651]

In July 1844, Heke led a taua muru to Kororāreka seeking compensation after Kōtiro, a Taranaki war captive who had formerly been part of Heke's household, took up residence with Lord, a butcher. Heke had wanted her back, but she met his messenger with insults. Heke then arrived with his taua muru and took up residence at Lord's house. The episode escalated as Lord failed to provide payment he had promised, resulting in a confrontation between Heke and the police

645. Heke to George Clarke, May 1843 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 312).
646. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 94.
647. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 324.
648. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), ch 7; Johnson, 'The Northern War' (doc A5), ch 1.
649. Johnson, 'The Northern War' (doc A5), p 86.
650. Johnson, 'The Northern War' (doc A5), pp 86–87.
651. For Governor FitzRoy's threats to use military force against Ngāpuhi during the second half of 1844, see Johnson, 'The Northern War' (doc A5), pp 99–100, 110, 135–141.

magistrate Beckham. This led Heke to protest that the Queen (and by extension her officials) had no right to interfere in his business, and to announce that he would cut down the flagstaff which (because of customs duties, discussed later) had destroyed Bay of Islands trade. The missionaries Henry Williams and Robert Maunsell intervened, paying utu of rice and sugar on Lord's behalf to address that matter, but leaving unresolved the broader issue of Crown interference in Māori affairs – to which Heke's party responded by carrying out their threat to cut down the flagstaff, and Governor FitzRoy, in turn, sent troops to the Bay of Islands.[652]

Other incidents continued throughout the year. In September, George Clarke senior visited Hokianga where another dispute had erupted between rangatira and settlers. On this occasion, the Hokianga police magistrate Robert St Aubyn, together with armed constables, raided the kāinga of the chief Ngāhu, attempting to recover a Ngāpuhi woman who, Johnson noted, was apparently the wife of a European. When Ngāhu saw the party approaching, he armed himself, at which point the constables made a hasty retreat by boat. Ngāhu fired a shot, which passed through the neck of a cow belonging to a Pākehā neighbour, Kelly. The shot caused very little injury, but nonetheless Ngāhu was subjected to a muru in which he lost his house, along with all of his food and pigs. Clarke, hearing of these events, took no action except to encourage Hokianga leaders to keep peace among themselves.[653]

Another major incident was sparked in September when police injured the wahine rangatira Kohu (Ngāti Hine, Ngāti Manu) as they were attempting to arrest her Pākehā husband (Joseph Bryers, who we discuss further in chapter 6). Kohu was of senior descent; her grandfather was the Ngāti Hine leader Kawiti. Regarding the injury as minor, the police magistrate Beckham refused to pay compensation – a decision that Dr Phillipson regarded as 'a serious error in judgement'.[654] In response, Kohu's brother Hori Kingi Tāhua conducted a series of muru against Pākehā settlers, taking several horses. Tāhua's people also stripped the jail in Kororāreka. Pōmare II, Tāmati Waka Nene, and other leading rangatira appealed to the Governor to address the situation before it worsened, and FitzRoy responded by sending the Royal Navy sloop HMS *Hazard* with Chief Protector Clarke senior aboard. Clarke acknowledged that Tāhua had a legitimate grievance and negotiated the payment of utu, in exchange for the return of the horses. Clarke also recommended that Crown officials pay utu in cases where they had offended against Māori law to reassure Māori of the Crown's good intentions.[655] During these negotiations, Clarke attempted to dissuade Tāhua from taking matters into his own hands; Tāhua responded that he had approached Beckham twice

652. Johnson, 'The Northern War' (doc A5), pp 90–92; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 329.

653. Johnson, 'The Northern War' (doc A5), p 129.

654. Phillipson, 'Bay of Islands Maori and the Crown' (doc A5), pp 324, 344–345.

655. Johnson, 'The Northern War' (doc A5), pp 141–145; see also Phillipson, 'Bay of Islands Maori and the Crown' (doc A5), p 345; Clarke to Colonial Secretary, 19 October 1844 (Crown document bank (doc W48), pp 168–169).

to no avail, and 'if he could not meet with redress from the police magistrate, he would take it'.[656]

Although Clarke's intervention had resolved the immediate issue, tensions were rising in the district. In Clarke's view, there were multiple causes. Māori were distrustful of the Crown's intentions towards them and their lands, and frustrated over rapidly declining trade; some settlers were encouraging these fears in the hope of scaring away their business competitors; and the influence of senior chiefs who had previously kept the peace was declining.[657] After these events, there were further muru at Te Puna, Waikare, and Kororāreka in 1844; FitzRoy responded by sending a warship and threatening military action against the Māori involved.[658] Yet more muru at Kawau and Matakana in January 1845, apparently sparked by settlers' occupation of contested lands, led the Governor to order confiscation of land and issue warrants to arrest several rangatira. This further escalation set the scene for another attack on the flagstaff, and ultimately for the outbreak of the Northern War, which we will consider in chapter 5.[659]

4.4.2.1.5 What steps did officials take to recognise tikanga in New Zealand law?

It is clear that in the first few years of the colony, there was considerable uncertainty among Crown officials over the extent to which the colony's laws might be applied to Māori, and conversely the extent to which the colony should recognise and protect tikanga Māori.[660] There was also some tension between the views of Ministers and officials in London, and the colonial Government. As we have seen, local officials initially attempted to enforce its law over some Te Raki Māori, before quickly stepping back and addressing most issues through mediation and negotiation.

In Dr O'Malley's view:

> This was the dilemma for authorities, and while some officials argued that the most honest course of action was for the Crown to abandon any pretensions to rule over Māori districts, others believed that such a policy would merely lead to further problems as unregulated settlement of such areas inevitably brought colonists into conflict with the tribes.[661]

Various events during 1842 highlighted the difficulties the colonial Government faced in attempting to keep peace and manage Māori–settler relations. These included an outbreak of intense intertribal fighting in the Bay of Plenty, which

656. Clarke to Colonial Secretary, 19 October 1844 (Crown document bank (doc w48), p169).
657. Johnson, 'The Northern War' (doc a5), p145.
658. Johnson, 'The Northern War' (doc a5), pp145–149.
659. Johnson, 'The Northern War' (doc a5), pp154–157.
660. See Alan Ward, 'Law and Law-enforcement on the New Zealand Frontier, 1840–1893', NZJH, 1971, vol 5, no2; O'Malley, 'English Law and the Maori Response', pp10–11; Damen Ward, 'A Means and Measure of Civilisation: Colonial Authorities and Indigenous Law in Australasia', in *History Compass*, vol 1, 2003, pp1–2, 6–7.
661. O'Malley, 'English Law and the Māori Response', p11.

the Crown tried and failed to suppress; and the Wairau Incident, in which Nelson settlers provoked a conflict with Ngāti Toa by attempting to force them from disputed land.[662] Intertribal fighting also broke out at Ōruru in the Mangonui district in 1843, at least in part (according to historian Dr Barry Rigby) because of the Crown's handling of conflicting land claims.[663]

In response to the Bay of Plenty conflicts, Attorney-General Swainson recommended the establishment of native districts where Māori would live under their own laws, subject only to the influence of missionaries and protectors. Underlying this proposal was Swainson's view that the Crown had no legal authority over Māori who had not signed te Tiriti, or had signed it without clear understanding of its provisions in the English text. Swainson did not intend that these districts be fully independent: the Crown would have jurisdiction over settlers, including power to disallow their land claims and punish them for breaches of the law. According to Professor Ward, such an outcome would have involved 'a *de facto* acceptance of the Maori social system', while allowing Māori to engage with the British parts of the colony as they chose. The result, Ward wrote, 'would have been a very different New Zealand, an essentially Maori New Zealand'.[664] In Orange's view, the native districts proposal 'probably came close to the Maori understanding of the treaty'.[665]

Chief Protector George Clarke did not believe that self-government would protect Māori from unruly or unscrupulous settlers; rather, that Māori would benefit from the protection of the colony's legal system, but only if they could be induced to submit to it – a step that would require concessions to existing Māori systems of law, authority, and conflict resolution. He proposed, therefore, that the colony's legal system protect Māori customs and that rangatira be co-opted to act as magistrates to adjudicate and enforce the law among their communities. In 1842, he reported that 'British law . . . can scarcely be expected to operate among [Māori], until they have the means of both knowing and making use of those laws . . . especially those living at a distance.' As things were, it was difficult, he said, to protect Māori from 'great hardships and from great injustice' if they came into contact with the colony's legal system. A Pākehā knew how to proceed in 'maintaining his right'; Māori were 'ignorant of even the first steps to be taken'. Where there were disputes between Māori and Europeans, over the killing of pigs belonging to Māori, trespass and spoiling of their crops by cattle, destruction of their wāhi tapu, encroachment on their land, the cutting of their kauri and other timber, and 'low abuse held in great abhorrence by the natives, viz. swearing at them', what was needed, in his view, was an 'efficient officer' who could 'direct and adjudicate'. English law thus posed problems for Māori: 'The law makes no provision for the

662. Ward, 'Law and Law-enforcement on the New Zealand Frontier', p 132.

663. Barry Rigby, 'The Oruru Area and the Muriwhenua Claim' (commissioned research report, Wellington: Waitangi Tribunal, 1991) (Wai 45 ROI, doc C1), pp 30–31; see also pp 26–30.

664. Ward, *A Show of Justice*, pp 61–62.

665. Orange, *The Treaty of Waitangi*, p 111.

many cases which, according to native custom, may be adjusted by compensation; it takes away all that once united society, and gives nothing adequate in its place.'[666]

In 1843, Clarke wrote a lengthy paper for the Colonial Secretary setting out his views in detail on adapting English law to tikanga. He began with a strong statement about the treaty:

> The inapplicability of the English law to the natives of New Zealand arises, in the first place, from the provision of the treaty of Waitangi, which guarantees all native customs. Now is it obvious that native customs and usages, if not absolutely at variance with the spirit of English law, in all cases, are, both in form and final issue, diametrically opposed to its administration, and especially inimical to its tardy operation.[667]

In other words, though tikanga was not incompatible with the spirit of English law, it was administered totally differently, its outcomes were totally different, and the slow operation of English law did not sit well with tikanga.

And, Clarke argued, leaving aside treaty rights, and focusing on Māori as British subjects 'amenable to British law in all its manifold ramifications', they were subject to 'great hardships' either because those who wronged them might escape conviction because of legal technicalities, or because they knew how to operate in commercial transactions to escape financial obligations. Therefore, English law 'pertaining to assault, larceny and felony, is irreconcilable with the natives' view of equity, and opposed to native custom'. It was inexplicable to them why compensation was not made to the injured party, and the result was that they sought redress in ways 'more compatible with their notions of justice, or creates a feeling of disgust at a system which is attended only with inconvenience and delay, especially when they appear as prosecutors'. The upshot was that despite the British promises of protection, Māori in different parts of the country 'have suffered wrong'.[668] Clarke turned then to his own proposal, which Ward outlines as follows:

> Clarke . . . proposed to legalise certain Maori principles of justice and apply them in Native Courts, consisting of the Protector of the district associated with the principal chiefs, and a jury – all Maori in disputes between Maoris, half European and half Maori in mixed cases. The courts were to sit in the villages and the record of their proceedings was to provide a guide to the further codification of custom. Decisions on land disputes were to build a record of land claims through the Colony.[669]

In Ward's view, an essential element in the scheme was Clarke's belief 'that the involvement of the ruling chiefs in the judgment would be tantamount to its execution'. The police would thus work in support of the chiefs, rather than of an alien authority. Clarke believed that the Crown should provide Māori with a

666. 'Chief Protector's Report', 18 June 1842, BPP, vol 2, p 191.
667. Clarke to Colonial Secretary, 31 July 1843, BPP, vol 2, p 346.
668. Clarke to Colonial Secretary, 31 July 1843, BPP, vol 2, p 347.
669. Ward, 'Law and Law-enforcement on the New Zealand Frontier', p 133.

code of laws, which they could use to 'adjust their differences'. Nothing should be done that seriously affected Māori usages and customs 'without reference to them through their chiefs'. The provision of courts in centres of Māori population would meet Māori expectations that offences should be dealt with expeditiously, and would get round the problem of trying to move all those involved to hearings in distant locations.[670]

Acting Governor Shortland shared Clarke's opposition to separate Māori districts, fearing that most or all Māori would take this course and reject British authority.[671] While he preferred Clarke's proposals, he also had reservations. The first was the cost. There were no funds available to administer the courts. The second was the risk of failure if the courts had no power to enforce decisions 'against turbulent chiefs or tribes'. Shortland was anxious that the Crown's position should be strengthened by the presence of an adequate military force.[672]

The Colonial Office made no objection to Clarke's proposals. Lord Stanley wrote to Shortland endorsing the principle behind them:

> [T]here is no apparent reason why the aborigines should not be exempted from any responsibility to English law or to English courts of justice, as far as respects their relations and dealings with each other. The native law might be maintained and the native customs tolerated, in all cases in which no person of European birth or origin had any concern or interest.[673]

Later that year, Under-Secretary Stephen clarified that, in the Crown's view, Māori were British subjects whether they had consented to the treaty or not. He refuted the suggestions, 'subjection to British sovereignty and subjection to English law are convertible terms'; that is, Māori could be British subjects while still having their own laws.[674]

Robert FitzRoy, the incoming Governor, was against using Crown troops in internal Māori conflicts; in his view, negotiation, compensation, and moral influence should be relied on instead.[675] In January 1844, newly arrived in New Zealand, FitzRoy addressed the Legislative Council in support of the introduction of 'declaratory or exceptional laws, in favour of the aborigines [Māori] and their descendants', and suggested that 'an arrangement for guardedly authorizing some of the native chiefs to act in a qualified manner as magistrates in their own tribes' would be one of the measures in the Government's legislative programme.[676]

670. Clarke to Shortland, 31 July 1843, BPP, vol 2, p 348; Clarke to Shortland, 30 June 1843, BPP, vol 2, p 345.
671. Ward, *A Show of Justice*, p 62.
672. Shortland to Stanley, 30 October 1843, BPP, vol 2, p 340.
673. Stanley to Shortland, 21 June 1843, BPP, vol 2, p 475; Ward, *A Show of Justice*, p 63.
674. Stephen, minute, 28 December 1843 (cited in Ward, *A Show of Justice*, p 62).
675. FitzRoy to Stanley, 16 May 1843, BPP, vol 2, p 389.
676. 'Minutes and Proceedings of the Legislative Council of New Zealand, 3rd sess, 1844, BPP, vol 4, p 246; Adams, *Fatal Necessity*, p 223.

Two incidents around the time of FitzRoy's appointment further reinforced the need for some alterations to the colony's laws. In one, Pipitea (Wellington) Māori twice freed the rangatira Te Waho from police custody, and threatened to sack the town, relenting only with the possibility of military action held against them. In another, Ngāti Whātua freed one of their kinsmen who was accused of petty theft, after a zealous magistrate declined an offer of compensation and instead imposed a prison sentence. These incidents reinforced the limited options available to FitzRoy. If the colonial Government was not going to adopt Swainson's native districts proposal, it either had to adapt its laws to Māori needs, or take what Professor Ward described as the 'expensive and bloody solution of conquering the country by force of arms'.[677]

Soon after these incidents, FitzRoy met Te Kawau and other rangatira at Government House where he explained that the Crown was preparing 'special laws for your good', so that Māori should not be dealt with harshly when they were not sufficiently acquainted with the law. He asked for the assistance of some of the chiefs in framing such laws.[678] The rangatira present responded with a request that cases involving Māori be resolved by payment of utu rather than imprisonment.[679] The Governor reiterated his stance at a major hui at Remuera in May 1844, acknowledging that some English laws and customs were 'very displeasing' to Māori. The Chief Justice and the Attorney-General, he said, were preparing laws 'less at variance with those habits and customs which, in your present circumstances, cannot be at once laid aside and discarded'.[680]

4.4.2.1.6 Native Exemption Ordinance 1844

Ultimately, the Governor and his advisors included some accommodations for Māori concerns in four of the ordinances passed by the Legislative Council during 1844. The most important of these was the Native Exemption Ordinance. It provided that, in cases of Māori–Māori conflict, the alleged offenders should not be charged or arrested except through the agency of rangatira. In cases of Māori–settler conflict, it provided that the law should be enforced in a manner least likely to endanger peace, and that outside of the main settlements, arrests should be made by rangatira, who would be paid an allowance of at least £2 for this service. The ordinance also made some provision for the tikanga of utu and recognised Māori abhorrence of imprisonment. Specifically, it provided that cases of theft could be settled by the payment of four times the value of the property taken (whereas Pākehā defendants would be imprisoned), and it provided that defendants facing charges other than rape and murder could be bailed on the payment of £20.[681] The other ordinances that year were the Unsworn Testimony Ordinance, which allowed Māori to give evidence in court without taking a Christian oath;

677. Ward, *A Show of Justice*, p 65.
678. Ward, *A Show of Justice*, p 65; FitzRoy, 'Address to Native Chiefs', 9 March 1844, BPP, vol 4, p 196.
679. Ward, *A Show of Justice*, p 65.
680. FitzRoy to Stanley, 25 May 1844, BPP, vol 4, p 229.
681. Ward, *A Show of Justice*, p 66; Native Exemption Ordinance 1844, sch.

the Juries Amendment Ordinance, which allowed Māori men to serve on mixed juries in cases involving Māori plaintiffs or defendants, and the Cattle Trespass Amendment Ordinance, which protected cultivations (including those of Māori) by allowing claims for damages caused by wandering cattle.[682]

Clarke regarded the Native Exemption Ordinance as a 'very judicious and philanthropic measure' which was 'admirably adapted' to meeting the needs of both the settler and Māori communities.[683] As Ward observed, the ordinance in essence recognised the reality that the Crown could not enforce its laws without Māori cooperation. Without a much larger armed force, FitzRoy had 'no real alternative to restricting the issue of warrants against Maori'. His only effective means of law enforcement was to rely on the cooperation of local chiefs; anything else could at the very least leave Māori in open defiance of the law, and at most embroil the whole colony in conflict.[684]

Professor Ward also noted that the ordinance incorporated the principle of utu, in that Māori convicted of theft could pay compensation to the complainant instead of facing imprisonment or some other punitive action. This, in his view, was 'a genuine attempt to make English law more acceptable to the Maori'.[685] Clarke reported in 1845 that the measure had satisfied the 'intelligent' rangatira, who paid compensation for offences committed by their people.[686] We note that the payment – four times the value of the goods taken – appears to be an extension of the principle established in 1842, when protected ducks were shot at Ōmāpere, and Bishop Selwyn resolved the issue by paying Hōne Heke four times the ducks' market value. As such, the rule combined the Māori principle of utu with scriptural precedent.[687]

We agree with Professor Ward that statutory recognition of utu was significant. However, we also observe that the provision applied only to Māori defendants; settlers who transgressed against Māori law were not required to pay utu, even though on many occasions the payment of utu was an appropriate and effective means of resolving the dispute. Furthermore, it is notable that the measure applied to cases of 'theft', a common Pākehā term for the taking of goods by taua muru. The ordinance cannot be seen as providing for full protection of Māori law. Nor did it implement Clarke's original plan under which rangatira would exercise authority by acting as magistrates. Ward noted that the utu principle was extended

682. Ward, *A Show of Justice*, p 66. The Cattle Trespass Ordinance 1842 had allowed claims only when damage was caused to fenced cultivations. The 1844 amendment extended this protection to unfenced cultivations, thereby imposing greater obligations on livestock owners to control their stock.

683. Clarke to the Colonial Secretary, 31 July 1844 (cited in Ward, *A Show of Justice*, p 67).

684. Ward, *A Show of Justice*, pp 66–67.

685. Ward, *A Show of Justice*, p 67.

686. Clarke to FitzRoy, 1 July 1845 (cited in Ward, *A Show of Justice*, p 67).

687. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 76; Johnson, 'The Northern War' (doc A5), p 89; Tucker, *Memoir of the Life and Episcopate of George Augustus Selwyn*, vol 1, p 150.

in 1845 to cover cases of assault, providing that half the fine would be paid to the victim.[688]

In Dr Kawharu's view, the ordinance went 'some way to recognizing that rangatira had a primary role in administering . . . the affairs of their people', but in general, Government officials 'took the view that they knew what was best for Maori'.[689] Dr Phillipson considered that Clarke genuinely intended to leave Māori communities to govern themselves without Crown interference 'except in matters that involved settlers' rights'. The ordinance recognised that there were two systems of law in operation, which would have to interact in some way when Māori and settlers clashed.[690] Mr Johnson saw the ordinance as an example of 'how a law might pay attention to the authority of rangatiratanga, albeit with a limited frame of reference'.[691] But he also pointed out the ulterior purpose, spelled out in its preamble: to weaken Māori attachment to their own laws and customs in order to bring Māori to 'a ready obedience to the customs and laws of England'.[692] The ordinance was, in other words, 'a colonial project designed to gradually uproot Maori customary tikanga and chiefly authority', in a manner that conflicted with the Tiriti guarantee of tino rangatiratanga.[693]

The ordinance came into force on 16 July 1844, soon after Hōne Heke's first attack on the flagstaff – an event that heralded a rapid hardening of the Governor's attitude towards Māori autonomy.[694] As we discuss in chapter 5, FitzRoy called for armed reinforcements and threatened an invasion of the north. He was persuaded to back down, but only in return for assurances that Ngāpuhi would control Heke – an extremely provocative action given the Ngāpuhi tikanga of hapū independence. On several more occasions from October 1844 into early 1845, FitzRoy again threatened Heke and other rangatira with military action and arrest. Their crime was to have conducted taua muru in response to breaches of tikanga, including injury to a wahine rangatira and occupation of contested land.

In any case, the ordinance had a short life. Settlers had loathed it from the beginning. According to Professor Ward, 'a stream of invective against the Governor was sent to London from the New Zealand settler community'.[695] Letters, petitions, newspaper articles, and more called for FitzRoy's replacement, repeal of the ordinance, abolition of the treaty, and adoption of a much firmer line against Māori. Settlers regarded Heke's resistance as proof that FitzRoy's 'appeasement' and 'mediation' policy had failed.[696] In Ward's view, the opposite was true. Crown–Māori tensions were emerging because the Crown had pressed too hard on Māori, failing to respect or provide legal protection for their independence, or to make

688. Ward, *A Show of Justice*, p 67.
689. Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 151.
690. Phillipson, transcript 4.1.26, Turner Events Centre, Kerikeri, p 229.
691. Johnson, 'The Northern War' (doc A5), p 138.
692. Native Exemption Ordinance 1844, preamble; Johnson, 'The Northern War' (doc A5), p 138.
693. Johnson, 'The Northern War' (doc A5), p 138.
694. Orange, *The Treaty of Waitangi*, p 113; Johnson, 'The Northern War' (doc A5), p 138.
695. Ward, *A Show of Justice*, p 68.
696. McLintock, *Crown Colony Government in New Zealand*, pp 187–188.

sufficient provision for Māori to have any effective role in the machinery of the State or the administration of justice.[697]

Within a short period, the Colonial Office received news of the enactment of the ordinance, the vitriolic settler response, Heke's rising against the Crown, and the emergence of Crown–Māori tensions in other parts of the North Island. Having initially regarded the ordinance as 'wise' if potentially controversial, Colonial Under-Secretary Stephen now determined that it contained an 'undue bias'[698] in favour of Māori, and that 'laws weighted too much in favour of the weaker party' would inevitably be self-defeating.[699] George Grey, appointed to replace FitzRoy as Governor after the fall of Kororāreka, was instructed to amend the ordinance to confine its application to disputes within Māori communities, and to enforce English law without compromise except where doing so might threaten public safety.[700] Grey went further, repealing the ordinance in 1847 and replacing it with the Resident Magistrates Courts Ordinance 1846, which we will consider in chapter 7.[701]

4.4.2.1.7 The Land Claims Commission and the Crown's land policies

As discussed in section 4.3, land was of central importance to the treaty relationship. Māori were assured, in article 2, of the tino rangatiratanga or fullest authority over their whenua, kāinga, and other taonga. Hobson also promised to inquire into settlers' pre-treaty land transactions and return any lands that had not been properly acquired. In the months after the treaty signings, Hobson provided further assurances that Te Raki Māori would retain possession of and authority over land, and during 1840 and 1841 the Crown took steps to establish the promised inquiry.

Yet, as we have explained, the Crown's assertion of sovereignty also brought with it British legal concepts about land – including the doctrine of radical title and associated pre-emption and 'surplus' land policies. The Crown's implementation of these policies during the early 1840s caused significant disquiet among Te Raki Māori and led to rumours that the Crown intended to dispossess Māori of their lands, which we will discuss later.

Even before te Tiriti was first signed on 6 February 1840, the Crown had taken significant steps to assert its authority over New Zealand's land market. Specifically, on 14 January 1840, Governor Gipps of New South Wales proclaimed that the Crown would not recognise any land title in New Zealand unless the title derived from a Crown grant. Gipps also proclaimed that a commission would be established to inquire into transactions prior to 14 January 1840, reassuring settlers

697. Ward, *A Show of Justice*, p 71.
698. Stephen, minute, 1 August 1845 (cited in Ward, *A Show of Justice*, p 71).
699. Stanley to Grey, 13 August 1845 (cited in Ward, *A Show of Justice*, p 71).
700. Ward, *A Show of Justice*, p 71.
701. Police Magistrates and Native Exemption Repeal Ordinance 1846; Ward, *A Show of Justice*, pp 68–71, 74–76; Orange, *The Treaty of Waitangi*, pp 112–113.

that they would not be disposed of any property acquired from Māori under 'equitable conditions'.[702]

This commission was established in January 1841 and operated until October 1844.[703] We consider its activities in detail in chapter 6, but discuss them here because of their relevance to the broader Crown–Māori relationship during that period. The commission was initially authorised by the New Zealand Land Claims Ordinance 1840, which was closely based on an 1835 New South Wales law, and was passed by the New South Wales legislature. The ordinance presumed that the Crown held the radical (underlying) title to New Zealand lands, and that all land titles must therefore derive from the Crown. Under the ordinance, the commission was required to inquire into land transactions before 14 January 1840, determine whether they were equitable and well founded, and make a recommendation about whether to award a Crown grant (the final decision rested with the Governor). The commission could recommend awards up to 2,560 acres if it was satisfied that the award 'may not be prejudicial to the present or prospective interests of . . . Her Majesty's subjects', subject to a sliding scale aimed at ensuring equity between earlier and later transactions.[704]

In conducting their inquiry, commissioners were to be 'guided by the real justice and good conscience of the case without regard to legal forms and solemnities' and 'direct themselves to the best evidence they can procure or that is laid before them'. They were to identify the land concerned, the nature of the transaction, the price, the payments made, and the circumstances in which the transaction occurred. Evidence from Māori was to be considered 'subject to such credit as it may be entitled to from corroborating or other circumstances'.[705] Reflecting the Crown's assumption of radical title, the commission could not recommend awards of land that was required for defensive purposes or for any town or public utility, or if the land was 'on the sea shore within 100 feet of high-water mark'.[706]

In September 1840, Gipps had appointed two former military officers, Captain Matthew Richmond and Colonel Edward Godfrey, as land commissioners.[707] The

702. David Armstrong, 'The Land Claims Commission – Practice and Procedure, 1840–1845' (commissioned research report, Wellington: Crown Law Office, 1992) (Wai 45 R01, doc I4), p 5; proclamations, 14 January 1840, BPP, vol 3, p 39.

703. Tonk, 'The First New Zealand Land Commissions', pp 74, 77–78.

704. The New Zealand Land Claims Ordinance 1840.

705. For further details of the ordinance, see Alan Ward, *National Overview*, 3 vols, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997), vol 2, p 34; Ward, brief of evidence (doc A19), pp 91, 91 n; Armstrong, 'The Land Claims Commission' (Wai 45 R01, doc I4), pp 7–11; D Moore, B Rigby, and M Russell, *Old Land Claims*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997) (doc H1), pp 14–17. Armstrong used the title New South Wales Act. As Ward explained, that was in fact the title of an imperial Act passed in 1841 to repeal the original ordinance and transfer jurisdiction to New Zealand.

706. New Zealand Land Claims Ordinance 1840 (cited in Boast, 'Surplus Lands' (Wai 45 R01, doc F16), p 76).

707. A lawyer, Francis Fisher, was also appointed at this time but never sat as a commissioner and, it seems, acted as a legal advisor only. He resigned, and his commission ended in June 1841. Governor FitzRoy appointed a further commissioner, Robert FitzGerald, in 1844, in an attempt to speed up the process; see also Tonk, 'The First New Zealand Land Commissions', pp 52–53; Stirling and Towers,

following month, he issued more detailed instructions on their duties. For all hearings, they were to publish advance notice, ensure that a translator was present, and ensure that the Protector of Aborigines (or his representative) was present to protect Māori rights and interests. Proceedings were to be conducted as far as practicable with 'open doors'.[708]

The commissioners' reports were to include, among other things, a description of any' surplus' land; that is, any land they regarded Māori as having sold but were not awarding to settler claimants. As discussed in section 4.3, the Crown intended to claim this land for itself, even though it had not explained this policy to rangatira before they signed te Tiriti. There was no instruction to commissioners about reserving kāinga and other places of occupation or cultivation out of grants to settlers.[709] However, as we discuss in chapter 6, it seems that Gipps anticipated that any necessary reserves could be set aside out of the 'considerable tracts of land' that would be placed at the Government's disposal as a result of the commission's work (see section 6.4.2.1).[710]

The New Zealand Land Claims Ordinance was enacted in June 1841 after New Zealand ceased to be a dependency of New South Wales (and three months after the commission had begun its sittings at Kororāreka). This ordinance repeated most of the key terms of the earlier New South Wales measure – like retaining the 2,560-acre limit and requiring that the commissioners be guided by the real justice and good conscience of the case.[711] There were, however, some significant changes; for example, the ordinance clearly stated that the Crown had a pre-emptive right, and that the commission must inquire into pre-treaty leases as well as sales.[712]

The first Land Claims Commission began its hearings at Kororāreka in January 1841; Hokianga claims were heard in March 1841 in Auckland, and then locally in December 1842 and January 1843; and claims from Whangaroa also in December 1842. During 1843, the commission visited Mangonui and Kaitāia in January–February, and returned to the Bay of Islands and Hokianga in March. A few more Bay of Islands claims were heard in Auckland, along with those for Auckland,

'Not With the Sword But With the Pen' (doc A9), p 252; Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 127.

708. Gipps, instructions to commissioners, 2 October 1840 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), pp 12–13).

709. This was despite Gipps's evident anticipation that any necessary reserves could be set aside out of the 'considerable tracts of land' of which the Government would assume control as a result of the commission's work – that is, surplus lands: Gipps, instructions to commissioners, 2 October 1840 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), p 14); see also Gipps to Hobson, 2 October 1840 (David Armstrong, supporting papers (Wai 45 ROI, doc I4(a)), pp 213–214).

710. Gipps to Hobson, 2 October 1840 (Armstrong, supporting papers (Wai 45 ROI, doc I4(a)), pp 213–214).

711. Ward, *National Overview*, vol 2, p 34; Moore, Rigby, and Russell, *Old Land Claims* (doc H1), pp 15–17.

712. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), pp 84, 87–88. In early 1842, Hobson would try to change the scale and increase the limit of land that could be awarded, and speed up the process of surveying grants by concentrating settlement in a few districts (including the Bay of Islands and Hokianga). However, the Colonial Office disliked the abandonment of the limit and the sliding scale and disallowed the ordinance.

Kāwhia, and Waipā, between April and July. The commission would then turn its attention to the Hauraki district in June and July, and to the South Island claims later in the year. It returned briefly to the Bay of Islands and Hokianga in March 1844, and went to Kaipara for most of April. Coromandel, the Gulf Islands including Aotea (Great Barrier Island), Mahurangi, and Firth of Thames claims were heard from late May to mid-June.[713] The last reports were submitted in October 1844, bringing the work of the first commission to an end.[714]

In this district, the commission began its work by attaching a hand-written notice to the doors of the church and 'town house' at Kororāreka, giving advance notice of the first hearings.[715] The commissioners also informed the Colonial Secretary of New South Wales that their intention was to obtain 'from the best sources as full information and evidence as can be procured of the nature of the Aboriginal titles and the rights of the chiefs and others to the particular lands they may have sold or to which they claim an exclusive proprietorship against others of the same tribe'.[716] The commissioners gave the Chief Protector (Clarke) a list of claims and notice of the commission's proceedings so he could carry out his duties as 'defender of the rights and interests of the natives' at the opening hearing. Godfrey assumed that Clarke would obtain 'all the necessary information' from Māori who were affected by the claims, and ensure that rangatira attended to give evidence about their rights and interests.[717]

Aware that some Māori were complaining about 'the secrecy of the Government' regarding their lands and themselves, Clarke advised the commissioners to publish a circular in te reo (see text box) which would correct any misapprehensions. Such a measure was necessary, Clarke thought, because many of this district's Māori believed 'that the principal object of the Commission is to secure land for the Government at the expense of the Europeans'. Clarke also warned that some Māori expected the 'surplus' lands 'will revert again to them' even if 'fairly purchased'.[718]

Clarke advised that copies of the claims to be heard should be translated into Māori and sent to the chiefs named as vendors so that they could approve or protest them;[719] and that sub-protectors should be sent to a district prior to notice of hearings 'to gather the necessary information' (though, as we discuss in chapter 6,

713. The following month, Commissioner Godfrey went to Tauranga, where he investigated claims as far south as Poverty Bay.

714. Tonk, 'The First New Zealand Land Commissions', pp 77–78.

715. Armstrong, 'The Land Claims Commission' (Wai 45 R01, doc 14), p 40. The commission had planned to publish a notice in the *Bay of Islands Gazette*, but it had ceased publication.

716. Godfrey to Thompson [NSW Colonial Secretary], 9 December 1840 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 R01, doc 14), p 40).

717. Godfrey to Clarke, 8 January 1841 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 R01, doc 14), p 43).

718. Clarke to Colonial Secretary, 9 February 1841 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 R01, doc 14), pp 46–47).

719. Armstrong, 'The Land Claims Commission' (Wai 45 R01, doc 14), pp 46–47.

Circular Published by the First Land Claims Commission

Friend

This book is to inform you of the sittings of the Queen's Investigators of Land for New Zealand at *, and they will inquire as to the equity of the land sales by the Europeans from the New Zealanders, and they will then report to the Governor, who will acknowledge or invalidate them. The Governor says, the land-sellers should come at the same time with the Europeans, on the * day of the month *, to give correct evidence concerning the validity or invalidity of the purchase of your lands. Hearken! [T]his only is the time you have for speaking; this, the entire acknowledgment of your land sale forever and ever.

From your friend

W Hobson.[1]

1. Only an English version of the circular is extant: Wyatt, 'Old Land Claims' (doc E15), pp 211–212.

it is unclear how often this in fact occurred).[720] In Clarke's view, these measures would ensure the 'continuation of peace and harmony amongst the tribes and Europeans'.[721]

The first hearing at Kororāreka went ahead without Clarke (who had been delayed) or an interpreter (none had yet been appointed). Unwilling to delay proceedings, Godfrey determined that the Chief Protector could review written evidence and decide whether any rangatira should be recalled.[722] James Davis, son of the missionary Richard Davis, agreed to act as a temporary interpreter. In his preliminary report, Godfrey noted that a combination of bad weather and poor communication had made it difficult to obtain Māori evidence. There was also no surveyor available, so the boundaries could be only loosely described in the commission's recommendations.[723] The second hearing was scheduled for 10 March 1841, and was to be held in Auckland though the claims concerned land in Hokianga. Despite Clarke's objection, the hearing went ahead as planned, but from then on it

720. Clarke to Hobson, 26 February 1841 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc 14), p 47).

721. Clarke to Colonial Secretary, 8 July 1841 (cited in Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc 14), p 52).

722. Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc 14), p 44.

723. Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc 14), pp 44–45.

became standard practice to hear claims in this district near the land involved, and at various locations, though some were occasionally heard in Auckland.[724]

It is not easy to gauge Māori reaction to the land claims ordinance and the commission's work. There appear to be no extant newspaper reports of the hearings and the attendance of Māori or their demeanour. Certainly, some 'old settlers' (such as James Busby and William Powditch) were angered by the 2,560-acre limit, the Crown's decision to keep any 'surplus' above that limit for itself, and the Crown's imposition of pre-emption which prevented direct dealings with Māori.[725] Those settlers argued that the prospect of Crown interference in land arrangements had caused northern Māori the 'greatest excitement and indignation'.[726]

Similarly, early in 1842, Kororāreka residents petitioned the Legislative Council and wrote to the press, describing local Māori as being 'in a state of most dangerous irritation respecting the Government measures'. There was, they warned, 'scarcely a korero in which their grievances are not brought forward; *they do not consider themselves as British subjects*'. Māori thought the Governor had treated the settlers as slaves by assuming the right to 'meddle' with their land and had concluded that 'unless they resist the Governor in this matter, *they* [the Crown] *will treat them* [Māori] *as such*' (emphasis in original). There were rumours, it was alleged, of a 'threat . . . going round among them, that they will kill the white men, and take the white women for themselves'.[727]

Governor FitzRoy also wrote later that Māori had been 'much astonished and irritated by the interference of government with estates purchased from them previous to 1840'.[728] In particular, Hōne Heke was angry at the commission's early handling of a Kororāreka transaction he had arranged with the trader Joel Polack, which was later contested by Rewa and others of Te Patukeha. According to Buick:

> [Heke] chose to regard the proceeding as an unwarrantable interference with his right to sell his own land. So deeply did he resent this prying into his dealings that he told the gentleman who was the purchaser that he was quite prepared to close the whole argument by driving such an inquisitorial authority out of the country.[729]

This suspicion of Crown intentions was likely of greatest significance in the Bay of Islands and Hokianga, where settler claims were more numerous.[730] Indeed, in

724. Armstrong, 'The Land Claims Commission' (Wai 45 ROI, doc I4), pp 46–48; Tonk, 'The First New Zealand Land Commissions', p 83.

725. 'Opinions Adopted at a Meeting of Landowners', *New Zealand Herald and Auckland Gazette*, 19 January 1842, p 2; see also Johnson, 'The Northern War' (doc A5), p 80.

726. Busby to Hope, 17 January 1845, BPP, vol 4, p 517.

727. Letter to the editor [10 January 1842], *New Zealand Herald and Auckland Gazette*, 19 January 1842, p 2.

728. Robert FitzRoy, *Remarks on New Zealand* (London: W & H White, 1846), p 12 (cited in Wyatt, 'Old Land Claims' (doc E15), p 202).

729. T Lindsay Buick, *New Zealand's First War, or the Rebellion of Hone Heke* (1926; repr Christchurch: Capper Press, 1976), p 31; Wyatt, 'Old Land Claims' (doc E15), p 202.

730. Rose Daamen, Paul Hamer, and Barry Rigby, *Auckland*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1996) (doc H2), p 74.

Hokianga at about this time, fears about the Government's intentions for Māori lands led a recently formed Māori committee to draw up hapū boundaries and impose a rāhui on the entire district. A local missionary observed that Hokianga Māori had 'a dread of being deprived of their land and reduced to a state of servitude'.[731] These fears were further fuelled by the kauri proclamation, discussed later in section 4.4.2.2.

Māori were also reported to be dissatisfied with the commission's proceedings, especially at Kororāreka where there were numerous small claims, each requiring the claimant to pay a £5 fee. In many cases this exceeded what Māori had received in the original transaction. There is also evidence that Māori viewed the commission hearings in a completely different light from that intended by the Crown. Philippa Wyatt, who has researched Bay of Islands old land claims, questioned whether Māori saw the commission as confirming land sales, or rather as confirming their economic relationships with the settlers concerned. She noted that Māori largely relied on what 'their' settlers told them.[732] There is also evidence of Māori demanding presents in return for attending hearings, a sign that the relationship was still seen in traditional terms.[733]

Some Government officials thought reports of Māori dissatisfaction with the commission to be exaggerated. Colonial Secretary Willoughby Shortland rejected claims that Māori were 'dissatisfied with the proceedings of government' or thought that the commission would deprive them of their lands. Shortland assured the Legislative Council that

> The natives are, on the contrary, perfectly satisfied that no such intention, on the part of Government, ever existed. All the communications which the Government has received from the natives themselves, and from persons best qualified to form a correct opinion on the subject, fully disprove the assertion of the [Kororāreka] petitioners. The natives do not now, and never did, entertain an opinion, so far as regards the Government, of distrust. They have, on the contrary, shown unbounded confidence in the justice and fair dealing with which they have hitherto been treated, and know that they can rely on being similarly dealt with for the future.[734]

Godfrey told Hobson in early 1842 that Māori rarely refused to attend the commission's hearings, so long as the hearings were not too far from their kāinga. Hearings were often conducted under canvas and in Government premises, leaving the doors open (as Gipps had instructed), where possible, to alleviate any suspicion among Māori that these matters were being decided in secret.[735] Despite

731. Reverend Warren, Waimā, to WMS, 16 September 1841 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 212).

732. Wyatt, 'Old Land Claims' (doc E15), p 209.

733. Tonk, 'The First New Zealand Land Commissions', pp 84, 93–95.

734. 'Legislative Council', *New Zealand Herald and Auckland Gazette*, 9 March 1842, p 3.

735. It is unclear, however, whether this was the practice throughout Te Raki; Whāngārei cases could be heard in the Bay of Islands or in Auckland: Tonk, 'The First New Zealand Land Commissions', p 83.

the reports of mistrust, hearings in this district proceeded smoothly and were completed without major incident. There was, however, a near outbreak of warfare between Ngāpuhi and Te Rarawa at Ōruru (Mangonui) when Godfrey took his commission there in 1843.[736]

In sum, then, the Land Claims Commission was established to inquire into pre-treaty land claims, as Hobson had promised at Waitangi in 1840; but the legislation empowering the commission was based on English land law, as transplanted to New South Wales, and asserted the Crown's radical title and its associated rights to pre-emption and surplus lands, none of which were part of the treaty agreement. There is some evidence of Māori opposition to the commission's work, in part because of the Crown's claim to surplus lands, and in part because the commission was seen as interfering in Māori relationships with what many still perceived to be 'their' settlers. We will consider these matters further in chapter 6, where we make our findings about the old land claims process.

4.4.2.2 *Did the Crown neglect this district's economy or intervene in the economy in ways that affected the tino rangatiratanga of Te Raki Māori?*

When Te Raki Māori signed te Tiriti, they did so in the belief that they were strengthening the existing Crown–Ngāpuhi alliance – which had already brought significant benefits in terms of access to trade and technology. On the basis of assurances they had received during the treaty debates, they expected the Crown to use its powers to control settlers and settlement, in a manner that would bring them

> peace and prosperity, protection of their lands and other taonga, the return of lands they believed Europeans had wrongly claimed, security from mass immigration and settler aggression, protection from the French, and a guarantee of their ongoing independence and rangatiratanga.[737]

Claimants told us that in the early years of the colony, the Crown made laws that supplanted the authority of Te Raki rangatira, by enacting ordinances in 1841 that prohibited the felling of kauri, prohibited the charging of anchorage fees, and imposed customs duties on trade. The Crown had also undermined the district's economy and the Crown–Ngāpuhi partnership by moving the capital to Auckland and encouraging settlers to leave Te Raki.[738]

736. Armstrong, 'The Land Claims Commission' (Wai 45 R01, doc I4), p176; Barry Rigby, 'The Mangonui Area and the Taemaro Claim' (commissioned research report, Wellington: Waitangi Tribunal, 1990) (Wai 45 R01, doc H2), pp17–18.

737. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p528.

738. Closing submissions for Wai 1040, Wai 549, Wai 1526, Wai 1728, and Wai 1513 (#3.3.297(a)), pp36–37; closing submissions for Wai 1477 and others (#3.3.338(a)), pp30–31; claimant closing submissions (#3.3.220(a)), pp6, 9–10; claimant submissions for Wai 1968 (#3.3.551), pp24–25. Mr Porter's submissions were repeated in several other closing submissions: submissions in reply for Wai 1522 and Wai 1716 (# 3.3.548), pp25–26; claimant submissions in reply for Wai 2394 (#3.3.546), pp25–26; claimant submissions in reply for Wai 2063 (#3.3.544), pp24–26; claimant submissions in reply for

The Crown's view was that the kauri notice had been misunderstood and was not intended to prevent Māori from cutting kauri on their own lands. The Crown did not accept that it had breached the treaty by moving the capital to Auckland, submitting that it had made no promise to keep the capital in this district.[739] It acknowledged that customs duties had an impact on trade and caused Ngāpuhi concern before the fees were removed in 1844.[740] But it submitted that it had not guaranteed Te Raki Māori economic prosperity, and that economic decline occurred at least partly for reasons that were beyond the Crown's control.[741]

4.4.2.2.1 The kauri proclamation: October 1841

On 30 October 1841, the *New Zealand Gazette* published a notice prohibiting the 'stealing, cutting, or destroying [of kauri] Pine, with intent to steal the same'. According to the notice, this was a response to 'serious depredations' that had occurred in some kauri forests, combined with the Crown's desire to preserve remaining kauri 'for the use of the British Navy'.[742] In this district (and also Kaipara), the notice caused considerable alarm among Māori, who interpreted it as a general prohibition against any felling of kauri and therefore as an attack on their rights to manage their forests as they chose.[743] Nene expressed his displeasure with the kauri proclamation, perceiving it as Crown interference in what had been a lucrative and important trade. According to Henry Williams, the proclamation 'tended seriously to disturb and unsettle the minds of all classes of the community'.[744]

The proclamation broadly coincided with two other events (discussed earlier) which also heightened Māori concerns about the Crown's intentions: the arrest of Maketū;[745] and the establishment of the first Land Claims Commission.[746] As noted in those sections, by December 1841 some elements within Ngāpuhi were evidently considering war against the Crown and Pākehā.[747] As Kororāreka residents wrote to the Governor:

> It is now no longer to be concealed that the present general excitement is by no means caused by the late atrocious murder; a case in which we feel assured the natives

Wai 1477 (#3.3.547), pp 24–26; submissions in reply for Wai 2000 (#3.3.541), pp 23–26; claimant submissions in reply for Wai 2005 (#3.3.542), pp 23–26; claimant submissions in reply for Wai 2377 (#3.3.545), pp 26–29.

739. Crown closing submissions (#3.3.402), pp 56–58.

740. Crown closing submissions (#3.3.403), pp 55–56, 85.

741. Andrew Irwin, transcript 4.1.32, Waitaha Events Centre, Waitangi, p 120.

742. *New Zealand Government Gazette*, 3 November 1841, p 97 (Crown document bank (doc w48), p 147).

743. Johnson, 'The Northern War' (doc a5), pp 58–59, 64–65.

744. Williams to CMS, 1 May 1847 (as cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc a1), p 325).

745. Johnson, 'The Northern War' (doc a5), pp 56–58.

746. 'New Zealand Land Commission', *New Zealand Herald and Auckland Gazette*, 10 July 1841, p 4.

747. Johnson, 'The Northern War' (doc a5), pp 57–58.

> themselves would have inflicted due punishment; but that it has been a means of bringing into operation the general disaffection caused by the Proclamation prohibiting to cutting [*sic*] Kauri timber and the claim of preemption of land. We are perfectly aware that although these acts of the government seem not to affect Native Populations, the Natives know and feel, through the depression of trade, the full extent of the evil done to private Europeans, and consequently perceive the future [?] injury which will be inflicted on themselves in the total cessation of that trade, followed by the prospect of a deprivation of their rights and property by the assumption of power which neither they nor the Europeans who desired and seconded the introduction of a civilized government could possibly contemplate; and we feel afraid unless these measures be totally and entirely rescinded, they [Ngāpuhi] will shortly make a strong and general effort to destroy or repel the European population with a view to recover their independence.[748]

Hobson responded in January, accusing settlers of misleading Māori and 'injudiciously' circulating rumours and false information 'with a view to excite their disaffection'. He chose not to directly answer the settlers' claims about the Land Claims Commission, on grounds that colonial officials were acting in accordance with instructions from London, though he did allude to numerous 'discrepancies and unfounded assumptions' in the settlers' petition. With respect to kauri, he wrote that his notice had been 'entirely misapprehended':

> It was never intended to prevent natives from cutting timber from lands which they had not alienated, nor to interrupt persons who had preferred claims before the Commissioners, from cutting timber from the . . . lands they had claims to; but the notice applied to those who neither had nor claimed any property [yet] had taken advantage of the existing state of things to commit serious injury to the forests, knowing well that claimants could not prosecute them in the absence of any title from the Crown.[749]

But this was not clear even in the original notice, which began with a badly worded statement – given the Crown's intentions – that 'all lands purchased from the Natives . . . [were] now the property of the Crown'. So far as we can determine, the notice was never translated into Māori; but if Māori became aware of its content, they were hardly likely to be reassured; and nor were settlers whose claims were before the land commissioners. The notice continued with a series of statements about penalties for criminal acts committed on kauri trees, or in the 'koudi forests of New Zealand', or affecting the 'Koudi Pine . . . within the Colony of New Zealand' which made no reference at all to the rights of owners of lands on which the forests were growing. Hobson attempted to clarify this important point in his

748. Residents of Kororareka to Governor, 18 December 1841 (cited in Johnson, 'The Northern War' (doc A5), pp 58–59).

749. 'The Governor's Reply to the Address of the Inhabitants of Kororarika', *Bay of Islands Observer*, 24 February 1842 (Johnson, supporting papers (doc A5(a)), vol 5, pp 991–992).

later statements without taking responsibility for the shortcomings of the notice. He focused instead on the Government's efforts to address the 'delusion' about which forests were affected and 'disabuse the natives of any false notions they may have imbibed'.[750] Henry Williams intervened, attempting to ease Māori concerns about the Crown's intentions. In January, Hobson wrote to thank him for 'refuting the wanton and unworthy insinuations that were circulated amongst the natives to create rebellion'.[751]

Nonetheless, tensions remained. In March 1842, Hobson informed the Secretary of State that Māori in Kaipara were 'in a state of considerable excitement' as a result of 'unfounded and inflammatory reports', spread by the 'lower order' of settlers, that the Crown intended to seize Māori lands. As evidence of this, settlers had referred to notices published in London newspapers offering lands for settlement. Similarly, Hobson wrote, the kauri order, which was intended only to prevent 'unrestrained and profligate destruction' of valuable forests, 'was converted into the means of exciting the most alarming apprehensions that the property of the natives would not be respected, and that the treaty was a mere farce'. The 'ruffian' settlers had also taken advantage of Maketū's arrest and trial 'to show that the British Government have no respect for [Māori] rights and customs, and . . . will in a short time overturn them altogether'.[752]

Soon afterwards, Williams wrote that Bay of Islands Māori distrust of the Crown was 'palpable' and was evident among all of the rangatira he knew. Māori frequently expressed their concern 'as to the ultimate intention of Government towards the natives and their possessions, which will require every care to correct'; and as noted earlier, he expressed the view that Māori did not see English law as applying to them.[753] He referred later to Waka Nene's reaction to the proclamation: 'Waka particularly declared that if the Governor were present he would cut down a Kauri tree before him and see how he would act.'[754] We note that Nene was far from the only rangatira who understood the notice as applying to Māori lands. The chiefs Mahe and Barton wrote to Governor FitzRoy in 1844 asking whether it was 'a just act to seize the Kauri of the forests' and therefore deprive Māori of an important source of income.[755]

Mr Johnson, in his evidence about the Northern War, saw the kauri proclamation as part of a broader pattern in which the Crown had begun to assert its effective authority over Te Raki Māori:

750. 'The Governor's Reply to the Address of the Inhabitants of Kororarika', *Bay of Islands Observer*, 24 February 1842 (Johnson, supporting papers (doc A5(a)), vol 5, pp 991–992).

751. Hobson to Williams, 24 January 1842 (cited in Carleton, *The Life of Henry Williams*, vol 2, app, p xxi).

752. Hobson to Secretary of State for the Colonies, 12 March 1842, BPP, vol 3, p 543.

753. Williams to Busby, 20 April 1842 (cited in Carleton, *The Life of Henry Williams*, vol 2, app, p xxii).

754. Enclosure in H Williams to CMS, 1 May 1847 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 325).

755. *Daily Southern Cross*, 17 February 1844 (Daamen, *The Crown's Right of Pre-emption*, p 123).

> [I]n some senses it was immaterial whether the timber regulations applied to Maori or not. The fact was that the governor's proclamation was perceived as another law or act seen to be impinging on rangatiratanga, supposedly protected by Te Tiriti. While from a British perspective, these laws might have seemed necessary for the foundation of a colony, to Maori, and Ngapuhi in particular, they directly conflicted with rangatiratanga and economic survival.[756]

Crown counsel acknowledged that Māori had understood the ordinance as an attack on their authority. During hearings, counsel told us that Nene's response reflected his understanding that 'despite signing the Treaty, he retained some kind of authority':

> when Nene thought . . . that [the] ordinance was going to apply to his lands he rejected that concept. And so his understanding was, it is not as simple as, 'I am loyal to the Queen and therefore I have to accept the authority of the British.' That was not his understanding in 1841.

Asked if Nene understood the treaty as meaning that he retained authority over his own people while the Crown acquired authority over settlers, counsel responded: 'In that individual circumstance yes.' Counsel then added that Nene also showed the same understanding of te Tiriti in his conduct in the lead-up to the Northern War.[757]

Historians Bruce Stirling and Richard Towers noted that the kauri proclamation was not an isolated measure, but one of several steps the Crown had taken to assert its control over the kauri trade. On the basis of its newly proclaimed sovereignty, the Crown had asserted its underlying or radical title over the lands of New Zealand; it had then imposed Crown pre-emption; and subsequently had 'stretched the concept of Crown pre-emption still further to include timber cutting agreements'.[758] Hobson had furthermore reserved forests for naval use and provided that 'Crown licences were required for timber cutting'.[759] In November 1841, Hobson gazetted his intention to preserve areas of kauri forest for naval purposes and to prosecute those who misused the forest. Historian Michael Roche added that Hobson had no way of policing the regulations.[760] Even if Hobson's kauri proclamation was not aimed at Māori lands, the cumulative impact of the Crown's various policies in the far north, leading to loss of Pākehā settlers and markets, was to undermine a trade that to this point had been extremely lucrative for Māori in Hokianga and elsewhere.[761]

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756. Johnson, 'The Northern War' (doc A5), p 65.
757. Andrew Irwin, transcript 4.1.32, Waitaha Events Centre, Waitangi, pp 37–38.
758. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 441.
759. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 441.
760. Wendy Pond, *The Land with All Woods and Waters*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997), p 40.
761. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 448–449.

We heard conflicting evidence on the tangible impacts of the kauri proclamation in this district. Dr Phillipson told us, 'Inevitably, the Government's authority was ignored.'[762] That certainly appears to have been the case in Mangakāhia, where Te Tirarau and other leaders entered kauri-cutting arrangements and private land transactions without feeling any need to involve the Government in the process. In that area, the kauri industry appears to have grown during the 1840s, though the market was volatile. Informal (or illegal) arrangements continued well into the 1850s and beyond.[763] In Hokianga, where timber had been a vital export commodity prior to 1840, Stirling and Towers concluded that the Crown's restrictions on the kauri trade were causing real economic harm by 1844, leaving once wealthy Māori in a state of 'debt and distress . . . relying on credit for goods they could once well afford';[764] indeed, the economic downturn in that district was 'just as severe' as in the Bay of Islands.[765]

4.4.2.2.2 Customs duties and anchorage fees: June 1841

Another significant point of tension between the Crown and Māori during these early years concerned control of trade. As discussed in our stage 1 report, the 1820s and 1830s had seen rapid growth in the district's economy thanks to visiting whalers, and exports of flax, timber, and kauri gum, as well as food cargoes to New South Wales. By 1839, New Zealand exports, much of them leaving from the Bay of Islands, were worth more than £72,000 in Sydney.[766] In turn, this rapid growth had created significant demand for services, including shipbuilding and carpentry, accommodation, liquor, and prostitution.[767] One small but nonetheless lucrative element of this trade was the charging of anchorage fees. This practice emerged during the 1830s, with rangatira charging up to £5 per vessel to anchor at coastal sites around the Bay of Islands. The fees went to the rangatira with mana over the area: Te Wharerahi or Rewa for Kororāreka; Pōmare II for Ōtuihu; Hōne Heke for Paihia and Waitangi; and Te Kapotai leaders for Waikare.[768] As Mr Johnson explained:

> This was a well-established system administered by the leading rangatira in the Bay of Islands and represented a tangible extension of rangatiratanga. Ngapuhi were mindful of the importance of the total quantity of trade and for this reason, levied a flat fee on each vessel, rather than separate customs fees on the amount or type of

762. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 325.
763. Thomas, 'The Crown and Maori in Northern Wairoa' (doc E40), pp 36–37.
764. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 448–449.
765. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1094; Bayley, 'Aspects of Maori Economic Development' (doc E41), p 49.
766. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 239.
767. Kathleen Shawcross, 'Maoris of the Bay of Islands, 1769–1840: A Study of Changing Maori Responses to European Contact' (MA thesis, University of Auckland, 1967), pp 332–334, 351.
768. Johnson, 'The Northern War' (doc A5), p 65; Te Kapotai Hapu Korero (doc F25), p 27. James Cowan, in his history of the New Zealand Wars, says Heke split his fees with the Ngāti Rēhia leader Tītore: James Cowan, *The New Zealand Wars: A History of the Maori Campaigns and the Pioneering Period*, 2 vols (Wellington: R E Owen, 1955), vol 1, p 16.

produce imported or exported. The fee also recognised the value of trade to Maori in the Bay of Islands.[769]

With 170 ships visiting during 1839, these fees were a significant contribution to the district's then thriving economy.[770] While the Bay of Islands was the principal trading settlement, other harbours – Hokianga, Whangaroa, and Mangonui – were also important in their own right.[771] Claimants told us that Pororua of Te Rarawa charged anchorage fees at Mangonui, and Te Taonui charged fees 'for all ships passing the narrows at Kohukohu' in the Hokianga Harbour.[772] We also received evidence that Roera Makere charged anchorage fees at Waitapu.[773] As we discuss later, rangatira who signed te Tiriti expected that a closer relationship with Britain would protect their rights and interests, thereby securing the conditions for further increases in material prosperity.[774]

From October 1840, the New South Wales legislature began to assert its authority over trade and commerce in New Zealand, passing an ordinance requiring that all liquor importers and sellers must be licensed, and empowering Hobson to grant licences in return for a fee of £30.[775] This had obvious application to Bay of Islands settlements such as Ōtuihu and Kororāreka with their numerous grog shops. According to Arapeta Hamilton (Ngāti Manu, Te Uri Karaka, Te Uri o Raewera), among the Crown's early targets 'were the two grog shops at Otuihu Pa – the Eagles Inn and the Sailors Return. . . . Hobson decreed that all establishments selling grog had to be licensed by the Crown, and Pomare's two grog shops did not get licenses.' We do not know whether Pōmare and other rangatira complied with the ordinance, but it seems more likely that they simply ignored it.[776]

Subsequently, on 17 June 1841, the New Zealand Customs Ordinance came into force, reflecting Hobson's instructions from London. This provided that no goods could enter New Zealand except under the supervision of customs officers, and set out detailed requirements for the declaration, inspection, and storage of imported goods, with substantial penalties (potentially including forfeiture of vessels) for smuggling or other breaches. A schedule provided for duties on wine (15 per cent), spirits (four or five shillings per gallon), tobacco (ninepence to one shilling per gallon), food staples such as flour and other grains (5 per cent), and all

769. Johnson, 'The Northern War' (doc A5), p 65.

770. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 240.

771. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, chapter 5; in particular, see pp 239–240, 243–245, 267, 275–276.

772. Pairama Tahere (doc G17(b)), p 44; Murray Painting (doc V12), p 14.

773. Ruiha Collier (doc G13), p 24.

774. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 524, 528; Phillipson, answers to questions for clarification (doc A1(e)), pp 5–6.

775. 'Government Gazette dated October 31, 1840', *The Sydney Monitor and Commercial Advertiser*, 6 November 1840, p 2. The ordinance also provided that recently imposed New South Wales customs duties would not apply in New Zealand until 1 July 1841. Duties on unmanufactured tobacco were further deferred to 1 January 1843, apparently to avoid conflict with Māori: 'Customs Duties in New Zealand', *New Zealand Gazette and Wellington Spectator*, 3 October 1840, p 3.

776. Arapeta Hamilton (doc F12(a)), p 12.

other goods (10 per cent).[777] According to Johnson, the Government subsequently designated the Bay of Islands, Hokianga, and Whāngārei as official 'ports of entry', meaning goods could be imported only through these harbours. Whangaroa was excluded.[778]

Johnson also told us that the ordinance 'prohibited chiefs from charging anchorage fees',[779] and other witnesses repeated this view.[780] The Crown argued that this was untrue. It submitted that the ordinance 'provided a code for the importation of goods into New Zealand' but 'did not contain any provision that prohibited the ability of rangatira to charge anchorage fees in harbours as they had done'.[781] The Crown furthermore submitted that there was some evidence of Heke continuing to charge 'victualling rights' (for anchorage and supplies) after the ordinance was imposed. It speculated that other rangatira might have also done so, though it provided no evidence of this occurring after 1840.[782]

We agree with the Crown that the ordinance did not explicitly prohibit anchorage fees. Nonetheless, it is clear that the ordinance – and indeed the mere existence of customs officials – imposed practical difficulties in the way of collection of these fees by rangatira. James Cowan, in *The New Zealand Wars*, described the anchorage fees as 'a kind of Customs dues', and reported that Heke and other rangatira collected the fees before ships had anchored, boarding them as they rounded Tāpeka Point.[783] The ordinance provided for customs officials to board ships and required that ships' masters report to customs officials with details of their cargoes.[784] We can reasonably presume that masters and captains would have been reluctant to allow their ships to be boarded twice by competing authorities, and unwilling to pay two sets of duties. In historian David Alexander's view, the Crown was 'heavily dependent for its own income on duty charged on imports'

777. Customs Ordinance 1841. This repealed the existing New Zealand Customs Ordinance 1840, enacted by the New South Wales Legislative Council; for the table of duties see 'Table of Duties of Customs', 25 June 1841, *New Zealand Gazette*, no 1, p 4 (Crown document bank (doc w48), p 144).

778. Johnson, 'The Northern War' (doc a5), p 66.

779. Johnson, 'The Northern War' (doc a5), p 65.

780. For example, see Manuka Henare, Angela Middleton, and Adrienne Puckey, 'He Rangi Mauroa Ao te Pō: Melodies Eternally New' (commissioned research report, Kawakawa: Te Aho Claims Alliance, 2013) (doc e67), pp 247–248; Manuka Henare, Hazel Petrie, and Adrienne Puckey, 'He Whenua Rangatira: Northern Tribal Landscape Overview (Hokianga, Whangaroa, Bay of Islands, Whāngārei, Mahurangi and Gulf Islands' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2009) (doc a37), pp 631–632; Willow-Jean Prime (doc f25(a)), p 8; Pairama Tahere (doc g17(b), p 43; Manuka Henare (doc o20), pp 27–28; 'Amended Te Awa Tapu o Taumarere and Te Moana o Pikopiko i Whiti' (doc m30(a)), p 29.

781. Crown closing submission (#3.3.403), p 56.

782. David McGill, *Guardians at the Gate: The History of the New Zealand Customs Department* (Wellington: New Zealand Customs Department/Silver Owl Press, 1991), p 22 (cited in Crown closing submission (#3.3.403), p 56). The Crown also cited the *Report on the Muriwhenua Fishing Claim* to support a view that pilotage fees might have been charged; that report gave one example of a pilotage fee being charged in 1833: Waitangi Tribunal, *Report on the Muriwhenua Fishing Claim*, p 61.

783. James Cowan, *The New Zealand Wars: A History of the Maori Campaigns and the Pioneering Period* (Wellington: R E Owen, 1955), vol 1, p 16.

784. Customs Ordinance 1841, ss 11, 14–16.

and therefore 'took over control of ship visits at an early stage, and prevented Maori from continuing to enjoy an income from that source'.[785] Mr Hamilton told us that the Crown did explicitly forbid Māori from charging fees. Recalling what his elders had told him about the early post-treaty years, he said:

> The ink had barely dried on Te Tiriti when Hobson rowed over to Otuihu to tell Pomare that he could no longer collect tolls on the ships as they did not belong to him but that they belonged to the Queen. This was the first recorded incident of the marginalization of Pomare by the Crown. Hobson's actions greatly angered Pomare and the other chiefs in the Bay. The anchorage fees formed a great part of their wealth in those days (to anchor a ship they were paid either five pounds sterling or one musket).[786]

In any case, the Bay of Islands trade entered a steep decline after the ordinance was enacted. As Johnson explained, most of the ships entering the Bay of Islands were whalers, which operated on principles of free trade. Kororāreka had flourished in accordance with these principles, with rangatira carefully managing relationships to ensure that the fees they charged for anchorage and other services did not discourage trade:

> There were a number of other towns on the whaling routes, such as Apia, Levuka, Honolulu, Valparaiso and Papeete, all competing with Kororareka. It appears that, upon the imposition of the government regulations, that whaling captains and other traders simply packed up and shipped off to another port town that supported free trade. The downturn that the departure of the whalers caused, hit Kororareka and the north hard.[787]

Johnson acknowledged that other factors also contributed to economic decline, including the Crown's decision to move the capital to Auckland. Nonetheless, the ordinance was at the very least a significant contributing factor.[788] For example, George Clarke junior later wrote:

> The Bay of Islands was at the time of the cession of New Zealand, the great resort of whaling ships, French, English and especially American. There were often as many as twenty whalers anchored at Kororareka at the same time, and of course there was a large trade between them and the natives. The proclamation of British sovereignty changed it all. The immediate result of imposing Customs regulations, was to destroy this local commerce, and the Ngapuhi tribe, from being the richest and most prosperous in the country, sunk rapidly into poverty. The port was deserted, and the [Maiki

785. David Alexander, 'Land-based Resources, Waterways, and Environmental Impacts', report commissioned by Crown Forestry Rental Trust (doc A7), p 57.
786. Arapeta Hamilton (doc F12(a)), pp 11–12.
787. Johnson, 'The Northern War' (doc A5), p 67.
788. Johnson, 'The Northern War' (doc A5), p 67.

> Hill] flag-staff [flying the British flag] and what it meant was the visible cause of the evil.[789]

Another settler noted in 1846 that the economic decline also led to an exodus of settlers, the 'government . . . drove the whaling ships entirely away by their obnoxious [customs] measures, and as they were the staple support of the place, the inhabitants began to remove themselves'.[790] With falling trade and an exodus of settlers, the prices of food crops also collapsed, further fuelling a spiral of decline.[791]

According to Johnson, Ngāpuhi 'reacted strongly' to this imposition of Crown authority over their trading relationships, and to the resulting loss of income.[792] He noted that their concerns were as much about relative authority as about economic benefits:

> The colonial government's decision to impose customs duties and prohibit the anchorage fees formerly controlled by Maori chiefs marked a major change in relations between Northern Maori and the Crown. From this act it became abundantly clear that the British kawana intended to make laws that supplanted the authority of rangatira.[793]

The imposition of duties was one of the principal motives behind Heke's first attack on the Maiki Hill flagstaff in June 1844: as one settler wrote, Heke felled the flagstaff because it 'drove all the shipping away and caused them (the natives) to have no trade'.[794] At a major hui at Waimate on 2 September (see also chapter 5, section 5.4), called in response to the arrival of British troops in the Bay of Islands, other Te Raki rangatira spelled out their grievances about the decline of the whaling trade and the parlous state of the district's economy:

> The cause of the discontent they plainly and forcibly stated to be their present extreme poverty and depression, because of the restrictions on the sale of their lands, and more especially the injury which they had sustained since the whaling ships, and other traders had ceased to visit their ports. In consequence of which they were now unable either to dispose of their produce, or to obtain those articles of European trade and manufacture, to which they had been accustomed, and had so easily and cheaply procured before the establishment of the Government.[795]

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789. George Clarke, *Notes on Early Life in New Zealand*, pp 68–69 (cited in Johnson, 'The Northern War' (doc A5), pp 66–67).

790. John Weavell to Alfred Wilson, 25 January 1846 (cited in Johnson, 'The Northern War' (doc A5), p 69).

791. Henare, Petrie, and Puckey, 'He Rangi Mauroa Ao te Pō' (doc E67), p 247.

792. Johnson, 'The Northern War' (doc A5), p 66.

793. Johnson, 'The Northern War' (doc A5), p 65.

794. Weavell to Wilson, 25 January 1846 (cited in Johnson, 'The Northern War' (doc A5), p 91).

795. 'Successful and Amicable Settlement of the Native Disturbance at the Bay of Islands', *Daily Southern Cross*, 7 September 1844, p 2.

FitzRoy was already aware of the harm caused by the duties. In April 1844, he reported to Lord Stanley:

> At this time there are about 10 sail of Whaling Ships, besides other vessels, lying there [in the Bay of Islands]: and were it not for the Customs regulations, probably thirty or forty sail of vessels would be seen there, at one time – as was the case formerly.[796]

Yet, in June, the ordinance was amended, increasing the duties on wine and imposing new duties on ales and munitions, while reducing the duty on general goods.[797] By September, facing a potentially disastrous conflict with Ngāpuhi (discussed in chapter 5), the Governor relented. Shortly before the hui at Waimate, FitzRoy called together the Russell settlers 'and informed them that the Bay of Islands was to be henceforth a Free port, and that the Custom House officers would be immediately removed'. FitzRoy's unilateral suspension of the ordinance had not been authorised either by the Legislative Council or the Colonial Office. Nonetheless, the Governor had judged it to be the price of Ngāpuhi support against Heke; he acted before the hui because he wanted to be seen as acting voluntarily, not responding to Ngāpuhi pressure. At a subsequent hui at Waimate, he told the assembled rangatira:

> I have found that some of the regulations of the Government about ships, and goods brought in them, have been injurious, have done harm to those who live near the Bay of Islands. Being truly desirous of promoting the welfare of the settlers among you, and yourselves, I have altered those regulations; and you will in future be able to trade freely with all ships.[798]

In the view of the *Daily Southern Cross*, the Governor was clearly acting to prevent other rangatira from joining Heke in a general Ngāpuhi uprising against the Crown's control of the district's trade:

> He might have saved a little revenue by keeping up the Customs at the Bay of Islands, but the attempt to do so would cost England a thousand times the amount before the Natives were subdued, and his own name and that of his country would be hatefully remembered as the destroyers of the Aborigines of Zealand. He has acted differently, and we earnestly trust the Home Government will approve of his conduct.[799]

The Legislative Council soon afterwards held an urgent meeting to abolish customs duties throughout the colony, replacing them with a property tax. Addressing

796. FitzRoy to Stanley, 10 April 1844 (cited in Johnson, 'The Northern War' (doc A5), p 72).
797. Johnson, 'The Northern War' (doc A5), p 67.
798. 'Successful and Amicable Settlement', *Daily Southern Cross*, 7 September 1844, p 2.
799. 'Successful and Amicable Settlement', *Daily Southern Cross*, 7 September 1844, p 2.

the Council, FitzRoy presented the change as a response to two related concerns: first, 'the critical nature' of Crown–Māori relations, 'owing in a great measure to the operations of the Customs Ordinance'; and secondly, the fact that the suppression of trade had left the colony without any source of funds.[800] Soon afterwards, the Governor wrote to Lord Stanley seeking his approval for the measure, and for these decisions,

> The effect of the Customs' establishment in New Zealand has been most pernicious, and, if continued, would be fatal to the prosperity of the colony, not only in a commercial point of view, but in a political sense, for it would alienate from us a large portion of the aborigines, would cause open opposition, indeed, rebellion, and involve us not only in hostilities with the native race, but possibly with France or America.[801]

Māori, being 'so jealous of their independence', would 'not long endure' a Government that prevented them from trading freely in their respective ports, or imposed duties that obliged them to pay higher prices for their tobacco, clothing, and tools.[802]

Yet, only seven months later the Government reversed its decision and reintroduced the duties. As Dr Phillipson explained, the abolition of duties did not materially improve Te Raki Māori economic circumstances. More importantly from FitzRoy's point of view, the Colonial Office had been 'astonished' to see the Governor ridding himself of his main source of taxation. When the property tax also failed to gather sufficient revenue for the colony, FitzRoy's hand was forced – the Government had to obtain revenue from somewhere.[803]

4.4.2.2.3 What were the impacts of the Crown's decision to move the capital to Auckland?

Ngāpuhi resentment of growing economic difficulties was exacerbated by the Crown's decision to move its capital away from the Bay of Islands, and the economic situation continued to worsen.[804] When Te Kēmara rose to close the treaty debate at Waitangi on 5 February, he asked where Governor Hobson might live. With the missionaries and the former British Resident James Busby having claimed so much Bay of Islands land, Te Kēmara said, there was 'no place left' for the Governor. In response, Busby said the Governor would live at Waitangi.[805] Indeed, just the previous day, Hobson had signed an agreement to rent Busby's

800. 'Legislative Council', *Daily Southern Cross*, 21 September 1844, p 2. The meeting took place on Tuesday 19 September, a week after FitzRoy's hui at Waimate. The Property Rate Act 1844 came into effect on 28 September.

801. FitzRoy to Stanley, 16 September 1844 (Crown document bank (doc w48), p 164).

802. FitzRoy to Stanley, 16 September 1844 (Crown document bank (doc w48), p 165).

803. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 313.

804. Johnson, 'The Northern War' (doc A5), pp 66–67.

805. Te Kēmara, quoted in W Colenso, *The Authentic and Genuine History of the Signing of the Treaty of Waitangi* (Wellington: Government Printer, 1890), p 27 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 129)).

home for the substantial sum of £200 a year.[806] Te Kēmara responded by rushing up to Hobson and shaking his hand.[807]

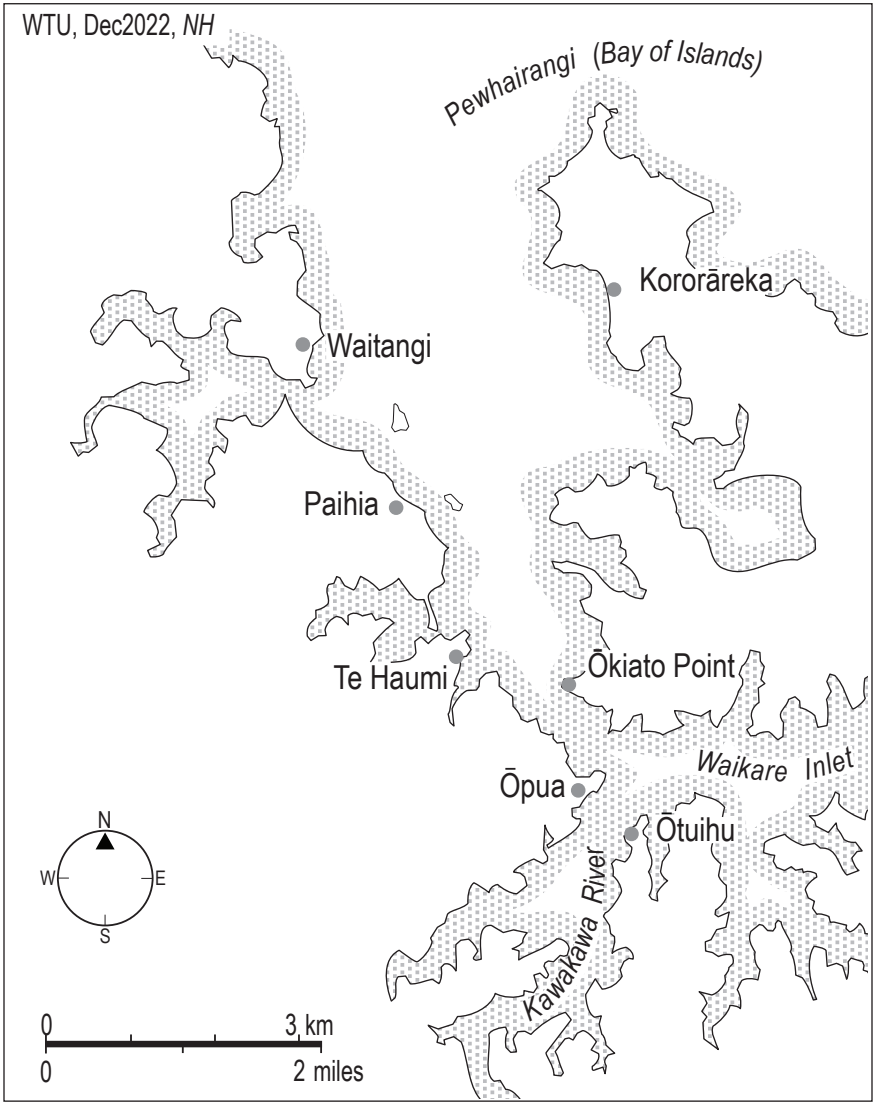
While Hobson made no specific promise to establish or keep the capital at Waitangi, there is no record either of his contradicting Busby's assurance.[808] In Ms Wyatt's view, 'to have had the Governor living on his land, under his protection (an interesting paradox), would have been of great moment to any chief, not to mention the significant revenue generated by his presence'.[809] Dr Phillipson, likewise, argued that Ngāpuhi leaders signed te Tiriti believing that the Governor would live among them, establish a Government town, and bring settlers, trade, and prosperity.[810] More particularly, Te Kēmara signed te Tiriti believing he would 'get the Governor as his Pakeha'.[811]

In fact, Hobson did not follow through on his agreement to rent Busby's house, and the capital was never established at Waitangi.[812] After te Tiriti was signed, Hobson based himself briefly at Paihia before moving to Okiato Point, which he established as his capital and renamed 'Russell' in honour of the Secretary of State.[813] The land at Okiato Point was acquired from the trader James Reddy Clendon, whose station had been established under the protection of the Ngāti Manu rangatira Pōmare II. According to the Ngāti Manu kaumātua Arapeta Hamilton, when Pōmare initially refused to sign te Tiriti, Hobson made his signature a priority.[814]

Mr Hamilton told us that the Governor and Pōmare 'met at Otuihu on a number of occasions to discuss Te Tiriti', but it was the trader Clendon who induced Pōmare to sign. In particular, what swayed Pōmare was the suggestion that New Zealand's first capital would be established on Clendon's land at Okiato Point, and therefore 'great trading opportunities' would come Pōmare's way'.[815]

Mr Hamilton also related Pōmare's response to these events, which demonstrated hope for future benefit mixed with scepticism about whether the Governor would deliver the expected results:

806. Wyatt, 'Old Land Claims' (doc E15), p 207.
807. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 129.
808. Phillipson, answers to questions for clarification (doc A1(e)), p 1; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 310.
809. Wyatt, 'Old Land Claims' (doc E15), p 207.
810. Phillipson, answers to questions for clarification (doc A1(e)), p 1; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 310.
811. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 129.
812. Orange, *The Treaty of Waitangi*, p 50 n After the signing, the surveyor-general Felton Mathew advised that Waitangi was not suitable for a substantial settlement, and also asked whether Hobson was willing to allow private speculators to control settlement of the district: Islands Mathew to Hobson, 23 March 1840, BPP, vol 3, pp 492–493.
813. Phillipson, 'Bay of Maori and the Crown' (doc A1), pp 307–308; Johnson, 'The Northern War' (doc A5), pp 68–69. The government buildings at Okiato Point were destroyed by fire in 1842, and the site fell into disuse. The name 'Russell' was later transferred to Kororāreka, whereas Okiato Point is sometimes referred to as 'Old Russell'.
814. Arapeta Hamilton (doc F12(a)), p 10.
815. Arapeta Hamilton (doc F12(a)), p 10.



Map 4.1: Ōkiato Point and environs.

He ngawari te ki ko ahau to hoa[.] Engari a Kapitana Hopihana e mohio he tino hoa a Kerenana ki a matou. Kahore ahau [i te] mohio ka taea e ia. E hoatu ana nga tau e toru. Tena pea a tera wa ka kitea e tatou mehemea he tino hoa ia e kahore ranei. He tangata whai rawa a Pomare i tenei wa. Aini pea ka pohara ia[.] Ka kite ahau a tera wa ka taea te maori pohara e tahanga ana ki tona kuaha Ka tukua he paraikete he kai mena e matekai ana. He ngawari noa iho te ki Ko ahau to hoa Ka hoatu ahau ki a Kapitana Hopihana nga tau e toru ki te whakatau ana korero.

> It is very easy to say I am your friend[.] However Captain Hobson does not know what a good friend Clendon has been to us. I do not know that he (Hobson) can even achieve it, I will give him 3 years. By then we will truly see whether he is a true friend or not. Pomare is a rich man at this time. Perhaps one day he will be poor[.] I will see at that time if a poor naked Maori arrives at his door whether a blanket will be given to him and food for him to eat. It is easy to say I am your friend but I will give Captain Hobson 3 years to really prove his words to us.[816]

Pōmare then promised to return with Te Tirarau, Kawiti, and other chiefs to sign it on a later date, and did so – though Kawiti refused to sign.[817] Hobson was aware that Clendon had a close relationship with Pōmare, and that – because of his role as United States consul – he was seen as neutral in the matter.[818] The American naval commander Charles Wilkes, who was then visiting the district, recorded that Clendon and others 'were made to understand that their interests would be much promoted if they should forward the views of the British Government'. From this time, '[e]very exertion was now made by these parties to remove the scruples of the chiefs'.[819] Ms Wyatt acknowledged that it was not possible to determine exactly what was promised to Clendon, but noted that Hobson agreed to buy Okiato Point soon after Pōmare signed te Tiriti. While it could not be proved that the two events were linked, it 'certainly seems . . . that this is what occurred'.[820] Indeed, Clendon later claimed that it was only through his influence that Pōmare signed.[821]

We note, however, that Hobson had other reasons for choosing Okiato. After the signing of te Tiriti, the Surveyor-General Felton Mathew had investigated the lands around the Bay of Islands, determining that Waitangi's exposed location and shallow waterways made it unsuitable for a substantial settlement. Mathew also advised against Kororāreka, and recommended Okiato as 'the only spot in the Bay of Islands which is at all suitable for a settlement, or calculated for the purposes of the Government'. It had a deep harbour, sheltered anchorage, sufficient land for a town, abundant water and timber, and a location – near the mouth of the Kawakawa River – that was particularly suitable for communication with the interior. Furthermore, it already had sufficient buildings to house the Crown's officials and troops, and for offices, stores, workshops, and boatbuilding yards. But even then he regarded the Bay of Islands as too far north for a capital, and its terrain too 'rugged and impracticable'; Mathew therefore recommended that a Government town be established at Okiato, while the capital was established elsewhere.[822]

816. Arapeta Hamilton (doc F12(a)), p 11. Another account is given in Nancy M Taylor (ed), *The Journal of Ensign Best*, pp 221–222.
817. Best, *The Journal of Ensign Best*, pp 219–222.
818. Wyatt, 'Old Land Claims' (doc E15), pp 206–208.
819. Wilkes, extract from journal (cited in Buick, *The Treaty of Waitangi*, p 149 n; Wyatt, 'Old Land Claims' (doc E15), p 206).
820. Wyatt, 'Old Land Claims' (doc E15), p 207.
821. Wyatt, 'Old Land Claims' (doc E15), p 208.
822. Mathew to Hobson, 23 March 1840, BPP, vol 3, pp 492–493; Philipson, 'Bay of Islands Maori and the Crown' (doc A1), p 308.

In April 1841, Hobson agreed to buy the 300-acre Okiato site for the very substantial sum of £15,000; he later wrote to the New South Wales Governor Sir George Gipps seeking to excuse himself for incurring 'so great an expense' without permission, his hand having been forced by the arrival of a ship carrying settlers from Sydney, who otherwise had nowhere to establish themselves.[823] The Colonial Office subsequently rebuked Hobson for exceeding his authority, indicating that it would only reluctantly allow the deal to go ahead. Hobson was instructed to enter no further land transactions without explicit authority.[824]

Okiato therefore became a temporary capital, while Hobson's agents investigated other options. Even before te Tiriti had been signed, Henry Williams had recommended that the capital be established at Waitematā, which offered several advantages: a more central location, a larger port, better river communication, and more land available for the development of a town, as well as plentiful timber and fertile soil. After a series of investigations and much lobbying from settlers in other parts of the colony, Auckland was confirmed as the new capital on 17 September 1840.[825] Land was acquired in September and October 1840,[826] and the Governor moved there between January and March 1841, along with his staff and troops, leaving only the police magistrate, a sub-protector, and a few constables in the Bay of Islands. It was barely a year since te Tiriti had been signed.[827]

While investigating Waitematā, Crown officials also turned their attention to the Mahurangi Harbour – its sheltered nature, abundant kauri, and sparse population in their view making it an ideal location for a Government settlement. Accordingly, in April 1841 George Clarke senior negotiated with Hauraki rangatira for rights to all territories from the North Shore to Te Ārai. As Dr Rigby noted in his history of Mahurangi lands, this vast territory – some 190,000 acres – was already subject to numerous old land claims; it was also highly contested among Māori, with Marutūāhu (Hauraki), Ngāti Whātua, and Te Kawerau a Maki groups all claiming occupation and usage rights. This initial purchase would therefore set off a chain of additional transactions lasting well into the 1850s. A second transaction covering lands from Te Ārai to Bream Tail was similarly complex. These transactions, so far as we can determine, were the sum total of Crown engagement with Mahurangi Māori during these early post-treaty years.[828]

823. Hobson to Gipps, 21 April 1841, BPP, vol 3, pp 494–495. Under the agreement, Clendon was to be paid £1,000 when the Government took possession on 1 May 1840, and another £1,000 on 1 October. The remaining £13,000 was due on 1 April 1841, with an additional 10 per cent interest. The Executive Council later agreed to grant Clendon scrip of 30 acres for each acre he had given up at Okiato, subject to his title being confirmed by the Land Commission, and to pay him rent in the meantime.

824. Stanley to Hobson, 10 May 1842, BPP, vol 3, pp 496–497.

825. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 307–308; Johnson, 'The Northern War' (doc A5), pp 68–69.

826. Waitangi Tribunal, *The Orakei Report*, pp 22–23.

827. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 307–308; Johnson, 'The Northern War' (doc A5), pp 68–69; Waitangi Tribunal, *The Orakei Report*, p 23.

828. Barry Rigby, 'The Crown, Maori, and Mahurangi, 1840–1881', report commissioned by the Waitangi Tribunal, 1998 (doc E18), pp 2, 6–7, 20.

The removal of the capital to Auckland was a significant blow to Ngāpuhi. As Dr Phillipson explained, not only had they 'lost the Governor as their Pakeha' but also the anticipated economic prosperity that went with him. 'Not only that, but it had been lost to their traditional enemies, Ngati Whatua.'[829] Johnson noted that what was more, Ngāpuhi had spent at least two generations nurturing their relationship with the British, and had built what they saw as a significant alliance with the Crown offering prosperity and protection. When Hobson decided to move from the Bay of Islands, rangatira saw him as spurning this long-term relationship.[830] Murray Painting of Te Pōpoto said the decision to remove the capital caused a loss of mana for Bay of Islands hapū.[831]

The decision had significant economic impacts. According to Johnson, there was 'a notable exodus of people and economic industry from the Bay of Islands'.[832] At September 1841, David Alexander reported, the 'combined European population of the Bay of Islands, Hokianga and Kaipara would have been less than 500'.[833] This compares with estimated 1839 populations of between 500 and 600 in the Bay of Islands and 200 in Hokianga, with 100 or so others in Whangaroa and Mangonui.[834] In turn, this drew trade and shipping away from the Bay of Islands, deepening the impacts of the customs regulations and helping to create the conditions for economic depression.[835] Crown officials acknowledged these impacts on several occasions. In April 1844, for example, FitzRoy reported that the Bay of Islands trade had been 'much checked subsequent to the removal of the Local Government to Auckland'.[836] Later, in September, Chief Protector Clarke visited several communities to calm tensions after the Waimate hui. At Hokianga, leaders such as Taonui and Patuone explained how the decision to remove the capital had harmed their relationship with the Crown:

> they said they were now extremely poor; a few years ago they were able to procure not only necessaries, but luxuries; now they were reduced, as I might see, to an old thread-worn blanket; and they had been given to understand that this was in consequence of their having signed the Treaty of Waitangi.[837]

829. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 306. As the Orakei Tribunal noted, the results for Ngāti Whātua were mixed. On the one hand, the arrival of the Crown provided some additional protection from attack by Ngāpuhi, which they continued to fear, and provided significant economic opportunities; on the other, the settler population quickly outstripped that of Māori, leading to rapid alienation of much of Auckland's land: Waitangi Tribunal, *The Orakei Report*, pp 24–25.

830. Johnson, 'The Northern War' (doc A5), pp 69–70.

831. Murray Painting (doc V12), p 25.

832. Johnson, 'The Northern War' (doc A5), p 69.

833. Alexander, 'Land-based Resources, Waterways, and Environmental Impacts' (doc A7), p 57.

834. Adams, *Fatal Necessity*, pp 26–27; Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 239.

835. Johnson, 'The Northern War' (doc A5), pp 68, pp 72–73; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 307.

836. FitzRoy to Stanley, 10 April 1844 (cited in Johnson, 'The Northern War' (doc A5), p 72).

837. Clarke to Colonial Secretary, 30 September 1844 (Crown document bank (doc W48), p 276).

Whereas previously there were ready markets for their produce, they were now travelling from one end of the Hokianga estuary to the other, in order to sell enough for a little tobacco:

> They had been told that the reason the Europeans could not now buy their produce was, that the demands of the Government for money were so great, that they had none to buy their produce; they confessed they felt these remarks, especially as they (from a conviction that their approval of the late Governor, and signing the treaty would tend to prosperity) had taken such an active part in getting the treaty signed; and after having taken such an active part in welcoming the Governor, and then to see him removing from them to Auckland was too much for them, and not treating them well.[838]

Expert witnesses Drs Manuka Henare, Hazel Petrie, and Adrienne Puckey noted that since 1820, rangatira had deliberately fostered the Bay of Islands as a trading port, forming alliances with traders, colonial officials, and successive monarchs. This allowed them to benefit from the bay's natural advantages: its anchorage, plentiful supplies of timber, and proximity to Australia and to Pacific whaling grounds. 'When the capital was relocated from Kororāreka to Auckland, the advantages of location were very largely lost to Ngāpuhi and the northern tribes.'[839]

Early in 1845, Clarke wrote again that Ngāpuhi were drawing a contrast 'between their former comparative wealth and their present poverty, in consequence of the depression of trade – in their opinion entirely the effect of the removal of the seat of Government from Russell to Auckland'.[840] As these reports made clear, Ngāpuhi leaders felt a deep sense of betrayal over Hobson's departure and over the associated economic impacts; they had welcomed him expecting prosperity, and instead were considerably worse off than before. As Johnson observed, the insult was heightened by the Government's regulations affecting matters such as customs and land, leaving Ngāpuhi to experience 'governance from afar'. Having experienced a close relationship with the Crown for many years – far closer, indeed, than any other tribe – Ngāpuhi now found that the relationship was increasingly distant.[841] FitzRoy referred to this in a pamphlet in 1846. He wrote that the removal of the capital had 'caused very great dissatisfaction' to Te Raki Māori:

> They soon discovered that the restraints and inconveniences of the newly-constituted authority which they had consented to acknowledge, however reluctant to obey, remained to interfere with them; while the countervailing advantages of augmented traffic, and good markets, were not only lost – gone to their greatest enemies – but that even the trade enjoyed previous to 1840 was almost destroyed by the Custom

838. Clarke to Colonial Secretary, 30 September 1844 (Crown document bank (doc w48), p 276).
839. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc a37), p 631.
840. Clarke to Colonial Secretary, 1 January 1845 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc a1), p 307).
841. Johnson, 'The Northern War' (doc a5), p 70.

> House regulations, and by the presence of government officers at Kororareka – (now called Russell).[842]

Historians in this inquiry said it was difficult to determine the relative impacts of the shift of the capital and the customs regulations; both caused significant harm to the Te Raki economy, as did other, market-related factors which we will discuss later.[843] Even after war had broken out in this district, some Ngāpuhi leaders continued to insist that the capital should return. When the new Governor, George Grey, visited the region in November 1845, the Kawakawa rangatira Tamati Pukututu asked him to establish his residence in the Bay of Islands: '[W]ill the Governor remain here, or go to the south to live, from whence his words only will come to us. They have had two Governors at Auckland, and why should not this one live here'. Pukututu continued: 'We asked him [Hobson] to come and live among us at Russell, which he did, but afterwards went to Auckland. I felt very much annoyed at his leaving Russell, and at the departure of the strangers and soldiers who I had invited to live among us.' After Hobson had died, Pukututu had asked that the new Governor live in the Bay of Islands, but FitzRoy remained at Auckland, 'and while he was there . . . evil grew'. Grey gave no commitment, and the capital did not move until 1865 when it was established even further south, in Wellington.[844]

In Dr Phillipson's view, it was reasonable for the Crown to consider factors such as river and ocean communication, a central location, and available land when determining its site for the capital. Phillipson noted that policy towards Māori was a factor:

> If the intention of the Governor was, as Busby believed, to mediate between Maori and settlers but not actively to colonise the country, then the Bay of Islands was a logical choice. It was the largest centre of European settlement and trade, set in the midst of a large Maori population. Nga Puhi wanted settlers and increased trade, but not to be swamped. If, on the other hand, the goal was to keep the corrupting influence of settlement as far as possible from Christian Maori, then Williams' choice [Waitematā] (which he believed empty of Maori) was also logical.[845]

Dr Phillipson suggested that Hobson wanted a northern location to be close to the majority of the Māori population, but he also sought somewhere that settlers did not already claim to own 'so that he could lay out a future city and sell its sections for the profit of the Crown, and to subsidise the Government and settlement'. The Bay of Islands 'simply was not practical in this respect'.[846] Dr Nicholas Bayley,

842. Robert FitzRoy, *Remarks on New Zealand* (London: W & H White, 1846), p 14 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 307).
843. Johnson, 'The Northern War' (doc A5), pp 69–70 .
844. Minutes of meeting between Governor Grey and chiefs at Kororāreka, 28 November 1845 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 307).
845. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 309.
846. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 309.

in his evidence about this district's economic history, agreed that Hobson moved the capital in order to secure revenue streams for the Crown. In this respect, the early success of the Bay of Islands as a trading centre had counted against it remaining as the capital.[847]

However, Dr Phillipson considered that Hobson could have taken steps to prevent his decision from becoming a grievance to Ngāpuhi. First, he could have consulted Ngāpuhi and other northern Māori; secondly, he could have established a Government town in the Bay of Islands, even if it was not to be the capital, providing some economic stimulus for the region; and thirdly, the Governor could have spent part of the year in the Bay of Islands. In the absence of these mitigating measures, the decision to move the capital 'was one of the contributing factors to the political crisis' that emerged during 1844 when Heke felled the Kororāreka flagstaff.[848] Professor Ward noted that the Governor did not seem to have considered consulting Māori; rather, he 'overlooked the wishes of northern rangatira', seeming to regard decisions about the machinery of government as a national matter which was solely within the realm of kāwanatanga, and to which the guarantee of rangatiratanga did not apply.[849]

Dr Phillipson also noted that the decision to move the capital was not entirely negative. While it harmed the economy and the treaty relationship, it also took the heat out of the contest for authority between Hobson and rangatira. With few officials on the ground, the Crown ceased its attempts to actively govern the district's Māori.[850] In 1841, soon after the capital had moved, Henry Williams observed:

> Many changes of a political nature have taken place and all have been kept in a continual state of anxiety. The natives have been evidently under serious alarm lest their country should be seized by the English. We are happy to observe that this feeling has now generally subsided. Since the removal of the Governor with the Government officers and people connected therewith to Auckland, the Bay of Islands has assumed its wonted quietness, the Europeans being comparatively but few.[851]

In Dr Phillipson's view, the Crown's departure 'postponed confrontation' between the Crown and Ngāpuhi to determine their relative authority.[852]

We note also that the economic damage from the Crown's departure was mainly focused on the Bay of Islands and Hokianga. Whāngārei claimants told us that the change had been beneficial for their taiwhenua: 'When the capital was moved to Auckland, the harbours of Whangarei Taiwhenua became the most strategic harbours for trade in the North.'[853]

847. Bayley, 'Aspects of Maori Economic Development' (doc E41), p 47.
848. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 310.
849. Alan Ward, 'Summary/Response' (doc A19(a)), p 37.
850. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 320.
851. Henry Williams, Paihia Mission Station Annual Report, 30 June 1841 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 323).
852. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 320.
853. Whangarei Taiwhenua Opening Statement (doc E46), p 32.

4.4.2.2.4 Did other factors also contribute to the district's economic decline?

The economy in the northern part of this inquiry district – the Bay of Islands, Hokianga, and Whangaroa – had grown rapidly during the 1820s and 1830s, based on demand for flax, kauri, and services and supplies for visiting whalers. By 1840, Bay of Islands Māori were growing and supplying significant amounts of food (meat and crops) to visiting ships and the British colony in New South Wales. From 1840, the economies of these northern areas entered a rapid decline which contributed to and continued after the outbreak of war. While the Crown's decisions to move the capital and impose customs duties were of undoubted importance, historians in evidence before us also referred to market forces that contributed to the decline.[854]

The flax trade had already declined by 1840, and the kauri trade was to follow.[855] Kauri had been of particular significance to Hokianga and Whangaroa Māori, and was of political as well as economic import: Patuone and Nene had entered arrangements with the Royal Navy, which they clearly viewed as part of a broader alliance with Britain.[856] By the end of the 1830s, there were high hopes of further growth owing to demand for building timber from Sydney and other Australian colonies.[857] Yet the optimism was not to last. According to historian Ian Wards, this trade peaked between 1838 and 1842 before entering a steep and rapid decline. This, in his view, was largely due to economic depression in Australia which suppressed demand.[858] Another factor was rising costs. Because the kauri resource had already been exploited, traders had to travel further inland and upriver to find spars of the required height and quality for sale to shipyards. Labour costs had also risen, as Pākehā and Māori alike were earning the higher wages they demanded, which meant that profits in the trade were less, and the initial advantages over Australian suppliers that New Zealand offered went into decline.[859]

As the decade wore on, reductions in British government spending further suppressed demand; the Royal Navy was no longer willing to pay the costs of extraction and shipping from New Zealand, and turned instead to other markets such as Russia and the United States.[860] Yet another factor in the decline of the kauri trade was competition from within New Zealand, especially after the decision to move the capital. According to Alexander, 'the very first wooden houses of Auckland

854. Bayley, 'Aspects of Maori Economic Development' (doc E41), p 45; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 54; Johnson, 'The Northern War' (doc A5), pp 68–69.

855. Alexander, 'Land-based Resources, Waterways, and Environmental Impacts' (doc A7), pp 55–56.

856. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 239–245.

857. Alexander, 'Land-based Resources, Waterways, and Environmental Impacts' (doc A7), pp 45–46.

858. 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 96.

859. Bayley, 'Aspects of Maori Economic Development' (doc E41), pp 45–46; Alexander, 'Land-based Resources, Waterways, and Environmental Impacts' (doc A7), pp 55–56.

860. Bayley, 'Aspects of Maori Economic Development' (doc E41), p 49; Alexander, 'Land-based Resources, Waterways, and Environmental Impacts' (doc A7), p 55.

were built with timber from the Hokianga', and this inspired a brief revival of the industry in 1841. However, from this point on, most of the timber for Auckland 'came from the closer and more accessible forests of the Waitemata, the Kaipara, and the Coromandel'.[861] George Clarke noted the declining timber trade as a contributing factor in the extreme poverty he witnessed when he visited Hokianga in 1844.[862]

Environmental and market forces also appear to have contributed to the decline in the number of whalers visiting the Bay of Islands. According to Dr Bayley, overexploitation of the resource was a significant factor: the decline occurred because there were fewer whales to be caught, and it would have happened regardless of the Crown's imposition of customs duties.[863] Dr Phillipson was also of this view that the decline in whaling 'would have happened regardless of the customs regulations'.[864] Johnson suggested that a fall in the price of whale oil might have been a factor as well.[865] Dr John Owens has written that the decline occurred through a combination of overfishing (which reduced supply), economic depression (which reduced demand), and the opening of other whaling grounds that were more financially viable.[866] All of these historians nonetheless acknowledged that the customs fees were a factor in the decline of the trade.[867]

The number of whalers visiting New Zealand peaked in 1839, then declined in 1840 before dropping steeply in 1841. While that was the year the customs fees were introduced, other factors were also influential. Harry Morton has written of the decline of the New Zealand right whale fishery from about 1840 as a result of overfishing by 'highly efficient American whaleships in New Zealand bays', and the discovery of major new grounds off the north-west Pacific coast of the United States.[868] Lindsay Alexander has noted that whaling off the western Australian coast also peaked in the early 1840s, and that the overwhelming majority of whaleships that visited the Bay of Islands were American.[869] Alexander McLintock saw an obvious connection, and noted that the trade briefly recovered in the mid-1840s before the right whale fishery was depleted in 1846.[870]

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861. Alexander, 'Land-based Resources, Waterways, and Environmental Impacts' (doc A7), p 57.

862. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 310–311; see also Johnson, 'The Northern War' (doc A5), p 71.

863. Bayley, 'Aspects of Maori Economic Development' (doc E41), pp 45, 48.

864. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 313.

865. Johnson, 'The Northern War' (doc A5), p 68.

866. J M R Owens, 'New Zealand Before Annexation', in *The Oxford History of New Zealand*, ed W H Oliver (Wellington: Oxford University Press, 1981), p 32.

867. Bayley, 'Aspects of Maori Economic Development' (doc E41), p 48; Johnson, 'The Northern War' (doc A5), pp 70–71; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 54, 311; Owens, 'New Zealand Before Annexation', p 32.

868. Harry Morton, *The Whale's Wake* (Dunedin: University of Otago Press, 1982), p 160.

869. Lindsay McFarland Alexander, *Whaleship Arrivals and Departures on the North-East Coast of New Zealand: Bay of Islands, 1841–1894* (Russell: Kororareka Press, 2011), pp 8–9; Lindsay McFarland Alexander: *Whaleship Arrivals and Departures on the North-East Coast of New Zealand: Mangonui, Whangaroa, Auckland and other Northern Ports* (Russell: Kororareka Press, 2013), p 46.

870. 'Early Whaling Operations', in A H McLintock (ed), *An Encyclopedia of New Zealand*, 1966, http://www. TeAra.govt.nz/en/1966/whaling-in-new-zealand-waters-1791–1963/page-5, accessed 30

While environmental and market factors might have been significant, we note that contemporary observers (including Crown officials) were near unanimous in their view that the Bay of Islands economic decline could be mainly attributed to the customs duties and the decision to remove the capital. We have noted the views of Hōne Heke, George Clarke junior, Governor FitzRoy, and the settler John Weavell, who all agreed that the customs duties had driven away shipping and therefore closed down Bay of Islands trading relationships.[871] None of these sources referred to market forces or the depletion of the fishery. The only exceptions were Bishop Selwyn and his assistant William Cotton, both of whom in 1844 expressed surprise that Māori were aggrieved about the operation of 'political economy' which had reduced prices for their foods and moved the capital to Waitematā.[872] These clerics appear to have been referring to general economic decline, as distinct from the whaling trade specifically.

As we have already discussed, the Crown's land policies were another significant factor in economic decline after 1840. The Crown's assertion of pre-emption cut off an important source of income (private land transactions) and prevented settlers from entering new economic relationships with Māori.[873] The anger of Te Parawhau rangatira Te Tirarau with the Crown early in 1841 arose in large part from this cause. In general, during the early 1840s Te Tirarau and his settlers simply ignored the Crown's directives and entered informal arrangements for kauri cutting rights and occupation of land. But, on occasions, settlers withdrew from these arrangements, fearing that their rights would not be recognised under the new colony's laws. The Government's action was therefore a blow to Te Parawhau trading relationships at a time when the district's Pākehā population was still very modest.[874] As Paul Thomas observed, it appeared to Te Tirarau that the Crown was interfering with Māori lands and mana.[875]

Governor FitzRoy, reporting to the Colonial Office in 1844, also noted that pre-emption was a factor in growing Ngāpuhi dissatisfaction with the Crown. In the Governor's view, these concerns were actively fanned by settlers who wanted Māori land and were telling Māori 'that while our flag waved in New Zealand they would be oppressed'. As a result, FitzRoy wrote, Māori believed that the Crown was 'only waiting till our numerical strength in New Zealand is sufficient to make all the aborigines slaves, and take from them all their land'.[876] Hobson's decision to allow settlers to exchange old land claims for 'scrip' (a right to take up land

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871. Johnson, 'The Northern War' (doc A5), pp 66–67, 69, 91; *Daily Southern Cross*, 7 September 1844, p 2; Crown document bank (doc W48), p 164.

872. William Cotton, journal, 8 July 1844, 3 September 1844 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 311, 339); see also Bayley, 'Aspects of Maori Economic Development' (doc E41), p 45.

873. Bayley, 'Aspects of Maori Economic Development' (doc E41), p 50; Thomas, 'The Crown and Maori in Northern Wairoa' (doc E40), pp 60–62.

874. Thomas, 'The Crown and Maori in Northern Wairoa' (doc E40), pp 35–37.

875. Thomas, 'The Crown and Maori in Northern Wairoa' (doc E40), pp 60–62.

876. FitzRoy to Stanley, 16 September 1844 (Crown document bank (doc W48), p 164).

elsewhere in the colony) also led settlers to leave the district and move closer to the new capital.[877] During 1844, as tensions rose in the district, Clarke encouraged Hokianga settlers to follow this course.[878] Dr Phillipson noted that the Crown's arrival also changed settler attitudes; they became less willing to give gifts to rangatira as part of an ongoing, reciprocal economic relationship.[879]

Overall, Dr Bayley's view was that the Crown's actions after 1840 had significant detrimental impacts on the district's economy and exacerbated the harm done by downturns in the kauri and whaling industries. The Crown's decision to move the capital to Auckland took settlers away from this district, reduced Ngāpuhi influence, and increased competition from other districts. The Crown's customs duties and land policies also harmed the economy.[880] Dr Bayley noted that it was difficult to give an exact weighting to the many components that contributed to economic decline. But, from the 1840s, the Government played 'an increasingly significant role in the capacity of Te Raki Maori to engage with, respond to, and advance economic opportunities'.[881] Dr Bayley wrote:

> Maori leaders knew what was needed for the region to develop economically, namely settlers, infrastructure, tradeable products and markets. They consistently sought to encourage the growth and development of these factors from 1840 onwards. National and international trading opportunities declined and the Te Raki region became less competitive however, which meant that sustaining a viable economic future became more challenging. Some of the factors that would have assisted Te Raki Maori to meet the economic challenges of this period were controlled or directly influenced by government action.[882]

Although Te Raki leaders might have expected the Government to take account of their concerns, it did not do so. The reality was that the Crown became 'a competitor with Maori'; it regarded other regions as more important, and prioritised its financial interests and associated need to obtain land for settlement over the interests of Te Raki Māori.[883] Johnson's view was that the Crown's decisions caused demonstrable harm to the district's economic fortunes, by removing settlers and cutting sources of revenue. Even if market forces were also at play, decisions such as moving the capital and imposing customs duties 'left the Bay of Islands susceptible to the vicissitudes of wider economic factors'.[884] This was also Phillipson's

877. Bayley, 'Aspects of Maori Economic Development' (doc E41), p 48. Scrip was usually awarded at £1 for each acre the settler had been awarded by the Land Claims Commission: Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 7.
878. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1094.
879. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 312.
880. Bayley, 'Aspects of Maori Economic Development' (doc E41), p 62.
881. Bayley, 'Aspects of Maori Economic Development' (doc E41), p 49.
882. Bayley, 'Aspects of Maori Economic Development' (doc E41), p 63.
883. Bayley, 'Aspects of Maori Economic Development' (doc E41), p 63.
884. Johnson, 'The Northern War' (doc A5), pp 68–69.

view. The drop in ship visits, the removal of the capital, and the Crown's land policies all combined to cause a serious downturn:

> The new settlers who might have formed a stable market went to Auckland instead of Russell. Local traders were affected and some either left or had their businesses fail. People like Busby went into serious debt. Those who wanted to speculate in land or sell what they believed they had acquired, found they had either no titles recognisable in British law, or paper awards for limited portions of the lands claimed. The 'surplus', it was said, belonged to the Crown. It was difficult to attract finance or start development under these conditions. The result was a spectacular economic crash.[885]

4.4.2.2.5 Had the Crown promised prosperity?

In his reports on Bay of Islands Māori and the Crown, Dr Phillipson said the Crown had promised Te Raki rangatira increased prosperity if they signed. When the economy declined, Ngāpuhi blamed the Government, he said, because it had 'promised the opposite'. The 'belief that the Governor would bring settlers, trade, and prosperity was one of the factors in Nga Puhi's acceptance of the Treaty'. Economic decline therefore 'quickly became a grievance against the Government'.[886] Furthermore, FitzRoy became convinced that the Crown had caused the economic downturn: 'Maori had been led to expect prosperity if they signed the Treaty, and it had not happened. Worse, their economic situation had seriously declined, and the Government was blamed. The British flag became a symbol of economic "oppression"'.[887]

The Crown did not accept that Hobson had made any explicit promise that Māori would be prosperous if they signed te Tiriti.[888] It sought clarification from Dr Phillipson, who acknowledged that he could not 'point to any specific promise made by Hobson', and that the word 'promise' might not have been correct.[889] The Crown also questioned Mr Johnson, who had made a similar point, about his source; Mr Johnson responded that he had been unable to locate the reference.[890] Crown counsel, responding to Dr Phillipson, submitted:

> The Crown accepts that there may have been an occasion where Hobson suggested that the colonisation of New Zealand would be for the economic benefit of Ngāpuhi, but says that there is no evidence that Hobson made this a condition of the treaty or made any promise to guarantee economic prosperity.[891]

885. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 310.
886. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 310.
887. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 312.
888. Crown closing submissions (#3.3.403), pp 54–55.
889. Phillipson, answers to questions for clarification (doc A1(e)), pp 5–6.
890. Memorandum of Crown counsel (#3.2.1675(a)), p 3; Ralph Johnson, questions for clarification (doc A5)(e), p [2].
891. Crown closing submissions (#3.3.403), p 54.

Even if the surviving accounts do not record any specific promise, historians in this inquiry pointed to significant evidence that Ngāpuhi believed they had been promised prosperity, or at least believed that prosperity would inevitably follow their acceptance of the Governor. We have discussed much of this evidence earlier. We referred, for example, to the view of Hokianga leaders in 1844 that they had signed te Tiriti believing that it would 'tend to prosperity';[892] and to Chief Protector George Clarke's view, also in 1844, that the Crown had delivered neither protection nor the prosperity that Hobson had led Māori to expect.[893] We note also the evidence (discussed earlier) that Te Kēmara and Pōmare both signed because they expected the Governor to live on their lands, bringing settlers and trading opportunities.[894]

Professor Ward, in his evidence to this inquiry, concluded that Māori 'expected their trust and cooperation to be reciprocated by the Crown, including a fair share of the benefits of the new economy'.[895] Similarly, Dr Phillipson concluded 'that the kōrero of Governor Hobson and his supporters [at Waitangi] included what Ngāpuhi understood to be assurances that economic prosperity would result from agreeing to the Governor and Te Tiriti'. Phillipson also noted that the question of what assurances Hobson might have given should be seen in the broader context of the Crown–Ngāpuhi relationship: 'Similar statements had been made by Busby and the missionaries prior to 1840, and were also made by FitzRoy in 1844 and by Captain Graham (on behalf of Grey) in 1846.'[896]

Indeed, we discussed in our stage 1 report the many occasions on which Te Raki leaders had approached the Crown during the 1820s and 1830s seeking protection and trading opportunities, and Crown officials had responded with encouragement that prosperity would follow any alignment with Britain.[897] We have no doubt that rangatira saw the treaty in this context – as deepening an already lucrative alliance with Britain, founded on mutual benefit.[898] We concluded that the Crown had at least promised to 'create the conditions for peace and prosperity', by guaranteeing Māori their lands and resources, and by controlling settlers who might otherwise threaten mutually beneficial relationships.[899] In our view, then, it was reasonable for rangatira who signed te Tiriti to conclude that prosperity would follow.

892. Clarke to Colonial Secretary, 30 September 1844 (Crown document bank (doc w48), p 276); see also Phillipson, 'Bay of Islands Maori and the Crown' (doc a1), p 310; Johnson, 'The Northern War' (doc a5), pp 72–73.

893. Crown document bank (doc w48), p 169; see also Phillipson, 'Bay of Islands Maori and the Crown' (doc a1), p 310.

894. Phillipson, 'Bay of Islands Maori and the Crown' (doc a1), p 129; Arapeta Hamilton (doc f12(a)), p 11.

895. Ward, 'Summary/Response' (doc a19(a)), p 31.

896. Phillipson, answers to questions for clarification (doc a1(e)), p 6.

897. For example, see Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 114, 125–126, 131, 239, 245, 271, 502–503; see also Phillipson, 'Bay of Islands Maori and the Crown' (doc a1), pp 238, 254–255.

898. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 519, 525.

899. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 515–517, 524.

We add that the Tribunal has also expressed this conclusion in other reports. In the *Wairarapa ki Tararua* report, for example, the Tribunal concluded that 'the Treaty envisaged Māori sharing with settlers the prosperity of the new colony'.[900] In *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims* (2010), the Tribunal found: 'The fundamental rationale for signing the Treaty was that Māori and settlers would each participate in the security and prosperity of the new nation thereby created.'[901] Indeed, this expectation that Māori and settlers would share in the benefits of a developing colonial economy is the basis for the well-established treaty principle of mutual benefit.[902]

4.4.3 Conclusions and treaty findings

The Crown's treaty obligations to Te Raki Māori can be summarised readily enough. It was obliged to recognise and honour tino rangatiratanga, the right of Te Raki Māori to live according to their own laws and exercise authority over their communities, lands, resources, and other possessions without external interference. It was obliged to protect Māori rights and interests. The Crown had a right to exert control over settlers, in order to keep peace and protect Māori, and it could make laws to that end. But it could not interfere with Māori rights and interests except with their informed agreement. Where kāwanatanga and tino rangatiratanga intersected, negotiation was required, in which both parties must act fairly and in a spirit of partnership and good faith.

4.4.3.1 *Tikanga and criminal law*

We have found that the Crown was in breach of the treaty in proclaiming its sovereignty. It then further departed from these obligations, taking steps to impose – or at least attempt to impose – its authority in ways that challenged Māori authority. With respect to criminal law, soon after te Tiriti was signed, the Crown established a rudimentary police force and began to assert its right to adjudicate in Māori–settler disputes. Kihi was brought before the court and faced English legal proceedings, the Governor sent troops to Pōmare's pā, and he also insisted to Heke that he alone could adjust disputes. These initial attempts to assert control were based on the Crown's assertion of sovereignty and its assumption that Māori were therefore subject to English law.

The Crown did make some concessions to Māori authority, which to a significant degree reflected the limits of the Crown's capacity to exert effective authority during these early years. Magistrates were instructed to make allowances for

900. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 2, p 559.

901. Waitangi Tribunal, *Tauranga Moana 1886–2006: Report on the Post-Raupatu Claims*, Wai 215, 2 vols (Wellington: Legislation Direct, 2010), vol 1, p 23.

902. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, Wai 27 (Wellington: Brooker and Friend Ltd, 1992), pp 273–274; Waitangi Tribunal, *The Radio Spectrum Management and Development Final Report*, Wai 776 (Wellington: GP Publications, 1999), pp 41, 51–52; Waitangi Tribunal, *Report on the Muriwhenua Fishing Claim*, Wai 22, pp 194–195; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, Wai 785, vol 1, p 5; Waitangi Tribunal, *Te Kāhui Maunga: The National Park District Inquiry Report*, Wai 1130, 3 vols (Wellington: Legislation Direct, 2013), vol 1, pp 16–17.

Māori customs and legal values, and to consult rangatira about arrests. After meeting initial resistance to its attempts to enforce English law, the Crown softened its stance further, choosing in most instances to mediate rather than make arrests. This was largely a matter of political reality; a few constables and a small detachment of troops were no match for 12,000 Ngāpuhi, and Te Raki leaders continued to enforce their own laws and resist most attempts to establish authority over them.

Nonetheless, the Crown's presumption was that it had sole discretion to determine whether English laws would be enforced against Māori or not. Having appointed magistrates and constables, the Government also established the Supreme Court in December 1841. During Maketū's trial, the court confirmed its jurisdiction over Māori on the basis of the Governor's proclamations of sovereignty. In pre-treaty times, resolving conflict had been the preserve of rangatira and their people; notionally at least, this new legal authority was therefore a significant challenge to the rangatiratanga of Te Raki Māori.

The trials of Kihi and Maketū provided early tests of the relationship between Crown and Māori authority. In both cases there was resistance among Ngāpuhi leaders, though ultimately, they acquiesced for their own reasons, particularly because there were Pākehā victims, which meant that Pākehā were entitled to seek utu. In the case of Maketū, the decision to hand him over to the Crown appears to have been motivated by a desire to avoid internal warfare that might otherwise have erupted had Rewa sought utu for the death of his granddaughter. Neither case, in our view, indicated that Māori accepted the general authority of the courts. On the contrary, the evidence is clear that Māori continued to enforce their own laws among their own people, and quite frequently against settlers as well. Where they engaged with the Crown's courts or officials, this was a matter of choice; the Crown provided another option for dispute resolution. This reflected the balance of power in the district at the time and meant that the prejudicial impacts of the Crown's claim to legal authority over Māori were limited, at least during these years.

After the trial and execution of Maketū, Te Raki Māori appear to have become less willing to experiment with British justice, and Māori resistance made the Crown's officials more wary of attempts to enforce their laws. We agree with Dr Phillipson that the decision to move the capital to Auckland also took the heat out of this contest for authority. The Crown's officials had been instructed by the Colonial Office to 'tolerate' Māori custom and appear to have mostly done so during the period between Maketū's trial and Governor FitzRoy's attempts to suppress taua muru in the second half of 1844, which we consider in chapter 5.

Ironically, FitzRoy's attitude was hardening just as his Native Exemption Ordinance 1844 came into effect. That ordinance in essence provided that the Crown would not get involved in Māori–Māori conflicts except through the agency of rangatira, and that in cases of Māori–settler conflict outside the main towns, the Crown would pay rangatira to make an arrest. In fact, these provisions did little more than bring statutory recognition to the existing reality that the Crown could not enforce its laws without the consent of rangatira. The ordinance

also made provisions that would allow Māori to avoid imprisonment except in cases of rape and murder.

Nonetheless, as 'positive declaratory law' of tikanga, it fell short of treaty compliance. It provided no general recognition of the right of Māori to live by their own laws. By providing for utu in cases of 'theft', it in essence confirmed that the Māori law enforcement practice of muru was illegal under English law. And it offered no protection for Māori when settlers breached rāhui or violated wāhi tapu. On Chief Protector Clarke's recommendation, and ultimately at the urging of the Colonial Office, the Government had considered proposals that would have provided greater recognition for the authority of rangatira, and greater protection against violations of tikanga. But these were not adopted, and officials did not engage with Māori leaders about the matter.

Accordingly, we find that:

- By asserting the authority of its police and courts to enforce criminal law over Māori communities, the Crown breached te mātāpono o te tino rangatiratanga, as well as te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect. By claiming this authority without first engaging with and seeking the consent of Te Raki Māori, the Crown breached te mātāpono o te houruatanga/the principle of partnership.
- By failing to engage with Māori to ensure appropriate recognition and respect for Māori customary law, including appropriate recognition of the law of tapu and for the mechanisms of rāhui and muru, and appropriate recognition of the role of rangatira in the exercise of tikanga, the Crown also breached te mātāpono o te houruatanga/the principle of partnership.

4.4.3.2 *The Crown's impacts on the district's economy*

During this period, the Crown asserted its authority over Te Raki trading relations by enacting customs regulations which included duties on imported goods. Prior to the treaty, Te Raki rangatira had managed relationships with visiting ships, and had charged anchorage fees as well as receiving substantial incomes for food, timber, and other export goods. The decision to charge duties was in accordance with Hobson's instructions, and from the Crown's point of view, was necessary to fund the new Government. It was also a clear example of the Crown asserting its authority over an activity that had previously been under the control of rangatira, placing itself, in so doing, in direct competition for the economic benefits arising from the district's trade. There is no evidence that rangatira were informed of the Crown's plans prior to their decision to sign te Tiriti. Nor is there any record of their being consulted in the months afterwards; the limited evidence available suggests that duties were imposed and rangatira were informed that they must comply.

In respect of the Crown's decision to move the capital to Auckland, there is no record of engagement with Te Raki Māori either. In Tiriti debates, rangatira had been led to believe that the capital would be established at Waitangi, and Pōmare was later promised that it would at Okiato. In either case, rangatira believed it would remain in the Bay of Islands, and that they would benefit from the trading

opportunities arising from the establishment of a new town. The evidence suggests that Hobson and his officials deliberately encouraged Māori in this view; at the very least, they did not attempt to correct it.

Hobson was within his rights as Governor to select a capital, but his lack of transparency in the months after te Tiriti was signed was a breach of good faith, and the decision to move the capital can fairly be seen as a broken promise. For Te Raki leaders who had spent two decades building their relationship with the Crown, this was a significant blow with implications for their trust in the Governor and for the long-term treaty relationship. We agree with Dr Phillipson that the Crown could have mitigated the impacts of Hobson's actions by engaging with Māori on the implications of this major decision, and by establishing a town at Okiato as Hobson planned to do, until overruled by the Colonial Office.

We acknowledge that Hobson did not prohibit Māori from felling kauri on their own lands, though it is clear that Nene and other rangatira believed he had done so. We did hear some evidence that the Governor took steps to seize control of the kauri trade in order that the Crown could take the profits. If that was the case, it would be another example of the Government usurping an economic role that was formerly the preserve of rangatira, and directly competing with Māori. However, the evidence we heard was not sufficiently detailed to justify such a finding.

Altogether, it is clear that the Crown's actions had significant impacts on the district's economy – in particular the economies of the Bay of Islands, Hokianga, and Whangaroa, which went into rapid decline from 1841. We acknowledge that other factors beyond the Crown's control were also relevant: fresh whaling grounds were opening off the north-west American coast as the number of whales available in the southern bays was declining; the demand for kauri was declining too. But Crown officials such as Clarke and FitzRoy acknowledged that the customs duties and the decision to move the capital were significant factors in the district's economic collapse. Together with other forces, these actions contributed to a spiral in which visiting whalers ceased to call, settlers departed from the district, and the market for produce dried up. To the extent that environmental and market forces contributed, the Crown's actions made Te Raki Māori more vulnerable than they would otherwise have been.

We also note that during this period, Te Raki Māori expressed considerable concern about the Crown's land policies. We will consider these issues and the impact of Crown policies and acts further in chapters 6 and 8.

We acknowledge that Governor Hobson did not explicitly promise that Te Raki Māori would become more prosperous if they signed te Tiriti, though Crown counsel acknowledged that he might at least have suggested that colonisation would bring economic benefits.[903] Certainly, Hobson and other officials knew that Māori were seeking to advance their people's material well-being and engaged with the Crown at least partly for that reason.

Accordingly, we find that:

903. Crown closing submissions (#3.3.403), p 54.

- By imposing customs duties without engaging with Te Raki Māori and without considering the impacts on Māori, the Crown breached te mātāpono o te tino rangatiratanga, and te mātāpono o te houruatanga/the principle of partnership.
- By moving the capital to Auckland without engaging with Te Raki Māori, in breach of prior assurances (from Busby to Te Kēmara, and from Hobson to Pōmare) that the capital would remain in the Bay of Islands, and without attempting to mitigate the impacts of its decision, the Crown fundamentally altered the course of its treaty relationship with Te Raki Māori, acting inconsistently with its duty of good faith, and breaching te mātāpono o te houruatanga/the principle of partnership.

4.5 What Was the State of the Political Relationship between the Crown and Te Raki Māori by 1844?

When they signed te Tiriti, Te Raki Māori understood this new arrangement on political and personal levels. They saw themselves as deepening their alliance with Britain, and securing the benefits of that alliance in terms of increased trade and protection from foreign threat. They also saw the Governor as 'a rangatira for the Pākehā'. He would be a more powerful version of the British Resident, an authority over the settlers; he would address offences and breaches of tapu, and enforce the tikanga associated with land arrangements. They would be able to turn to him when Māori–Pākehā disputes arose.[904] In Dr Phillipson's view, rangatira saw the Governor as 'a Busby with a little more of everything', notably more power to control settlers.[905] The historian Dr James Belich likewise considered that they understood the Governor would 'assist them in policing the Pakeha-Maori interface', freeing them of the burden of controlling the growing settler population.[906] Rangatira also saw the Governor as a representative of the Queen and of Britain's power and generosity. They expected the Governor to live among them at the Bay of Islands as Busby had – one of 'their' Pākehā, with whom they would experience an ongoing personal relationship.[907] As Dr Phillipson noted, this included expectations that the Governor would give gifts and distribute wealth, as befitting his status as 'a great chief'.[908] This obligation was explained to Bishop Selwyn as 'he whakaaro rangatira no tua iho', which he translated as 'an hereditary aristocratic feeling', similar to the European concept of *noblesse oblige*.[909]

904. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 524–525, pp 527–528.
905. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 250.
906. James Belich, *Making Peoples: A History of the New Zealanders From Polynesian Settlement to the End of the Nineteenth Century* (Auckland: Allen Lane, 1996), p 200.
907. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 306–308.
908. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 313.
909. G Selwyn to W Selwyn, 15 September 1849 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 313). *Noblesse oblige* literally translates as 'nobility obligates' and refers to a belief that people of aristocratic lineage are obliged to support and be generous to others of lesser means.

Māori expectations of the Governor can be seen in early exchanges between Hobson and Pōmare II. As discussed earlier, after a fight between whalers and Māori at Ōtuihu, Pōmare told the Governor: 'if I would keep the white men in order he would answer for the natives'.[910] The Governor's role, in other words, was to control settlers and keep them from causing trouble for Māori. Pōmare also wondered if Hobson would be as generous to Ngāti Manu and Māori as the American trader James Clendon had been. He commented shrewdly:

> Capt Hobson does not know how good a friend Mr Clendon has been to us[.] I do not expect him to be such a one but I give him three years then I shall see if he is a friend. Pomaray [Pōmare] is rich now perhaps he may be poor perhaps not, but I shall by that time see if when the *Poor* Mauri [Māori] goes to his door naked he is given a blanket and to eat should he be hungry or if he is driven away. It is easy to say I will be a friend, I give Capt Hobson three years to prove his words. [Emphasis in original.][911]

For reasons we have already discussed, in most respects the new Governor, and the Crown he represented, were significant disappointments to Ngāpuhi. This was particularly true of those in the Bay of Islands, Hokianga, and Whangaroa who had actively fostered their alliance with the Crown in the years prior to the treaty. Hobson assumed that Māori were subject to English law and acted accordingly. With respect to criminal law, the Governor instructed his officials to make concessions to Māori, such as working through chiefs to make arrests, and exercising discretion when applying the law.[912] In accordance with his instructions, the Governor also asserted the Crown's authority over trade, imposing customs regulations and duties that undermined the authority of rangatira and caused significant economic damage.[913] Additionally, Gipps and Hobson imposed the Crown's authority over the district's pre-treaty land arrangements; their laws and policies presumed that pre-treaty transactions could be understood in terms of English property law, and that the Crown was entitled to keep any surplus above that it granted to settlers (see chapter 6).[914] Early in 1841, Hobson moved his capital to Auckland, effectively ending his personal relationship with Te Raki rangatira,

910. Hobson to Gipps, 15 June 1840 (O'Malley, supporting papers (doc A6(a)), vol 16, pp 5274–5275).

911. Best, *The Journal of Ensign Best*, p 220.

912. Ward, *A Show of Justice*, p 46. Damen Ward has discussed colonial officials' debates about the extent to which indigenous law should be incorporated into colonial law: Ward, 'A Means and Measure of Civilisation', pp 1–4, 9–10, 14.

913. Johnson, 'The Northern War' (doc A5), pp 65–67. Normanby's 1839 instructions to Hobson referred to the 'absolute necessity' that the colony become self-funding, and recommended import duties as the primary means of raising revenue, supplemented by a modest land tax and funds raised through buying and selling Māori lands: Normanby to Hobson, 14 August 1839, BPP, vol 3, p 89. Later, Governor Gipps approved a budget comprising £10,000 from customs duties, £5,000 from sale of lands, and another £5,000 if required from the New South Wales Treasury: Gipps to Hobson, 5 January 1840 (as cited in Robert Carrick, *Historical Records of New Zealand South Prior to 1840* (Dunedin: Otago Daily Times and New Zealand Witness, 1903), p 47).

914. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 318, 323.

causing further economic damage.[915] All of these actions inspired suspicion and distrust among Te Raki leaders, who expressed fears that the Crown intended to assert its authority and take their lands.[916]

We have seen no evidence that the Governor or his officials thought to engage with Te Raki Māori over any of these decisions.[917] Nor is there any evidence of early Governors seeking to foster close relationships with the rangatira – so far as we can determine, during Hobson's brief time in the Bay of Islands, he called no hui after the treaty signings and offered little in the way of hospitality to his host rangatira. On occasions, he communicated with the district's rangatira by circular letter. After his departure for Auckland, Hobson did not return to the Bay, and nor did Acting Governor Willoughby Shortland. Governor FitzRoy first visited the north in September 1844, by which time the Crown–Ngāpuhi relationship had deteriorated.[918] In effect, Hobson's departure in March 1841 severed the personal relationship between Crown and rangatira that Ngāpuhi had enjoyed for many years before the treaty. In the period between March 1841 and September 1844, the Crown's senior officials in this district were the police magistrate Beckham and the sub-protector Kemp; and its main political engagement was through sporadic visits by the Chief Protector Clarke.[919] In southern parts of this district, there was simply no political relationship. The Crown ignored Whāngārei and Mangakāhia, other than on two occasions when Clarke arrived to mediate in taua muru (see section 4.4). It ignored Mahurangi completely, except to buy vast tracts of land (we discuss the 1841 Mahurangi and Omaha purchase in chapter 8).

Although Clarke moved to Auckland with the Governor, he travelled widely and returned to the north on several occasions. He attempted to mediate in disputes between Māori and settlers, and between hapū or tribes. In 1842, he reported that Māori–settler relations were generally peaceful, though this reflected Māori patience more than settlers' prudence.[920] Clarke's reports during these early years informed his superiors about Māori systems of law, authority, and economic management; he explained, for example, that Māori held land and other possessions in common, and that overlapping interests created a risk of conflict over land transactions.[921] Clarke also alerted Hobson and others to Māori unease or irritation over the Crown's attempts to regulate their lives or interfere with trading relationships and land arrangements.[922]

915. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 306–309.
916. For examples, see Johnson, 'The Northern War' (doc A5), pp 48–49, 59–60, 87; Thomas, 'The Crown and Maori in Northern Wairoa' (doc E40), pp 61–62; Wyatt, 'Old Land Claims' (doc E15), pp 244–245.
917. According to Phillipson, there was no consultation about the decision to move the capital: Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 308, 310.
918. Johnson, 'The Northern War' (doc A5), p 113.
919. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 324.
920. Johnson, 'The Northern War' (doc A5), p 84.
921. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 65–66, 67; Orange, *The Treaty of Waitangi*, pp 105, 108–109.
922. Orange, *The Treaty of Waitangi*, pp 94, 96–97.

Clarke had been present at the treaty signings in Waitangi, Waimate, and Māngungu. He believed that Hobson had guaranteed Māori not only their lands and estates, but also their customs. On several occasions he noted that Māori were determined to retain their independence and did not see English law or authority as applying to them.[923] In 1843, for instance, he reported that Māori were unwilling to accept Crown intervention in intertribal disputes; there was 'never . . . a people more uneasy under the yoke of submission to authority than the New Zealanders, and they only want a bold and enterprising leader to throw off even the name of subject'.[924] Later that year, after attempting to intervene in a land dispute in Hokianga between Nene and Taonui, Clarke reported that Māori were 'asserting their independence of, and contempt for, the Government'.[925] In 1845, he acknowledged that Te Raki rangatira who signed te Tiriti had not understood what was meant by sovereignty, and as a consequence had not shared the Crown's understanding of the agreement.[926] Later still, he acknowledged that Māori had been guaranteed far more than possession of their lands: 'when the subjects in the Treaty were under consideration, the subject of Tribal rights and the full power of the Chiefs over their own tribes and lands was explained to the natives, and fully understood by the Europeans present'.[927]

This was in our view a remarkable statement. Dr Phillipson observed that Clarke's account was corroborated by others from Waitangi, who confirmed that 'both sides understood the Treaty to guarantee the full power and authority of the chiefs over their lands and people'.[928] Nonetheless, like other colonial officials, Clarke believed that Māori must eventually be brought under the rubric of the colony's law and Government – otherwise its laws could not protect Māori from the growing settler population. Clarke therefore sought to persuade Māori of the Crown's benevolent intentions. To this end, in 1842, he founded *The Maori Messenger: Te Karere o Nui Tireni*, a Māori-language newspaper. As the first issue explained, its purpose was to explain 'nga tikanga a te Kawana' (which historian Dr Lachy Paterson (now Professor) has translated as 'the role of the Governor'); 'nga ture a te kuini' ('the Queen's laws'); 'nga tikanga wakawa, me nga hara e wakawakia ai te tangata' ('the principles of justice and the crimes for which people are judged'); and other aspects of the Pākehā system of law and Government, so that Māori and Pākehā would no longer be ignorant of each other's customs.[929]

923. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 276, 280, 325.
924. Clarke, half-yearly report, 4 January 1843 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 325).
925. Clarke to Colonial Secretary, 1 June 1843 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 325).
926. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 276.
927. G Clarke, *Remarks Upon a Pamphlet by James Busby, Esq* (Auckland: Philip Kunst, 1861), p 21 (as cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 284–285).
928. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 306.
929. *Te Karere o Niu Tireni*, January 1842, p 1 (cited in Lachy Paterson, 'The New Zealand Government's Niupepa and Their Demise', NZJH, 2016, vol 50, part 2, p 48).

The newspaper first appeared soon after Maketū was arrested, and the first edition was almost entirely devoted to letters from Ngāpuhi rangatira explaining their decision to hand him over to the colony's justice system.[930] But the decision to launch had been made earlier, after news of Governor Gipps's New Zealand Land Claims Ordinance 1840 reached New Zealand. This prompted Māori to ask in 1841 why the Crown was making laws for their lands, and to ask why those laws were not circulated among Māori so they could judge for themselves.[931] Clarke, in response, advised that settlers were stirring up Māori concerns about the Crown's intentions, and it was 'much safer' for the Crown to inform Māori directly.[932]

Dr Paterson regarded the newspaper as part of a broader Crown attempt to convert its notional sovereignty to on-the-ground power. As he explained, the Crown's 'theoretical sovereignty' did not mean that Māori accepted British government or English law, and nor did it cause them to sell land for settlement:

> Lacking effective coercive powers, successive early governors relied largely on personal relationships, persuasion and propaganda, including niupepa [newpapers], for the first two decades of colonial rule in their attempts to 'amalgamate' Māori into the nascent state.[933]

The initial print run for *Te Karere* was 250 copies, later raised to 500. Circulation, however, was much wider. Clarke arranged for copies to be sent to mission stations and sub-protectors, and some Māori also travelled to Auckland where copies of the paper were read out and discussed (though we do not know if Te Raki Māori joined in these meetings).[934]

The newspaper was edited mainly by the sub-protector Thomas Forsaith, who was appointed in 1842, shortly after Kaipara Māori had accused him of stealing kōiwi (see section 4.4). According to Rose Daamen, *Te Karere* contained 'official Government announcements (policies and laws) affecting Maori' but also 'a fair amount of moralizing on the value of education and on Christian beliefs'.[935] In their evidence, Drs Henare, Petrie, and Puckey also pointed to Māori language newspapers supporting 'the suppression of women and the curtailing of their activities by addressing readers as men and advising them on how to treat "their" women'.[936] From mid-1843, Clarke also arranged for Māori to receive the Government *Gazette* and copies of legislation. On occasions, *Te Karere* published Māori responses to the Governor's initiatives.[937] The Auckland settler Walter Brodie, writing in 1845,

930. Johnson, 'The Northern War' (doc A5), p 59 n; *Te Karere o Niu Tireni*, January 1842, pp 2–4.
931. Daamen, '*The Crown's Right of Pre-emption*', pp 49–50; Protector of Aborigines' Report of his Visit to Thames and Waikato, not dated, BPP, vol 3, p 445.
932. Protector of Aborigines' Report of his Visit to the Thames and Waikato, BPP, vol 3, p 448 (cited in Daamen, *The Crown's Right of Pre-emption*, p 50).
933. Paterson, 'The New Zealand Government's Niupepa', p 46.
934. Daamen, *The Crown's Right of Pre-emption*, pp 50–51.
935. Daamen, *The Crown's Right of Pre-emption*, p 50.
936. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 511.
937. Daamen, *The Crown's Right of Pre-emption*, pp 50–51.

described the newspaper as '[o]ne of the few good acts that the Government have ever done in New Zealand', and asserted that it was the first indigenous language newspaper published in a British colony. He also made the interesting comment that descriptions of the colony's laws were frequently 'simplified' to make them more acceptable to Māori, 'for on these points their usages are so opposite to ours, that much tact is required to prevent their thinking us inconsistent and unjust'.[938] The publication lasted until 1846 when Governor Grey abolished it and the protectorate.[939]

Another of Clarke's projects was the adoption of a legal code that recognised chiefly authority and Māori customary law. He opposed other officials who proposed establishing separate native districts under Māori law, believing that this would leave them vulnerable as the number of settlers increased. In his view, Māori needed to be part of the colony's legal system so it could protect them from settlers.[940] As discussed in section 4.4, he advocated for the appointment of rangatira as magistrates and proposed that settlers pay utu for violations of tapu. While these proposals were not adopted, Clarke's influence was evident in the Native Exemption Ordinance 1844 which (as discussed earlier) made some modest concessions to tikanga.[941] In his 1845 half-year report, Clarke lamented the Government's failure to adopt the measures he had proposed:

> I feel persuaded that many, if not all, of our difficulties would have been prevented had we legalised those native customs which are not repugnant to the fundamental principles of morality, and had we invested the well-disposed and most intelligent of their chiefs with magisterial authority: but, instead of this, we have been so apprehensive lest any portion of the executive power should pass into their hands, that our firmest friends have been shaken in their confidence in our ultimate intentions . . .[942]

As we have discussed in section 4.3, the Colonial Office was anxious for a declaratory law, and expressed support for recognition of Māori law (with some qualifications) alongside English law on a number of occasions. But London was a long way off, and the concerns that Clarke identified about sharing power with Māori were clearly local ones.

With respect to protection of Māori lands, Clarke's role was considerably more ambiguous. Clarke did write a substantial report on Māori land tenure, when asked to. As with all official interest in Māori land rights and requests for information, underlying his report was a wish to understand how to conduct purchases more effectively. But he tried to convey the origin of hapū and iwi land rights, and the care with which names were bestowed on every landmark and waterway, and passed down over generations. He conveyed the great range of family resource

938. Walter Brodie, *Remarks on the Past and Present State of New Zealand* (London: Whittaker & Co, 1845), pp108–109.
939. Daamen, *The Crown's Right of Pre-emption*, p50.
940. Orange, *The Treaty of Waitangi*, p111.
941. 'Chief Protector's Report', 18 June 1842, BPP, vol 2, p191.
942. Clarke, half-yearly report, 1 July 1845 (Crown document bank (doc w48), p268).

rights, and stressed 'how very tenaciously they [Māori] maintain their customs and usages on all subjects connected with their lands'.[943] Clarke acknowledged that Māori land tenure was complex. He advised that there was a risk of conflict if the Crown attempted to purchase land, or confirmed pre-treaty purchases, without involving all those who held customary rights.[944] He warned of the dangers to the 'dignity' of the Government of its becoming a purchaser of land. He also acknowledged that there were significant risks that Māori and settlers did not have the same understanding of pre-treaty transactions.[945]

Clarke and the northern sub-protector Henry Tacy Kemp both served as translators and advisors to the first Land Claims Commission, which sat in this district from 1841 to 1844.[946] Indeed, the commissioners were highly dependent on Clarke and the missionaries, since they knew nothing themselves of Māori land tenure.[947] Yet Clarke was also a claimant before the commission, having entered agreements for substantial tracts of land at Waimate and Whakanekeneke.[948] In the view of Stirling and Towers, Clarke's advice was compromised by his own land interests, and by his other official duties which included purchasing land for the Crown.[949] Other historians agreed with this assessment, which we will consider further in chapters 6 and 7.[950] Stirling and Towers were also critical of Clarke's role in assessing settlers' applications for pre-emption waivers allowing them to buy Māori land.[951]

Overall, in Dr Phillipson's view, 'the yoke of Crown authority rested very lightly on Nga Puhi' during these early years, with the Crown making 'no real attempt to turn nominal sovereignty . . . into substantive sovereignty'. This was partly because of Clarke's influence, and partly because the Governor, with his officials and troops, had moved to the new capital at Auckland. But above all, Te Raki Māori continued to conduct their affairs in accordance with tikanga. Local officials, such as the resident magistrate Beckham and the northern sub-protector Henry Tacy Kemp, had minimal impact on Te Raki Māori lives.[952] Nonetheless, as we have set out in preceding sections, some Crown actions did have impacts on Te Raki rangatiratanga and became significant irritants in the Crown–Māori relationship. These

943. George Clarke to colonial secretary, 17 October 1843, BPP, vol 2, pp 356–359.
944. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 284–285; Bruce Stirling and Richard Towers, '"Not with the Sword but with the Pen"' (doc A9), p 239.
945. Shortland to Stanley, 30 October 1843 (cited in Daamen, *The Crown's Right of Pre-emption*, p 62); Duncan Moore, Barry Rigby, and Matthew Russell, 'Old Land Claims', Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997), p 19.
946. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 256–257, 286, 429; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 132, 143.
947. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 216.
948. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 626–627.
949. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 216.
950. Moore, Rigby, and Russell, 'Old Land Claims', pp 19–20.
951. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 466.
952. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 321.

included the moving of the capital to Waitematā, and the Crown's approaches to tikanga, customs, land, and management of the kauri resource.[953]

In 1844, these tensions spilled over, and a series of events brought the district to the brink of open conflict (which we discuss at length in chapter 5). In July 1844, the Ngāti Tautahi leader Hōne Heke led a taua muru into Kororāreka, which ended when his party felled the flagstaff on Maiki Hill, symbolically challenging the Crown's claim of authority over Te Raki Māori.[954] Heke was a young mission-educated chief who had, in 1840, been the first signatory to te Tiriti.[955] In response, FitzRoy called for military reinforcements and threatened to invade Heke's territories. This was a significant change of course for the Governor, who had caused much anger among settlers with his refusal to intervene after the Wairau Incident.[956] It was also a change of course for Clarke, who was present when the Executive Council resolved to call for troops.[957] FitzRoy then reached a compromise with Tāmati Waka Nene and other Ngāpuhi leaders, in which he withdrew his army and made a series of concessions (including removal of the customs duties) in return for their agreement to control Heke.[958]

As Phillipson and Johnson both observed, these leaders shared Heke's concerns about the Crown's policies, but did not want war.[959] In the months that followed, Crown–Māori tensions escalated. Local officials injured and then insulted senior Ngāti Hine leaders; Māori responded with a series of taua muru; the Governor made further threats of military invasion; and in 1845 war erupted.[960] We will consider these events in detail in chapter 5. Our concern here is with the deterioration of the relationship in the period leading to Heke's July 1844 attack on the flagstaff. It does not appear that any single decisive event triggered a breakdown in the relationship during 1844; rather, as Clarke and other officials observed at the time, the relationship broke down due to cumulative effects of the Crown's actions over the four years since te Tiriti was signed, combined with Māori mistrust of the Crown's future intentions.[961] As Clarke explained in July 1845, Māori had always been aware of the double-edged nature of their relationship with Pākehā. On the one hand, settlers and traders brought much-desired material possessions and prosperity; on the other, contact with settlers and with Britain's imperial power could lead to them being overrun and losing their authority, lands, and new-found prosperity. This, indeed, had been exactly the consideration that had led Māori to accept

953. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 373–374; Johnson, 'The Northern War' (doc A5), p 96.

954. Johnson, 'The Northern War' (doc A5), pp 90–94.

955. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 375; Orange, *The Treaty of Waitangi*, p 54; Johnson, 'The Northern War' (doc A5), p 41.

956. Johnson, 'The Northern War' (doc A5), pp 88, 99–100; see also pp 113–117.

957. Johnson, 'The Northern War' (doc A5), pp 116–117; see also p 99.

958. Johnson, 'The Northern War' (doc A5), pp 116–117; see also pp 117–127.

959. Johnson, 'The Northern War' (doc A5), pp 116–117, 213–214; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 325, 349.

960. These events are recounted in Johnson, 'The Northern War' (doc A5), pp 135–149.

961. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 362, 373–374; Johnson, 'The Northern War' (doc A1), p 22.

the establishment of a governing authority for settlers.[962] However, Busby wrote in 1845 that the Northern War had resulted because Māori believed they had been misled by the Crown over its intention to fund colonisation through profits from trade in Māori land.[963]

Te Raki rangatira had signed te Tiriti only after much 'anxious discussion' and reassurance from the missionaries, and some at least were uncertain that they were taking the right step. Scarcely had te Tiriti been signed than Māori began to express 'doubts and misgivings' about the wisdom of that step. These misgivings 'increased when they were told that they must no longer take the law into their own hands in the punishment of offenders'.[964] They were willing to put these concerns aside so long as they could continue to trade, but then they found the Government was interfering in their economic relationships as well:

> [T]he establishment of a regular Government necessarily required the introduction of certain regulations and prohibitions which were as little understood as expected by the natives. The sole right of pre-emption vested in the Crown, which in itself cut off one fruitful source of their wealth,—the exacting of customs,—some injudicious notices respecting the felling of Kauri timber;—all these natural concomitants of the establishment of a regular government [combined to . . .] rekindle in the minds of the native chiefs those feelings of doubt and suspicion which had been smothered by the novelties of their temporary prosperity.[965]

We observe that none of these regulations had been fully disclosed to Māori during the treaty debates. Pre-emption had been explained by Henry Williams only as a right of first refusal;[966] and no mention had been made of Crown controls on the kauri trade or on imports.[967] Clarke, however, blamed Māori concerns on 'unthinking and disaffected Europeans' who had themselves been affected by the customs duties and other regulations, and had therefore misled Māori about the Crown's intentions:

> [E]ven the institution of the [Land] Commissioner's court, which was intended to serve as a check to the fraudulent proceedings of land speculators, was represented to

962. Crown document bank (doc w48), pp 265–266.
963. Johnson, 'The Northern War' (doc A5), pp 342–343; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 283–284.
964. Clarke, half-yearly report, 1 July 1845 (Crown document bank (doc w48), pp 265–266).
965. Clarke, half-yearly report, 1 July 1845 (Crown document bank (doc w48), pp 265–266). Missionaries and Hobson also commented about Māori doubts in the period soon after the treaty was signed: Johnson, 'The Northern War' (doc A5), p 87; Johnson, transcript 4.1.24, Oromāhoe Marae, pp 643–646; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 324.
966. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 519; Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 449.
967. The debates are described in detail in Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 351–383.

the natives as calculated to infringe upon their freedom in disposing of their lands in any quantity, and to whomever they might think proper.[968]

By blaming Heke's actions on disaffected whalers and settlers, Clarke sought to deflect attention from the Crown's own role in contributing to Māori concerns. Nonetheless, he could not avoid the fact that the Crown was partly responsible. This was somewhat due to 'one or two imprudent acts on the part of the Government', but more broadly it was because Māori who signed te Tiriti had not expected the Government to assert its authority as it had. Clarke made some very telling comments: as he put it, they 'had not a correct and comprehensive idea of all that was implied in ceding the sovereignty of their land'. As a result, it was 'very probable' that there was 'a . . . discrepancy between their intentions in the act, and our views and interpretations of it'; some rangatira felt the Governor's laws only applied to Europeans, and Te Raki Māori in general believed they were free to exercise 'sovereign acts and rights' such as the rights to make war and peace.[969] Clarke acknowledged that Te Raki leaders 'plead ignorance' on the impacts of Crown sovereignty, 'and accuse us of abusing their confidence' – though again, he sought to absolve the Crown by blaming this on 'the exaggerations of the public press' and on settler agitation, and by claiming that, despite their protestations, Māori were 'not altogether ignorant of the general meaning and tendency of their own act in signing the treaty'.[970]

Ms Wyatt noted that the main Pākehā agitators during the lead-up to the Northern War were the American settlers William Mayhew and Henry Smith, and the English-born ex-convict Charles Waetford, all resident traders at Te Wahapū under Pōmare's patronage. Frequently accused of being 'evil' or 'tangata kino', in Ms Wyatt's view they were simply explaining Britain's real intentions to assert authority over Māori and acquire their lands for settlement. Unlike missionaries and Government officials, they had no reason to 'mislead, deceive or assure' Māori: according to Ms Wyatt, none had claims to land, and none stood to benefit from any Māori rebellion against the Crown. They did, however, believe 'that their trading partners had been misled, and that an injustice had been committed'.[971]

This last point is borne out by Clarke's 1845 report, which amounts to an unambiguous admission by a senior official that the Crown had failed to give a clear explanation of its intentions before asking Māori to sign te Tiriti, either in general terms or in relation to specific matters such as the application of English law to criminal acts, trade, and use of land and resources. Being 'not altogether ignorant' of those intentions is scarcely the same as giving informed consent; indeed, as we concluded in our stage 1 report, Māori carefully presented their concerns and fears to Governor Hobson, and in return received assurances that they would

968. Clarke, half-yearly report, 1 July 1845 (Crown document bank (doc w48), p 266).
969. Clarke, half-yearly report, 1 July 1845 (Crown document bank (doc w48), p 267).
970. Clarke, half-yearly report, 1 July 1845 (Crown document bank (doc w48), p 267).
971. Wyatt, 'Old Land Claims' (doc e15), p 247.

retain their independence and would not be subordinate to the Governor.[972] Governor FitzRoy, writing in 1846, viewed the growing tensions in very similar terms, while also noting that the removal of the capital had caused 'very great dissatisfaction' to Te Raki Māori, and that the Wairau Incident – in which Nelson settlers had attempted to take disputed land by force and arrest Te Rauparaha – had shaken Māori confidence in settlers as people of peace and trade.[973] Dr Phillipson observed that these concerns were common among Ngāpuhi and were shared by Hōne Heke and those who would ultimately oppose him.[974]

While the Crown had acted in ways that had increased tensions, Bishop Selwyn pointed out that it had also failed to act in ways that might have fostered mutually beneficial relations. Early missionaries, he noted, had won Māori confidence by establishing schools and churches, whereas the Crown had brought soldiers, jails, 'swindling transactions in land', and protectors who did no more than patch up quarrels. The Crown could prove its good intentions by building schools and hospitals, securing Māori lands for the future, protecting Māori rights, and keeping its promises. Then Māori would have 'loved the Government as much as they do the Mission'.[975]

The colonial Government, of course, had no money in this period. Jonathan Adams, in his study of FitzRoy's financial plight, has highlighted the Governor's attempts to solve the colony's massive monetary problems by issuing Government debentures. FitzRoy saw this as a short-term measure until the depression had passed (in the wake of a huge drop in revenue from trade and customs duties), the British government had sent assistance, and the development of the colony's resources had allowed it to become self-supporting. As it was, the colonial debt was increasing daily, payment of Government salaries was behind, and FitzRoy could neither raise a loan nor draw bills on Treasury. He compounded his departure from his instructions by passing an ordinance proclaiming the debentures as legal tender. These would be prime causes of his dismissal from office (a decision taken by the Colonial Office by April 1845). But the Executive Council had supported his issue of the debentures, and the Legislative Council had passed his ordinance, seeing no alternative.[976]

It is hard to avoid the conclusion that the British government, in its rather rushed preparations for annexation, had simply made no proper provision for financing a new colony with a large indigenous population, which was also poised to receive a continuing influx of settlers. It seems to have relied instead on frequent reminders to the Governors to be as frugal as possible. By the time Governor Grey, FitzRoy's successor, was appointed, the matter was at least addressed, with Grey receiving substantial parliamentary grants in aid of New Zealand's revenue from

972. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 524.
973. FitzRoy, *Remarks on New Zealand*, pp 12–13, 14, 16, 31–32.
974. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 349–350.
975. G A Selwyn to E Coleridge, 8 August 1845 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 313–314).
976. Jonathan Adams, 'Governor FitzRoy's Debentures and their Role in his Recall', in NZJH, vol 20, no 1 (1986), pp 44–63.

the outset. But for the first crucial years of the colony's existence, when Crown policies aimed at bringing about the prosperity it had held out to Te Raki Māori might have been expected, the colonial Government was left without resources and was living hand to mouth.

Historians in this inquiry acknowledged the same immediate causes of tension between Te Raki Māori and the Crown that Clarke and FitzRoy had identified.[977] In Dr Phillipson's view, land issues were of considerable significance. As he saw it, Te Raki Māori wanted to maintain relationships with their settlers, and saw those relationships as involving ongoing reciprocal obligations; settlers occupied and used a portion of hapū lands, and in turn advanced Māori prosperity by giving gifts (both as part of the initial land transaction they entered into, and subsequently) and bringing trade. This arrangement had continued into the early 1840s – indeed, many rangatira appeared before the Land Claims Commission only after receiving gifts. According to Phillipson, Ngāpuhi leaders were indignant when they learned that the Crown would grant a limited acreage to settlers and keep the surplus for itself. Dr Phillipson regarded this policy as one of 'confiscation'. He noted that settlers had been telling Heke and other rangatira for years that the Crown intended to take their lands, but these rumours were not believed until Māori became aware of the surplus lands policy. But once Māori learned of the policy, and more generally understood that the Crown intended to acquire and profit from their lands, their mistrust grew, contributing to the emergence of a full-blown crisis in the Crown–Māori relationship in 1844.[978]

During the latter months of 1844 and into 1845, Clarke and several missionaries made attempts to repair the relationship and to reassure Māori of the Crown's protective intent. Clarke, together with Nene and other rangatira, persuaded the Governor against invading Ngāpuhi territories in September 1844.[979] Clarke also mediated in Crown–Māori disputes, and encouraged the Crown to respect Māori law and acknowledge the roles of rangatira in keeping peace and governing the country.[980] Towards the end of the year, Clarke and Henry Williams arranged for copies of te Tiriti to be circulated in the district, and Clarke also urged that the Crown respect Māori law.[981] These efforts were undermined by other Crown officials. Beckham and Kemp angered Ngāti Hine leaders by refusing to pay utu after a constable wounded one of their wahine rangatira.[982] After threatening to invade Ngāpuhi territories, FitzRoy made significant concessions at his hui with Ngāpuhi leaders at Waimate in September 1844, including promises (later broken) to end

977. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 373–374; Johnson, 'The Northern War' (doc A1), p 22.

978. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 100, 103, 147, 283–284, 316–317, 362, 370, 373.

979. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 333.

980. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 345; Johnson, 'The Northern War' (doc A5), pp 93, 114, 130.

981. Johnson, 'The Northern War' (doc A5), pp 87, 149.

982. Johnson discussed these events in detail: Johnson, 'The Northern War' (doc A5), pp 141–149.

the customs duties and return the surplus lands.[983] But his subsequent actions tended to escalate tensions. Wounded by incessant settler criticism of his policy of appeasement, he became increasingly determined to stamp out taua muru and make an example of Heke – to demonstrate once and for all that Māori must obey the colony's laws or face severe consequences.[984] War in the north was not inevitable at the end of 1844, but it was growing ever closer.[985]

4.6 Whakarāpopototanga o ngā Whakataunga / Summary of Findings

In respect of the Crown's proclamation of sovereignty and the establishment of Crown Colony government, we find that the Crown acted inconsistently with the guarantees in article 2 of te Tiriti and in breach of te mātāpono o te tino rangatiratanga and te mātāpono o te houruatanga/the principle of partnership by:

- Proclaiming sovereignty over the northern island of New Zealand and over all New Zealand in May 1840 by virtue of cession by the chiefs, and publishing and thereby confirming the proclamations in October 1840, despite the fact that this was not what Te Raki rangatira had agreed to or expected; nor did the proclamations reflect the treaty agreement reached between Te Raki rangatira and the Crown's representative about their respective spheres of authority.
- Subsequently appointing Hobson as Governor and instructing him to establish Crown Colony government in New Zealand, on the basis of the incomplete and therefore misleading information he supplied about the extent of Māori consent, without having considered the terms and significance of the treaty, in particular the text in te reo, and its obligations to Te Raki Māori from the outset.
- Undermining Te Raki Māori tino rangatiratanga and authority over their land by asserting radical (paramount) title over all the land of New Zealand, without explaining, discussing, or securing the consent of Te Raki Māori to this aspect of British colonial law, despite the control it gave the Crown over Māori land, and more especially the ultimate disposal of lands transacted pre-treaty with settlers.
- Further undermining Te Raki Māori authority over their land by asserting its sole right of pre-emption, which was not clearly expressed in either the te reo text of te Tiriti nor in the oral debate; the Crown was anxious to secure

983. Johnson described FitzRoy's negotiations and concessions in detail: Johnson, 'The Northern War' (doc A5), pp 116–129. FitzRoy reinstated customs duties in April 1845: Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 313. He did not inform the Colonial Office of his promise to return surplus lands, and nor did he take any action to implement the promise. Instead, he simply deferred any action: Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 339–341.

984. Johnson, 'The Northern War' (doc A5), pp 135–141.

985. In Phillipson's view, war became inevitable only after Heke's fourth attack on a heavily fortified and defended flagstaff in March 1845: Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 355, 363.

this right so it could fund and control British colonisation, and its failure to convey its intentions on a matter of great importance to hapū used to conducting their own transactions with settlers was not in good faith.

- Failing to acknowledge the significance of the treaty and of Te Raki Māori agreement to it in any of the Crown's acts of state asserting sovereignty over New Zealand.

These actions, in the absence of informed Te Raki Māori consent to the Crown's plans for the governance of New Zealand, were also inconsistent with the Crown's duty of good faith conduct, and thus breached te mātāpono o te houruatanga me te mātāpono o te whakaaronui tetahi ki tetahi/the principles of partnership and of mutual recognition and respect.

In respect of the assertion of effective Crown authority over Te Raki Māori during this period, we find that:

- By asserting the authority of its police and courts to enforce criminal law over Māori communities, the Crown breached te mātāpono o te tino rangatiratanga, as well as te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect. By claiming this authority without first engaging with and seeking the consent of Te Raki Māori, the Crown breached te mātāpono o te houruatanga/the principle of partnership.
- By failing to engage with Māori to ensure appropriate recognition and respect for Māori customary law, including appropriate recognition of the law of tapu and for the mechanisms of rāhui and muru, and appropriate recognition of the role of rangatira in the exercise of tikanga, the Crown also breached te mātāpono o te houruatanga/the principle of partnership.

In respect of the Crown's impacts on the district's economy, we find that:

- By imposing customs duties without engaging with Te Raki Māori, and without considering the impacts on Māori, the Crown breached te mātāpono o te tino rangatiratanga, and te mātāpono o te houruatanga/the principle of partnership.
- By moving the capital to Auckland without engaging with Te Raki Māori, in breach of prior assurances (from Busby to Te Kēmara and from Hobson to Pōmare) that the capital would remain in the Bay of Islands, and without attempting to mitigate the impacts of its decision, the Crown fundamentally altered the course of its treaty relationship with Te Raki Māori, acting inconsistently with its duty of good faith, and breaching te mātāpono o te houruatanga/the principle of partnership.

4.7 Ngā Whakahāweatanga/Prejudice

The breaches of the treaty discussed in this chapter have caused lasting prejudice to Te Raki Māori. Te Raki rangatira had signed te Tiriti believing the Governor would be their equal – a British rangatira who would control settlers, minimise harm to Māori arising from the process of settlement, and set the district on a course that would bring peace and prosperity to both Pākehā and Māori. Hobson's initial steps as Governor set the district on a different course. His 21 May

proclamations of sovereignty asserted that the Crown was to be the superior authority. The British expected to establish its authority over hapū and iwi through its own governing and legal institutions without further discussions even with the signatories at Waitangi whom Hobson considered had entered into the actual treaty with the Queen.

This constitutional step set in train events that would ultimately undermine the authority that Ngāpuhi had sought to protect when they signed te Tiriti. The Crown created and took sole control of the institutions that would shape and run the colony in future. From the Crown's point of view, all legislative and executive authority in New Zealand would thereafter be exercised by its officials, acting in the name of the Queen; the Governor and Executive Council – and their superiors in London and (initially) Sydney – would make decisions about matters of vital interest to Te Raki Māori, including past and future land arrangements, and trade. British law – though modified to fit New Zealand circumstances – would thereafter be the law of the land. During these early years, officials would make some concessions to Māori tikanga and authority, partly for reasons of humanitarian sentiment and partly because it was simply the most realistic position to take – especially when so many Māori communities lived well beyond the reach of British settlements. But in any case, it was always considered by the Colonial Office and Governors to be a short-term measure along the path to assimilation. We note therefore that for Māori the fact that New Zealand was designated a 'settled' rather than a 'ceded' colony probably made little difference. 'Settled' status embodied the legal position that English law would in principle apply to all inhabitants; but had 'ceded' status been allocated, the existing legal system (Māori customary law) remained unless or until it was modified.[986] It seems very unlikely that the status of Māori law, in this case, would have remained unchanged for very long. Both categories, as McHugh explains, arose in the course of Britain's territorial acquisition, and the eventual attempts of British colonists to secure their political rights.[987]

The treaty relationship in Te Raki was in fact fragile from the start. The Queen's representative had just arrived in New Zealand, and had to feel his way; Ngāpuhi were committed to te Tiriti, but uncertain about the role of the new Kāwana. We cannot see that Governor Hobson made a sustained effort to nurture the relationship, or even saw that it was important to Ngāpuhi that he do so. He did not call hui, or explain his decisions to the rangatira, or form relationships with them. There seemed little sign that he considered the rangatira to be on an equal footing. Yet Ngāpuhi rangatira had made it clear that this was what they expected. When he spoke at Waitangi, Patuone explained graphically, 'by bringing his two index fingers side by side, that they would be perfectly equal, and that each chief would similarly be equal with Mr Hobson'.[988] As Crown policies unfolded, suspicion and disenchantment took root. To some degree, this could be blamed on agitation by self-interested settlers, but to a greater degree it reflected the Crown's actions

986. Joseph, *Joseph on Constitutional and Administrative Law*, 5th ed, p 53.
987. McHugh (doc A21), pp 82–97.
988. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 366.

and Māori perceptions of them: its policies on old land claims, Māori control of the kauri trade, customs, the role of introduced law; the presence of its soldiers; Hobson's claims that he alone could manage Māori–settler disputes; the imprisonment and execution of the young man Maketū; and the Governor's decision to abandon the district altogether and remove his establishment to found a new town in Auckland.

These decisions jeopardised the treaty relationship, and also caused substantial economic harm to Te Raki Māori. By asserting authority over shipping, by charging customs duties, by enforcing British understanding of the land arrangements they had entered into with Pakeha pre-1840, and by abandoning the Bay of Islands, the Crown undermined tino rangatiratanga, contributed to a collapse in trade, and discouraged settlement in the north. Market forces could take some of the blame, but the Crown's actions at worst precipitated the collapse and at best made Te Raki Māori much more vulnerable to economic downturn than they would otherwise have been. Overall, Te Raki Māori, who had been wealthy in 1840, were described as impoverished by 1844 – thus beginning a long and difficult history of Māori economic marginalisation in the far north as further Crown policies saw reduced, not increased settlement and economic activity.

The political impacts of Crown actions were also significant. The Government may have struggled to exert substantive power in Te Raki at first. But, as we will see, that in itself contributed to the failure of Governor FitzRoy to defuse rising tensions there between 1844 and 1845. Under considerable settler pressure, and fearing that he might be held responsible for insults to the Queen's flag, he rapidly resorted to a military and naval response. The Crown's conduct during the Northern War would prove a low point in Crown relations with Te Raki Māori. Though its armies suffered defeats in the field, its naval and fire power enabled them to inflict damage and distress on many communities, destroying their pā, kāinga, waka, and cultivations. In the end, it was the kind of heavy-handed imperial response that some Māori had long feared, and some settlers had predicted; it seemed that warnings of dispossession by the British authorities had after all been justified.

Further long-term prejudicial legal and political impacts on the rights of tribes arose from the Crown's decision to secure Māori consent to its sovereignty through a treaty of cession, and from the impact of that sovereignty on Māori land rights. Both would be gravely damaging to tribal rights in ways Māori could not have foreseen; in fact, they were impacts that would not be evident to them for some time to come. We add at this point that it is possible they have borne the brunt of a historical construction of the treaty of Waitangi that may yet be found to be wrong. Dr Palmer has suggested that this is the case, based on what is now understoof of the Māori text of the treaty. Conventional international law, he states, is clear that 'To constitute cession it must be intended that sovereignty will pass. Acquisition of governmental powers, even exclusive, without an intention to cede territorial sovereignty, will not suffice.'[989]

989. Palmer, *The Treaty of Waitangi*, p 163.

He concludes that '[t]his analysis makes it difficult to accept that the Treaty of Waitangi was a treaty of cession of sovereignty at international law (it may have been more analagous to a 'treaty of protection', he suggests, but in 1840 Britain did not enter into treaties of protection). On the basis of what we know today, an interpretation of the Treaty . . . that accorded to most rangatira an intention to cede sovereignty is, in my view, untenable'.[990] Certainly, as we have concluded, Te Raki rangatira did not cede their sovereignty; they had no intention to do so, and did not understand that that was the effect of their signing te Tiriti.

The English text of the treaty, then, was drafted as a treaty of cession. The Government sought a cession from Māori for a range of reasons. This was its normal practice, as we have outlined, but it was also concerned about he Whakaputanga in which the chiefs, mostly from the far north, had affirmed the independence of their country only a few years before); and there was the further complicating factor of the pre-1840 purchases by settlers or speculators – including those by French and American citizens. It was considered that the Government would be in a stronger position to deal with these if the chiefs ceded sovereignty to the Crown.

For Māori, the legal impacts of the British decision were lasting. The loss of their tribal rights at law happened despite the British government's commitment by the early nineteenth century to recognition of the capacity of tribal societies to enter into treaties at international law. By signing te Tiriti, despite their own understanding of it as an agreement between equal parties, Te Raki Māori were deemed by the Crown to have ceded sovereignty, and as the ceding party 'they ceased to exist in the international sphere'.[991] Palmer, noting the view of international law experts on this, cites Ian Brownlie's view that the signing of the treaty meant that 'the separate international identity of the Confederation of Chiefs was extinguished'. He adds however that 'such a conclusion is easily founded on the English text of the Treaty'. He himself draws the conclusion that 'iwi or hapu no longer possess international legal capacity'; 'they have, no standing at international law to enforce the Treaty of Waitangi as a treaty of cession' (see section 4.3).[992]

The characterisation of the treaty by the British Crown as a 'complete cession of all the rights and powers of sovereignty of the chiefs' would also have long-term consequences for Māori treaty rights in New Zealand's domestic law. The general rule in New Zealand law Palmer explains, 'is that an international treaty will not be taken by New Zealand courts to impose domestic legal obligations unless Parliament says so by enacting it in legislation'.[993] It is now incorporated

990. Palmer, *The Treaty of Waitangi*, pp 164–165.

991. Palmer, *The Treaty of Waitangi*, p 160.

992. Palmer adds however that if there were a judicial ruling that the Treaty of Waitangi is valid in international law, it would be difficult for the New Zealand Government to ignore and difficult even for the New Zealand Parliament to overturn in practice without huge embarrassment' : Palmer, *The Treaty of Waitangi*, pp 160–162, 168).

993. Palmer, *The Treaty of Waitangi*, p 168. Joseph notes that the Treaty of Waitangi 'received legislative recognition from the outset but this did not transform the promises exchanged into justiciable rights'. He cites early legislation such as the Land Claims Ordinance 1841, the New Zealand

into some legislation, 'for some purposes, in certain circumstances, but not others'.[994] In *Te HeuHeu Tukino v Aotea District Maori Land Board* (1940), the Privy Council considered the legal status of the treaty (on the basis of the English text), commenting: 'It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the courts, except insofar as they have been incorporated in the municipal law.'

The Privy Council noted that this principle had been laid down in a series of decisions, summarised by Lord Dunedin in the Gwailor case, *Vajesingji Joravarsingji v Secretary of State for India* in these words:

> When a territory is acquired by a sovereign state for the first time that is an act of state. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler . . . In all cases the result is the same. Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing.[995]

The court could not therefore recognise claims based on the treaty. Palmer, writing in 2008, expressed his surprise that *Te Heuheu Tukino* was 'still the most recent judgment by New Zealand's highest court to consider directly the legal status of the Treaty of Waitangi'.[996]

These decisions would not, however, be the only impact of introduced law on Māori rights. We noted earlier in this chapter the impact of common law aboriginal title. As we have seen, on the proclamation of Crown sovereignty, tribal land rights were recognised as a qualification on the Crown's radical (or paramount) title to the land of New Zealand. But an emerging view among British authorities in the late 1830s was that the legal status of traditional polities after the acquisition of sovereignty should not be recognised. They might be recognised, it seems, just long enough to cede their sovereignty. In a new colony, however, tribal lands had not been granted by the Crown; they had no rights therefore which might be recognised at common law. Tribes had no legal status, and could not commence or maintain proceedings in court to protect tribal rights. Instead, their rights would be recognised through the Crown's guardians (indeed, through appointed

Constitution Act 1852 (UK), and the Native Lands Acts 1862 and 1865 as examples of such Acts, and cites *Nireaha Tamaki v Baker* in which the judicial committee determined that the Land Claims Ordinance 'did not establish any independent enforceable rights'. Joseph, *Joseph on Constitutional and Administrative Law*, 5th ed, pp 77–78.

994. Palmer, *The Treaty of Waitangi*, p 153.

995. *Te HeuHeu Tukino v Aotea District Maori Land Board* (1841) NZLR 590 (PC) (cited in Palmer, *The Treaty of Waitangi*, p 173).

996. Palmer, *The Treaty of Waitangi*, pp 172–174. We add that the Treaty has already been recognised by the courts as a relevant interpretative tool in statutory interpretation, regardless of whether the statute in question refers to the treaty. And in *Takamore v Clarke* [2011] NZCA 587 at [248]–[249], the Court of Appeal cited Matthew Palmer in his work *The Treaty of Waitangi*, noting that he states that the courts have nonetheless enforced the Treaty indirectly in a number of ways.

Protectors).[997] The individual rights of indigenous people might be recognised, McHugh has argued, but the British, having assured themselves of sovereignty over them, were then much less willing to recognise their collective rights, particularly those associated with the authority of their polities and their ownership of land. Post sovereignty, tribal polities held no legal status. They were subordinated to the authority of the settler-states.[998]

In New Zealand the proclamations of sovereignty and the establishment of the country as a British colony with a system of Crown Colony government had set in motion the process of ensuring that British authority and laws would also apply to Māori. Ultimately, it is no exaggeration to draw a direct line from these constitutional upheavals to countless subsequent breaches of the treaty in which the Crown and its institutions would exercise authority in a manner inconsistent with Māori rights and interests, causing war, land loss, and lasting political, economic and cultural prejudice. We consider the extent of this prejudice in some detail in the rest of our report.

997. McHugh, *Aboriginal Societies*, pp 133–134.
998. McHugh, *Aboriginal Societies*, pp 132–134.

CHAPTER 5

TE PAKANGA O TE RAKI, 1844–46 / THE NORTHERN WAR, 1844–46

> I tawahi ko ta koutou nei rahui he mea tuhituhi ki te reta koutou nei rahui. Tahae kau te Pakeha, Ka mau te ture ko to matou tikanga. He mea tapatapa tahae kau ka maru te tukituki.
>
> Your prohibition is written in letters, and [with] your prohibitions if a Pakeha just steals, the law binds him. Our custom is from naming some things as sacred, and if there is stealing, there is killing.
>
> —Hōne Heke, 6 February 1842[1]

5.1 Hei Tīmatanga Kōrero / Introduction

By 1844, there was increasing tension between the treaty partners in Te Raki. The Crown and Māori had differed over land and resources, law and tikanga, control of trade, and the very nature of their relationship. Rangatira who had signed te Tiriti believing it would bring their people prosperity, security, and ongoing independence instead found that the district's economy was declining sharply, while the Crown and settlers increasingly challenged or ignored their authority.

On 8 July 1844, rangatira Hōne Heke Pōkai and his supporters signalled their dissatisfaction with how the treaty relationship had developed by felling the flagstaff on Maiki Hill. Tensions increased during the following months, and early in 1845 he felled the flagstaff on three more occasions. The last of these, on 11 March 1845, involved violent clashes between Ngāpuhi and British forces, and ended in the destruction of Kororāreka. These events widened internal divisions within Ngāpuhi as some rangatira sought to limit the impact of Heke's actions and maintain peaceful relations with setters.[2] The Governor of New Zealand, Robert FitzRoy responded by sending forces to attack Heke, Te Ruki Kawiti, and others he considered to be in rebellion against the Crown. Between 28 April 1845 and 11 January 1846, Crown and Māori forces fought four battles at Te Kahika (also known as

1. Hone Heke to Bishop Selwyn, 6 February 1842 (cited in Ralph Johnson, 'The Northern War, 1844–1846' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2006) (doc A5), p 63.

2. The principal rangatira who acted in opposition to Heke and Kawiti were Patuone, Makoare Te Taonui, Tāmati Waka Nene, Hōne Mohi Tāwhai, and Arama Karaka Pī among others: Ralph Johnson, 'The Northern War, 1844–1846' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2006) (doc A5), p 213.

Hōne Heke's Attacks on the Maiki Hill Flagstaff

On four occasions during 1844 and 1845, Hōne Heke and his supporters felled the flagstaff on Maiki Hill. These actions occurred on 8 July 1844 (which, for convenience, we sometimes refer to as 'the first attack'); 10 January 1845 ('the second attack'); 19 January 1845 ('the third attack); and 11 March 1845 ('the fourth attack').

Puketutu), Ōhaeawai, Waikare, and Ruapekapeka. Crown forces destroyed several pā, kāinga, and cultivations. Taking into account both sides, more than 200 people were killed.[3] These conflicts would come to be known collectively as the Northern War.

This chapter addresses the large number of claims we received concerning the origins and causes of the Northern War, the Crown's use of force, and the Crown's approach to peace negotiations.[4] The tensions that emerged between 1840 and 1844 reflected divergent Crown and Māori understandings of the treaty. The Crown and claimant submissions in this inquiry also reflected different perspectives on the treaty's meaning in Te Raki in 1840. Put in simple terms, the Crown believed (and believes) it had a right to its exert authority over Te Raki Māori in the 1840s; the claimants and their tūpuna rejected that view. As first discussed in chapter 2, successive Tribunal reports have conceptualised the treaty relationship

3. According to Mr Ralph Johnson, at least 74 died from among Ngāpuhi who were resisting the Crown: Johnson, 'The Northern War, 1844–1846' (doc A5), p 413. Another five of Heke's party were killed at Te Ahuahu in fighting against Hokianga hapū: Johnson, 'The Northern War' (doc A5), pp 290–291. The Crown lost 10 at Kororāreka, 13 to 14 at Te Kahika, more than 100 at Ōhaeawai, and 12 at Ruapekapeka: Johnson, 'The Northern War' (doc A5), pp 206, 252–253, 306, 380. Māori who opposed Heke lost two to three at Waikare and five at Te Ahuahu: Johnson, 'The Northern War' (doc A5), pp 270, 290–291.

4. This includes the following claimants who raised the Northern War in their submissions: Whangaroa Taiwhenua collective (submission 3.3.385) and Mangakahia Taiwhenua collective (submission 3.3.293(a)); Wai 49 and Wai 682 (submission 3.3.382(b)); Wai 120 (submission 3.3.320); Wai 121, Wai 230, Wai 568, Wai 654, Wai 884, Wai 1129, Wai 1313, Wai 1460, Wai 1896, Wai 1941, Wai 1970, and Wai 2191 (submission 3.3.262 and submission 3.3.324) ; Wai 156 (submission 3.3.401(c)); Wai 354, Wai 1514, Wai 1535, and Wai 1664 (submission 3.3.399); Wai 375, Wai 520, and Wai 523 (submission 3.3.322); Wai 421, Wai 593, Wai 869, Wai 1247, Wai 1383, and Wai 1890 (submission 3.3.329(b)); Wai 549, Wai 1513, Wai 1526, and Wai 1728 (submission 3.3.297); Wai 605 (submission 3.3.315); Wai 774 (submission 3.3.391); Wai 862 (submission 3.3.290); Wai 919 (submission 3.3.390); Wai 990, Wai 1467, and Wai 1930 (submission 3.3.274); Wai 966 (submission 3.3.252); Wai 1354 (submission 3.3.292(a)); Wai 1445 (submission 3.3.343); Wai 1464 and Wai 1546 (submission 3.3.395); Wai 1477 (submission 3.3.338); Wai 1514 (submission 3.3.357); Wai 1516 and Wai 1517 (submission 3.3.246); Wai 1522 and Wai 1716 (submission 3.3.368(a)); Wai 1534 (submission 3.3.292); Wai 1536 (submission 3.3.368); Wai 1666 and Wai 2149 (submission 3.3.323); Wai 1732 (submission 3.3.278); Wai 1971 and Wai 2057 (submission 3.3.282); Wai 2059 (submission 3.3.296); Wai 2071 (submission 3.3.375); Wai 2355 (submission 3.3.275); Wai 2371 (submission 3.3.327); Wai 2377 (submission 3.3.333(a)); and Wai 2394 (submission 3.3.336).

as a partnership based on mutual recognition of powers, kāwanatanga, and tino rangatiratanga, each of which qualifies or fetters the other. In this district, the terms of that partnership can be found in those elements of the Crown's proposal that rangatira consented to – not in what the Crown assumed, based solely on the English text and its own political and legal norms. In essence, rangatira did not consent to the Crown's exercise of sovereignty over them or their territories but they did consent to the Crown controlling British subjects, in order to keep peace and protect Māori interests. Rangatira agreed also to regulate their own communities and expected to be the Governor's equals, albeit with distinct spheres of influence.[5] These differences in understanding were core precursors to the outbreak of the Northern War.

5.1.1 The purpose of this chapter

This chapter addresses issues of claim relating to the causes of the Northern War, the Crown's use of force during this conflict, and its approach to peace negotiations after. Many of the issues discussed here centre on what the claimants have described as the Crown's unwillingness to have meaningful discussions about the Crown–Māori relationship in the lead-up to the war; its subsequent aggression, and the efforts of their tūpuna, as the established and legitimate authority in Te Raki, to protect their tino rangatiratanga in the face of military force. The overarching aim in exploring these issues is to assess the extent to which the Crown's actions during the Northern War complied with its treaty duties and obligations.

5.1.2 How this chapter is structured

The next section of this chapter (section 5.2) sets out our issues for determination. We begin by introducing the key themes and conclusions of previous Tribunal reports concerning the Crown's treaty obligations in respect of Crown–Māori warfare, and the positions of the parties in stage two of our inquiry. Our issues for determination are distilled from the key differences in the positions of claimant and Crown parties, and from Tribunal jurisprudence.

The main historical analysis is prefaced by a brief chronological narrative, an overview of the key events of the Northern War, to provide context for our subsequent discussion of the issues. We proceed to address these issues, structuring our analysis of the treaty-compliance of the Crown's conduct into three key time periods: the phase of escalating tensions preceding the outbreak of armed conflict on 11 March 1845 (section 5.3); the Crown's use of force against sections of Ngāpuhi between 29 April 1845 and 11 January 1846 (section 5.4); and the peace negotiations that occurred from mid-1845 until the war's conclusion in January 1846 (section 5.5). We then consider the prejudice suffered by Māori as a result of these Crown actions (section 5.6). In the final section, we summarise our findings (section 5.7).

5. Waitangi Tribunal, *He Whakaputanga me te Tiriti, The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry*, Wai 1040 (Wellington: Legislation Direct, 2014), pp 528–529.

5.2 Ngā Kaupapa / Issues

5.2.1 What previous Tribunal reports have said

In other inquiries, the Tribunal has found that treaty partners may use force but only in very limited circumstances. In *Te Urewera* (2017), the Tribunal found that the Crown was justified in using force to respond to a series of lethal attacks by Te Kooti and his followers against Māori and settler communities. The Crown was duty-bound to protect its citizens,[6] and had a right to use force to keep peace[7] and restore order during a state of emergency where lives were at stake.[8] By the 1860s, when these events occurred, most Māori expected the Crown to protect them from harm caused by other Māori. In this respect, the Tribunal noted, circumstances differed from the immediate post-treaty years.[9]

The Tribunal has also found that the Crown can use force to secure peace and protect its citizens from harm, but only on two conditions. First, force must be necessary under the circumstances – the Crown cannot justify the use of force based on rumours or supposition; it must genuinely believe that force is required to address a real threat of physical harm.[10] Secondly, the Crown cannot resort to force without exhausting all other reasonable means of maintaining and securing peace; if at all possible, it must arrive at a negotiated solution.[11] These tests mean that the Crown cannot use force for the purposes of subjugating Māori, or asserting its sovereignty, or imposing its laws on Māori communities in breach of the guarantee of tino rangatiratanga.[12] The Crown cannot claim to have exhausted all possibilities for peace if it fails 'to provide for or protect Māori tino rangatiratanga, as the treaty required it to do'.[13] As the Tribunal found in *The Taranaki Report* (1996), and as we confirmed in our stage 1 report, New Zealand was founded on the principle that authority (and, indeed, sovereignty) must be shared between Māori and the Crown. Crown recognition of and respect for Māori autonomy was therefore 'the only foundation for peace' between the treaty partners.[14]

6. Waitangi Tribunal, *Te Urewera*, Wai 894, 8 vols (Wellington: Legislation Direct, 2017), vol 1, pp 281, 291–293, 498–499.
7. Waitangi Tribunal, *Te Urewera*, Wai 894, vol 1, pp 315–317, 498–499.
8. Waitangi Tribunal, *Te Urewera*, Wai 894, vol 1, pp 319, 498–499; see also pp 315–317.
9. Waitangi Tribunal, *Te Urewera*, Wai 894, vol 1, p 318; see also Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, Wai 201 (Wellington: Legislation Direct, 2004), p 220.
10. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, Wai 201, pp 214, 216, 219–220; see also Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, Wai 814, 2 vols (Wellington: Legislation Direct, 2004), vol 1, pp 116–118; Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pp 462–463.
11. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 894, pp 444–446. For an example of the application of this principle, see Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, Wai 201, pp 216–217.
12. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 1, p 121; Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi*, Wai 143 (Wellington: Legislation Direct, 1996), pp 78–79, 103.
13. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, p 446; see also Waitangi Tribunal, *The Taranaki Report*, Wai 143, p 80.
14. Waitangi Tribunal, *The Taranaki Report*, Wai 143, pp 6, 20; Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 524–525, 528–529.

In several inquiries, the Tribunal has considered situations in which the Crown used force to suppress what it saw as a rebellion. The Tribunal's concern has not been with the question of whether Māori were in rebellion in terms of the British law, but with the treaty compliance of the Crown's actions, particularly in the context of claims that the Crown had unfairly branded Māori as rebels, causing them prejudice.[15] Consistently, the Tribunal has found that Māori could only be labelled as such if two conditions were met: first, as the Tribunal found in *Te Urewera*, they must be 'citizens owing a duty of allegiance to the Crown'; and secondly, they must intend to overthrow the Crown's established authority by using force or the threat of force.[16] In *The Taranaki Report*, the Tribunal questioned whether a duty of allegiance could exist where the Crown's practical authority had not yet been established on the ground, and concluded that for much of the Taranaki War, 'The Governor was in rebellion against the authority of the Treaty and the Queen's word that it contained.'[17]

In other inquiries, the Tribunal has found that Māori have a right to defend their people, lands, and autonomy against threatened or actual Crown invasion.[18] This includes a right for hapū to support kin in accordance with tikanga and defend territories neighbouring their own where necessary to protect their own lands.[19] Under these circumstances, Māori could not fairly be regarded as being in rebellion,[20] and to deem them so would be a breach of treaty principles.[21]

When force is used for legitimate purposes (such as protecting citizens from violence), the Tribunal has found that it must be reasonable and proportionate. The force used must be no more than is absolutely necessary to support legitimate

15. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pp 421–422, 522; Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage 1*, Wai 1200, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 1, pp 253–254; see also Waitangi Tribunal, *The Taranaki Report*, Wai 143, pp 9, 91–92.

16. Waitangi Tribunal, *Te Urewera*, Wai 894, vol 1, pp 292–293, 317; see also Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 1, pp 117–118; Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, Wai 201, p 248; Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, p 253.

17. Waitangi Tribunal, *The Taranaki Report*, Wai 143, pp 9, 132–133.

18. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, pp 253–254; Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 1, pp 120–121; Waitangi Tribunal, *The Taranaki Report*, Wai 143, pp 59–60, 80; Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pp 422–423, 463.

19. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pp 362, 422–423, 463; Waitangi Tribunal, *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims*, Wai 215 (Wellington: Legislation Direct, 2004), p 114.

20. Waitangi Tribunal, *The Taranaki Report*, Wai 143, pp 9, 79–80; Waitangi Tribunal, *Te Raupatu o Tauranga Moana*, Wai 215, p 114; Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, pp 116–117; Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, Wai 201, p 249; Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pp 421–422.

21. Waitangi Tribunal, *Te Urewera*, Wai 894, vol 1, pp 292–293, 317.

objectives.[22] Even during times of war, fundamental treaty principles endure, including principles of active protection and good government, and the obligation to act honourably, fairly, and in good faith; these rights 'do not all evaporate in emergency conditions'.[23] Treaty partners have a right not to be arbitrarily punished or deprived of life.[24] The Tribunal has found breaches of the treaty where prisoners were summarily detained, deported, or executed without due process; non-combatants imprisoned or killed; and food and property plundered or destroyed without a legitimate military purpose and without sufficient regard for the potential impacts on non-combatants.[25]

5.2.2 Crown concessions

The Crown conceded that it had breached the treaty and its principles by 'making a cession of land a condition for peace in July 1845'. As a result of this condition, 'the war continued to the prejudice of those affected by it'.[26] We discuss this issue in section 5.5.3.7. The Crown also conceded that the 'effective confiscation' of Pōmare II's land interests at Te Wahapū in 1845 breached the treaty and its principles.[27] We discuss this in section 5.5.3.4.[28]

5.2.3 The claimants' submissions

The war, and all it represents, is of course a significant issue for the claimants. They saw it as having emerged from the Crown's unjustified claim of sovereignty over Te Raki Māori and its attempts to extend its practical authority into the north.[29] They viewed each of the attacks on the Maiki flagstaff as symbolic acts that were aimed at asserting mana and tino rangatiratanga, at contesting the Crown's claims of sovereign authority over Māori, at defending against Crown attempts to extend its practical authority into the north, at protesting over the negative impacts of Crown and settler actions, and at challenging the Crown to engage and resolve

22. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pp 354, 466, 527; Waitangi Tribunal, *Te Urewera*, Wai 894, vol 1, pp 296, 319; see also Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 1, p 116. The Tribunal, in its Te Rohe Pōtae inquiry (see *Te Mana Whatu Ahuru*, pp 464–466), considered whether there were standard rules of military engagement, understood by both Māori and colonial forces, at the time of the Taranaki and Waikato wars. It concluded that if there was any doctrine covering the conduct of colonial troops, 'it was the concept of military necessity: do what has to be done to achieve the desired ends, but no more than that'. That Tribunal report (p 527) also determined that all military action was in breach of treaty principles if the war itself was not justified and carried out for legitimate purposes.

23. Waitangi Tribunal, *Te Urewera*, Wai 894, vol 1, pp 319, 321–322, 499.

24. Waitangi Tribunal, *Te Urewera*, Wai 894, vol 1, p 319.

25. Waitangi Tribunal, *Te Urewera*, Wai 894, vol 1, pp 319, 327–330; Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pp 360, 527–528; Waitangi Tribunal, *The Mohaka ki Ahuriri* Report, Wai 201, p 219; Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 1, p 193.

26. Crown statement of position and concessions (#1.3.2), p 2.

27. Crown statement of position and concessions (#1.3.2), p 3.

28. Crown closing submissions (#3.3.403), p 3.

29. Claimant closing submissions (#3.3.219), pp 18–19, 24–25, 81–84; closing submissions for Wai 1477 (#3.3.338), pp 6–7.

these matters.[30] Some described these as acts of political protest;[31] others, as acts of resistance.[32]

Claimants told us that the Crown's responses were unreasonable. Instead of addressing Ngāpuhi concerns and thereby avoiding war, the Crown took actions that made armed conflict inevitable:[33] it rebuilt the flagstaff;[34] ignored or delayed invitations to engage with Heke and other rangatira;[35] and threatened to use force against Heke. Thus, they escalated tensions, caused or widened divisions within Ngāpuhi, and forced Ngāpuhi to take sides.[36] The subsequent militarisation of Kororāreka was an overt and provocative demonstration of the Crown's determination to assert authority over Ngāpuhi. This was the catalyst for the fourth attack on the flagstaff, on 11 March 1845, and meant that action could not occur without violence.[37] In 'the first true act of war', claimants said, the Crown responded by shelling and destroying Kororāreka.[38] And throughout the period leading up to war, in the claimants' view, the Crown took a punitive and autocratic approach, and failed to consider options other than military escalation; indeed, the Crown was more concerned with asserting its claim of sovereignty than maintaining peace,[39] despite knowing from an early stage that war would be the inevitable result of this approach.[40]

After the destruction of Kororāreka, claimants said, the Crown once again ignored opportunities to seek peace. Instead, it adopted a 'punitive and bellicose course'.[41] The Crown declared martial law,[42] and its troops invaded Ngāpuhi territories, attacking and destroying pā, kāinga, and other property, including that

30. Claimant closing submissions (#3.3.219), pp 49–51, 56, 57, 60, 89–91; claimant closing submissions (#3.3.220), p 6; Reply submissions for Wai 120, Wai 966, Wai 1837, and Wai 2217 (#3.3.521), pp [9]–[10].

31. Claimant closing submissionsr (#3.3.219), pp 90–91, 93–94; submissions in reply for Wai 1477 (#3.3.547), p 32; closing submissions for Wai 2377 (#3.3.333(a)), p 15; closing submissions for Wai 2394 (#3.3.336), p 10; closing submissions for Wai 1477 (#3.3.338), pp 6–7; closing submissions for Wai 774 (# 3.3.391), p 25.

32. Submissions in reply for Wai 120, Wai 966, Wai 1837, and Wai 2217 (#3.3.521), pp [9]–[10].

33. Claimant closing submissions (#3.3.219), pp 34–35, 49–50; claimant closing submissions (#3.3.220), p 31; closing submissions for Wai 1477 (#3.3.338), pp 11–12, 43; submissions in reply for Wai 1477 (#3.3.547), pp 31–32; joint submissions on reply for Wai 1522 and Wai 1716 (#3.3.548), pp 31–32; draft closing submissions for Wai 1514 (#3.3.357), pp 52, 54; closing submissions for Wai 2059 (#3.3.296), p [27].

34. Claimant closing submissions (#3.3.219), pp 34–35.

35. Claimant closing submissions (#3.3.219), pp 34–35, 51–52, 54–55, 57.

36. Claimant closing submissions (#3.3.219), pp 28, 34–35, 52–54, 56–57, 86–87, 92; draft closing submissions for Wai 1514 (#3.3.357), p 52.

37. Claimant closing submissions (#3.3.219), p 93; claimant closing submissions: Northern War (#3.3.220), pp 11, 12, 15; closing submissions for Wai 1477 (#3.3.338), pp 11, 15.

38. Claimant closing submissions (#3.3.220), p 6; claimant closing submissions (#3.3.219), pp 95–99.

39. Claimant closing submissions (#3.3.219), pp 54, 57, 60–61, 99–100; closing submissions for Wai 2059 (#3.3.296), pp [26]–[27].

40. Closing submissions for Wai 1477 (#3.3.338), pp 11–12.

41. Claimant closing submissions (#3.3.219), p 61.

42. Claimant closing submissions (#3.3.219), p 62.

of rangatira who had taken no part in the attacks on the flagstaff.[43] The Crown wrongly labelled some Ngāpuhi as 'rebels' and others as 'loyal', causing stigma to both.[44] The Ngāti Manu rangatira Pōmare II was wrongly arrested and detained, despite the Crown being aware of his neutrality.[45] Claimants said that throughout the conflict, the Crown was the aggressor while Ngāpuhi (on both sides) fought only reluctantly, in order to defend their homes and territories, and their mana and tino rangatiratanga.[46] The Crown ignored or rejected numerous offers of peace,[47] continued to initiate military actions after it had received those offers,[48] and when negotiations began, it imposed unreasonable conditions and refused to negotiate in good faith.[49]

Claimant counsel submitted that the Crown's actions caused the war, which was imposed on all of Ngāpuhi, including those who fought against Heke's alliance.[50] Those actions were in breach of the treaty principles of active protection, equity, and partnership.[51] Claimants therefore submitted that the Crown's use of force throughout the war was inappropriate and illegitimate.[52] It was not Ngāpuhi aggression that brought the conflict to the district, but 'the Crown's obstinate and wrongful belief that it was sovereign over Ngāpuhi, combined with its readiness to use aggressive war to defend that wrongful belief'.[53] The Crown 'did not merely fail to recognise or provide for the tino rangatiratanga and autonomy of nga hapu o Te Raki, but actively sought to crush it, in serious breach of the Treaty of Waitangi'.[54]

5.2.4 The Crown's submissions

Aside from its concessions (discussed earlier at section 5.23), the Crown maintained that it had acted reasonably in all circumstances, while Heke escalated tensions and ultimately started the war.[55] Crown counsel acknowledged that Heke most likely cut down the flagstaff in order to assert his mana and challenge the Crown's right to govern over Māori; however, the Crown did not regard this as a

43. Claimant closing submissions (#3.3.219), pp 63–66, 68–71.
44. Draft closing submissions for Wai 1514 (#3.3.357), p 52; reply submissions for Wai 2382 (#3.3.553), p 24; submissions in reply for Wai 1477 (#3.547), pp 23, 48–49; Jason Pou, transcript 4.1.30, Te Renga Parāoa Marae, pp [409]–[410]; closing submissions for Wai 2059 (#3.3.296), p [27].
45. Closing submissions for Wai 354, Wai 1514, Wai 1535, and Wai 1664 (#3.3.399), p 84.
46. Claimant closing submissions (#3.3.219), pp 36, 80; closing submissions for Wai 2059 (#3.3.296), p [26].
47. Claimant closing submissions (#3.3.219), p 139; see also pp 67–68, 70–71, 128–130, 139.
48. Claimant closing submissions (#3.3.219), p 146.
49. Claimant closing submissions (#3.3.219), pp 129, 135–136.
50. Closing submissions for Wai 1477 (#3.3.338), p 11; closing submissions for Wai 2059 (#3.3.296), p [27]; claimant generic closing submissions, level 1 (#3.3.219), pp 72–73, 80.
51. Closing submissions for Wai 1477 (#3.3.338), p 11; claimant generic closing submissions, level 1 (#3.3.219), pp 72–73, 80.
52. Claimant closing submissions (#3.3.219), pp 146–148.
53. Claimant closing submissions (#3.3.219), p 73.
54. Claimant closing submissions (#3.3.219), p 181.
55. Crown closing submissions (#3.3.403), pp 7–8, 69–70, 72–74, 90–91, 98–99, 105–108, 110, 125–126, 128–129.

legitimate or widely supported cause.[56] Counsel submitted that it was necessary for the Governor to respond with a show of military force in order to assert the Crown's authority.[57] The Governor then acted reasonably by negotiating with leading rangatira to secure peace, while making concessions that resolved all outstanding Ngāpuhi concerns.[58] It was Heke who acted unreasonably by declining to meet the Governor.[59]

After Heke had felled the flagstaff twice more, and was preparing for a fourth attack, the Governor issued a warrant for Heke's arrest and sought military reinforcements. Crown counsel submitted that these actions were reasonable under the circumstances.[60] The 'attack on Kororareka' by Heke and Kawiti on 11 March 1845 was unreasonable and put lives at risk.[61] The Crown asserted that it was not at fault for that attack or for the conflict that followed.[62] Military action became necessary 'after Heke and Kawiti had failed to meet their Treaty responsibilities by breaching law and order'[63] and because Heke and his allies were in rebellion against the Crown's authority.[64] The Crown acknowledged that its actions during the war included attacking and destroying pā, and destroying property including whare, food sources, and waka. Crown counsel submitted that these actions were justified for military purposes.[65]

5.2.5 The issues for determination

Arising from the findings of previous Tribunal reports (section 5.2.2), the differences between the parties' arguments (sections 5.2.2, 5.2.3, and 5.2.4), and the evidence presented to us, the issues for determination in this chapter are as follows:

- From June 1844 to March 1845:
  - What prompted the first (8 July 1844) attack on the flagstaff, and did the Crown take all reasonable steps to resolve tensions with Te Raki Māori?
  - Did the Crown take all reasonable steps to resolve tensions in the period between the September 1844 Waimate hui and the January 1845 attack on the flagstaff?
  - Did the Crown cause or provoke the fourth (11 March 1845) attack on the flagstaff?
- From March 1845 to January 1846:
  - Was the Crown justified in pursuing military action against Heke, Kawiti, and their allies?

56. Crown closing submissions (#3.3.403), pp 5–6, 69–70.
57. Crown closing submissions (#3.3.403), p 74.
58. Crown closing submissions (#3.3.403), pp 6–7, 87.
59. Crown closing submissions (#3.3.403), pp 6–7, 80.
60. Crown closing submissions (#3.3.403), pp 6–7, 90–91.
61. Crown closing submissions (#3.3.403), pp 7–8.
62. Crown closing submissions (#3.3.403), pp 7–8.
63. Crown statement of position and concessions (#1.3.2), p 80.
64. Crown closing submissions (#3.3.403), pp 104–105.
65. Crown closing submissions (#3.3.403), pp 8–9.

- Were some Ngāpuhi 'rebels' and others 'loyal'?
- Was the Crown justified in destroying Ōtuihu and arresting Pōmare II?
- Did the Crown take advantage of divisions within Ngāpuhi to support its military objectives?
- Was the Crown's stance on 'neutral' rangatira and hapū reasonable?
- Did the Crown use inappropriate or excessive force?
- Did the Crown take all reasonable steps to restore peace?

5.3 The Key Events of the Northern War, 1844–46: An Overview

The parties did not contest the facts though they disagreed about how these events should be interpreted. The Crown and claimants agreed that the attacks on the Kororāreka flagstaff were intended as challenges to the Crown's claim of authority over Te Raki.[66] They also agreed that the Governor threatened and later used force in order to assert the Crown's authority over Heke and his supporters. The essential point of difference between claimants and the Crown concerned the legitimacy of these actions. As the claimants regarded tino rangatiratanga as the established authority in Te Raki before and after 1840, they therefore regarded actions (including force) in defence of tino rangatiratanga as reasonable and legitimate, and actions that challenged tino rangatiratanga as illegitimate. The Crown's position was completely the reverse: it regarded its sovereignty as the established legal authority over the whole of New Zealand from 1840 onwards, and so considered actions in defence of its sovereignty and laws as reasonable and legitimate, and actions that challenged its authority as illegitimate.

To contextualise our consideration of these main points of difference, in this section we summarise the key events of the Northern War.

5.3.1 The attacks on the Kororāreka flagstaff

On 5 July 1844, Hōne Heke and a large party of his followers entered Kororāreka and conducted a taua muru against one of the townspeople. Heke remained in the town for three days, and on 8 July his party felled the flagstaff on Maiki Hill.[67] In his response, Governor FitzRoy sought to make a show of force 'that could maintain order and support the law when necessary'.[68] He requested military and naval support from Sydney.[69]

66. Claimant closing submissions (#3.3.219), pp 49–51, 56, 57, 60, 89–91; claimant closing submissions (#3.3.220), p 6; Crown closing submissions (#3.3.403), pp 5–6, 69–70.

67. Johnson, 'The Northern War' (doc A5), pp 92–94; Manuka Henare, Hazel Petrie, and Adrienne Puckey, '"He Whenua Rangatira": Northern Tribal Landscape Overview (Hokianga, Whangaroa, Bay of Islands, Whāngārei, Mahurangi and Gulf Islands)' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2009) (doc A37), p 457; Emma Gibbs-Smith (doc W32), p 24.

68. Executive Council Minutes, 11 July 1844 (Johnson, 'The Northern War' (doc A5), p 100).

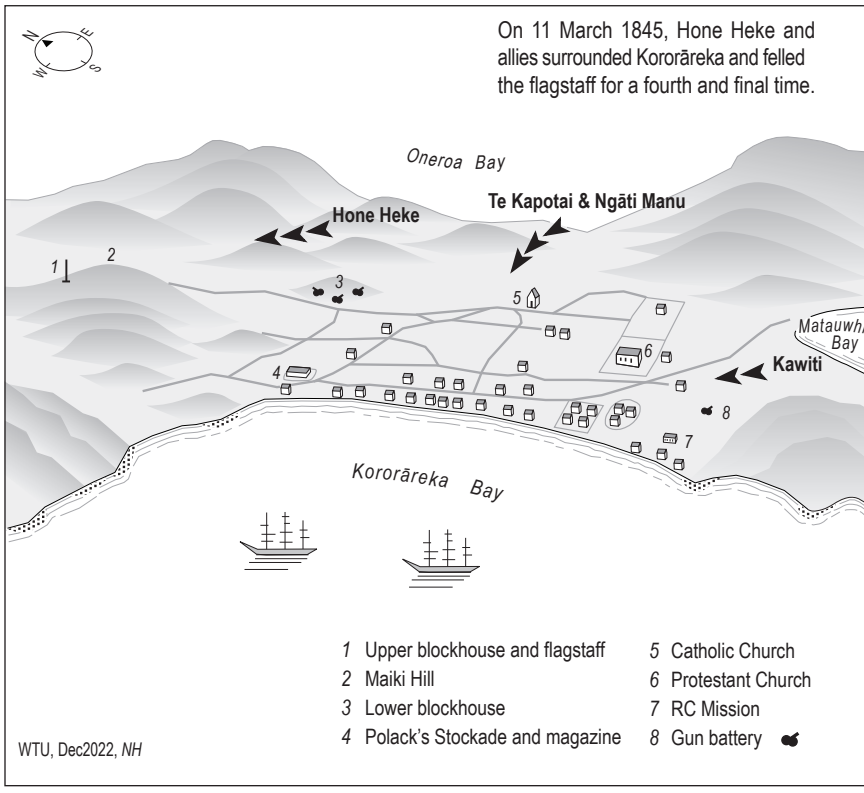
69. Ralph Johnson, presentation summary and response to statement of issues, 2016 (doc A5(f)), p 12.

On 17 July, a first contingent of soldiers arrived from Auckland with orders to defend Kororāreka and rebuild the flagstaff.[70] The following day, a large hui was held at Waimate, attended by more than 300 rangatira, who expressed their desire for peace and their opposition to the presence of British troops in their territories. Heke objected to the power exercised by Pākehā since the signing of the treaty, and more particularly to the replacement of the 1834 flag of independence with a British ensign.[71]

On 19 July, Heke wrote to the Governor offering to install a new flagstaff so as to secure peace, and he urged that FitzRoy keep his soldiers away from Te Raki.[72] Other Ngāpuhi rangatira, including Tāmati Waka Nene of Ngāti Hao, also wrote to FitzRoy and reminded him of King William's offer to recognise the Māori flag.[73] FitzRoy received Heke's letter in early August but did not reply.[74] Nor did he rescind his request for troops or his order that the flagstaff be rebuilt.[75] At some point in early-to-mid August, the flagstaff was rebuilt,[76] and on 18 August troop reinforcements arrived from Sydney.[77] These developments angered Heke and alarmed other Ngāpuhi leaders.[78]

On 25 August, FitzRoy arrived in the Bay of Islands with further military reinforcements,[79] demanding that Heke pay compensation for the flagstaff or face military action. Heke refused, saying he would not meet the Governor or agree terms so long as the flagstaff remained up.[80] FitzRoy then pressed ahead with his plan to march on Kaikohe,[81] but relented after overtures from Nene and several other leading rangatira who promised to pay the required utu and answer for Heke's future conduct.[82] On 2 and 3 September, a major hui was held at Waimate where this arrangement was formalised. The utu was paid, and the Governor agreed to withdraw his troops, sending most of them back to Sydney, leaving Nene and others to control Heke.[83] As part of this hui, FitzRoy made some important concessions. He announced that he was removing Bay of Islands customs duties (first discussed in chapter 4), which had crippled the northern economy and caused much resentment among Ngāpuhi. FitzRoy also told rangatira that he

70. Johnson, 'The Northern War' (doc A5), p 112.
71. Johnson, 'The Northern War' (doc A5), pp 102–103.
72. Johnson, 'The Northern War' (doc A5), p 104.
73. Johnson, 'The Northern War' (doc A5), p 108.
74. Johnson, 'The Northern War' (doc A5), p 109.
75. Johnson, 'The Northern War' (doc A5), p 110.
76. Johnson, 'The Northern War' (doc A5), p 110.
77. Johnson, 'The Northern War' (doc A5), pp 112–113.
78. Johnson, 'The Northern War' (doc A5), pp 110, 112–113; Grant Phillipson, 'Bay of Islands Maori and the Crown, 1793–1853' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2005) (doc A1), pp 332–333.
79. Crown document bank (doc W48), p 191; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 332.
80. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 332, 338; Johnson, 'The Northern War' (doc A5), pp 113–115.
81. Johnson, 'The Northern War' (doc A5), p 115.
82. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 332, 334–335.
83. Johnson, 'The Northern War' (doc A5), pp 121, 129, 130.



Map 5.1: The fourth attack on the Kororāreka flagstaff.

would provide a flag for Ngāpuhi and reverse the Crown's policy of retaining 'surplus' lands from pre-1840 land claims.[84]

Heke did not attend this hui, hosting a rival hakari nearby, but sent a note asking the Governor to remain for a few days so they could meet. FitzRoy did not stay.[85] On 7 September 1844, Heke visited Waimate, where he addressed a gathering of missionaries and Ngāpuhi. He said he wanted the Governor and rangatira to erect dual flagpoles, to fly the British and Māori flags side by side.[86] Soon afterwards, he wrote to FitzRoy asking for a hui to resolve their differences, and expressing a wish for peace.[87] Te Hira Pure (Te Uri o Hua, Te Uri Taniwha) also wrote to the Governor, saying he had committed a hostile act by bringing soldiers and restoring the flagstaff. He asked the Governor to return, take down the British

84. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 333–334, 339.
85. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 338.
86. Johnson, 'The Northern War' (doc A5), p 131.
87. Johnson, 'The Northern War' (doc A5), pp 133–135.

flag, and hold another hui so peace could be secured.[88] On 5 October, FitzRoy replied, promising to visit in summer, and he explained that from his point of view, the flag was a sacred symbol of the Queen's authority.[89]

In the meantime, during late September and early October, Ngāti Hine conducted a series of taua muru against settlers as utu for a police action during which one of one of their wāhine rangatira had been injured; named Kohu (Ngāti Manu and Ngāti Hine), she was a granddaughter of Kawiti.[90] Other Bay of Islands and Whāngārei hapū also conducted taua muru during the period from October 1844 to January 1845. Although many were motivated by disputes over land and tikanga,[91] another factor was growing concern among Bay of Islands Māori that the Crown was claiming to have acquired authority over their territories through the treaty. Copies of it were reprinted by the Government and missionaries, who offered reassurance that the Crown's intentions were entirely protective.[92]

Yet FitzRoy also prepared for the possibility of conflict. On 19 October 1844, he wrote to the Colonial Office seeking two warships and a regiment of troops.[93] On 21 October, he wrote to the Bay of Islands resident magistrate recommending that settlers leave the area, warning that military action might be necessary. FitzRoy also sent a visiting warship to the Bay of Islands.[94] In December, he wrote to Te Raki rangatira instructing them to prevent any further unrest and to warn that he might take action himself. This was published on 1 January 1845, but as historian Ralph Johnson observed, may not have reached Ngāpuhi before the punitive proclamations that followed.[95] On 8 January, the Governor issued one such proclamation that called for the arrest of rangatira responsible for taua muru at Kawau and Matakana, and warned that anyone who assisted them would face 'the strongest measures'.[96]

Early in the morning on 10 January 1845, Heke attacked the flagstaff for the second time.[97] Although no violence was involved, the Governor issued a new proclamation ordering Heke's arrest for defying 'the Queen's authority' and offering a £100 bounty for his capture.[98] On 17 January, soldiers arrived in the Bay of Islands and established their camp at Kororāreka. The following day, they erected a new flagstaff, and on the next Heke felled it – the third time he and his supporters

88. Johnson, 'The Northern War' (doc A5), p 132.
89. Johnson, 'The Northern War' (doc A5), pp 140–141.
90. Johnson, 'The Northern War' (doc A5), pp 141–144.
91. Johnson, 'The Northern War' (doc A5), pp 145–146, 148–149, 166.
92. Johnson, 'The Northern War' (doc A5), pp 149–150; Claudia Orange, *The Treaty of Waitangi* (Wellington: Allen & Unwin, 1987), pp 121–122; Hugh Carleton, *The Life of Henry Williams Archdeacon of Waimate* (Auckland: Wilsons and Horton, 1877), vol 2, p 200.
93. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 346–347; FitzRoy to Stanley, 19 October 1844, BPP, vol 4, p 413.
94. Johnson, 'The Northern War' (doc A5), p 147.
95. Johnson, 'The Northern War' (doc A5), pp 153–154.
96. Proclamation, 8 January 1845 (Johnson, 'The Northern War' (doc A5), p 157).
97. Johnson, 'The Northern War' (doc A5), pp 157–159.
98. Proclamation, 15 January 1845 (Johnson, 'The Northern War' (doc A5), p 159).

had done so. Although the flag was guarded by Nene's forces, no violence was involved.[99]

From this point, FitzRoy was certain that military action was necessary.[100] On 21 January, he wrote to the Governor of New South Wales, Sir George Gipps, asking for permanent troops and naval support.[101] FitzRoy sent two warships to the Bay of Islands, with instructions that the flagstaff be rebuilt with its staff encased in iron, and that it be surrounded by a palisade and guarded by soldiers in a block-house.[102] As tensions grew, missionaries wrote to FitzRoy urging him to visit the Bay of Islands, which he refused to do.[103] During the second half of February, Heke sought to build alliances with other Ngāpuhi leaders.[104]

On 11 March, Heke, Kawiti of Ngāti Hine and Pūmuka of Te Roroa together with Te Kapotai and sections of Ngāti Manu were involved in the attacks in Kororareka during which the flagstaff was felled for a fourth time. Fighting occurred between British forces and Māori, leading to casualties on both sides. After the flagstaff had fallen, British officers evacuated the town and began to shell it to prevent it from falling into Māori possession. Māori responded by looting and burning the town.[105]

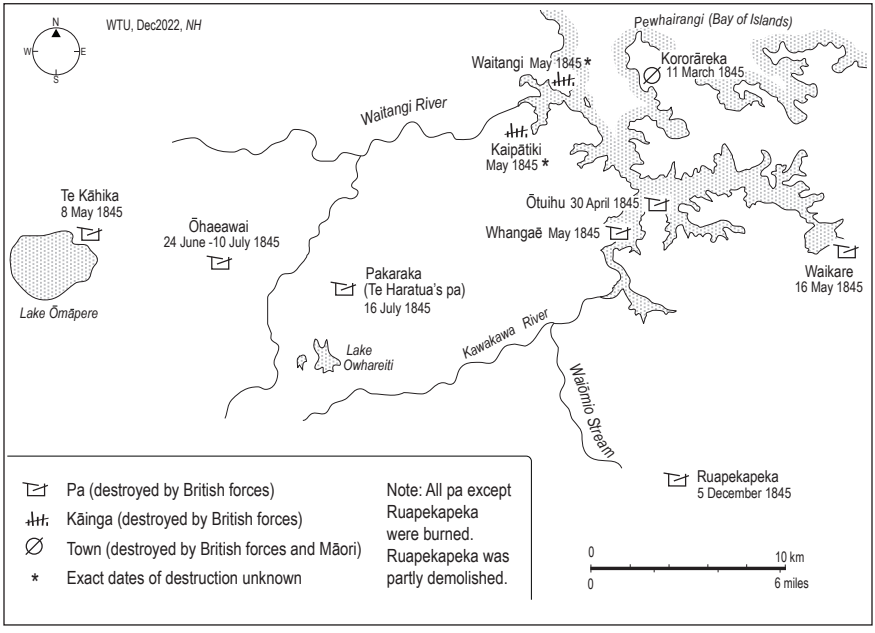
5.3.2 The key battles

The escalation to all-out conflict in the aftermath of the felling of the flagstaff was swift. Historians have characterised the Northern War as a three-sided conflict, in which Heke and Kawiti fought against both the Crown and other sections of Ngāpuhi, led by Tāmati Waka Nene and other Hokianga leaders. Other parts of Ngāpuhi, such as Whangaroa and the coastal Bay of Islands, remained neutral. Historian Dr Grant Phillipson, in his report 'Bay of Islands Maori and the Crown: 1793–1853', characterised the conflict as a civil war in two senses: first, within Ngāpuhi, and secondly, between sections of Ngāpuhi and the Crown.[106]

On 31 March 1845, Heke met with Nene in an attempt to make peace. This was not successful and armed skirmishes began almost immediately afterwards, continuing throughout much of April.[107]

On 17 April, the Governor issued a proclamation ordering a naval blockade of the Bay of Islands, and the following day the HMS *Hazard* sailed from Auckland back to the Bay of Islands, where many Ngāpuhi resided, to enforce the edict.[108] On 26 April, martial law was declared throughout the district and would remain

99. Johnson, 'The Northern War' (doc A5), pp 163–164.
100. Johnson, 'The Northern War' (doc A5), pp 164–165.
101. Johnson, 'The Northern War' (doc A5), p 165.
102. Johnson, 'The Northern War' (doc A5), pp 165, 169.
103. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 351–352; Johnson, 'The Northern War' (doc A5), pp 179–180.
104. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 352.
105. Johnson, 'The Northern War' (doc A5), pp 196–200.
106. Grant Phillipson, answers to questions of clarification (doc A1(e)), p 13; Grant Phillipson, transcript 4.1.26, Turner Events Centre, p [243]; see also Johnson, 'The Northern War' (doc A5), p 227.
107. Johnson, 'The Northern War' (doc A5), pp 228–229.
108. Johnson, 'The Northern War' (doc A5), pp 222–223.



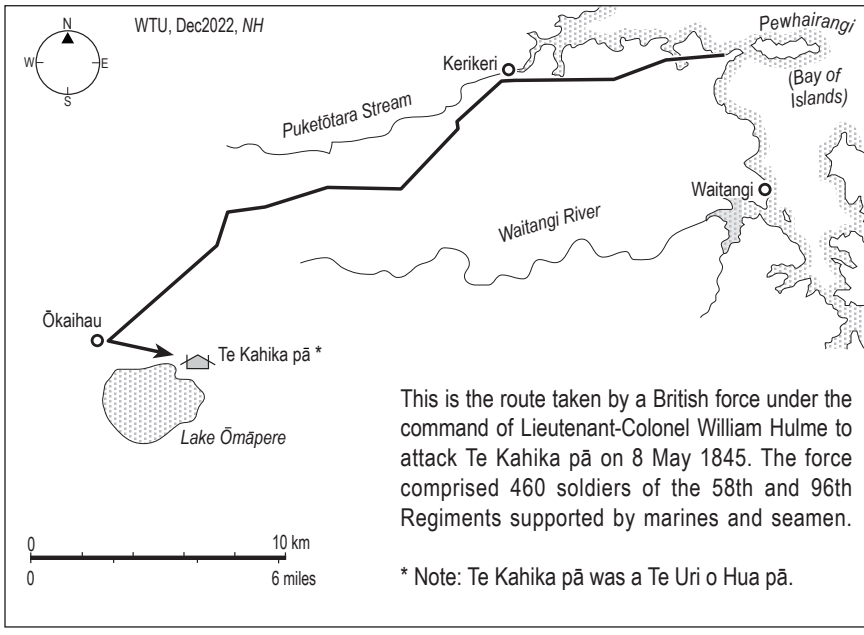
Map 5.2: Northern War key sites.

in place until the war ended. Heke, Kawiti, and their allies were declared to be in rebellion against the Crown's sovereign authority.[109] Governor FitzRoy instructed his military force to capture Heke, Kawiti, and other leaders, alive if possible, but to spare no other 'rebels'.[110] On the same day, a proclamation called on 'loyal' Māori to gather at mission stations, to fly the British ensign from their own pā, or else to follow the instructions of Nene and other Hokianga leaders who had aligned with the Crown; otherwise they would be regarded as rebels.[111]

On 30 April, British forces attacked and destroyed Ōtuihu, the pā of Ngāti Manu rangatira Pōmare II. Pōmare and his eldest daughter Iritana were captured and taken to Auckland aboard the *North Star*, where Pōmare was pardoned after Patuone (Ngāti Hao) and other rangatira intervened.[112]

On 8 May, the British forces attacked Te Kahika, a pā built by Heke and Te Hira Pure on Te Uri o Hua land at Ōmāpere. Heke and Te Hira Pure were joined in their defence by Ngāti Hine warriors under Kawiti, and by several other Bay of

109. Johnson, 'The Northern War' (doc A5), pp 224–225.
110. Crown document bank (doc W48), p 253.
111. FitzRoy to Hulme, 26 April 1845 (Crown document bank (doc W48), p 250); Johnson, 'The Northern War' (doc A5), pp 226–227.
112. Johnson, 'The Northern War' (doc A5), pp 232, 235–238, 241–243.



Map 5.3: The battle of Te Kahika.

Islands and Taiāmai hapū.[113] Johnson observed that the final death toll of this fighting is not known.[114] Historian James Belich estimated that five of Heke's party were killed inside the pā, and Kawiti 'lost twenty three killed outside the pā.'[115] Johnson notes that these figures are corroborated by the account of a French missionary, who wrote, 'Each side suffered about 50 casualties, with Maori dead outnumbering British by 28 to 13.'[116] English missionary Robert Burrows estimated that the British lost 14 killed and more or less 40 wounded.[117] At about the same time, seamen and marines from the Royal Navy ships attacked and destroyed several kāinga and a significant number of waka around the Bay of Islands coast. The kāinga are recorded as Waitangi, Whangae, Kaipatiki, and Kaihera.[118]

113. Johnson, 'The Northern War' (doc A5), pp 228, 249–251. Hapū involved in defence of the pā included Te Uri o Hua, Ngāti Hine, sections of Ngāti Manu, Te Kapotai, Ngāti Hineira, Ngāti Rangi, Te Uri Taniwha, and Ngāti Korohue: Hone Mihaka (doc B35), p 9; Hone Pikari (doc W11), pp 10–11; Te Kapotai claimants, 'Te Kapotai Hapu Korero: Mana, Rangatiratanga' (doc F25), p 54; Paeata Brougham-Clark (doc AA158), p 6.

114. Johnson, 'The Northern War' (doc A5), pp 253.

115. James Belich, *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (Auckland: Auckland University Press, 2015), p 43 (cited in Johnson, 'The Northern War' (doc A5), p 253).

116. Brother Emery to Brother Francois, 14 September 1845 (cited in Johnson, 'The Northern War' (doc A5), p 253).

117. Johnson, 'The Northern War' (doc A5), pp 253.

118. Johnson, 'The Northern War' (doc A5), pp 256–257.

On 16 May, British forces led an attack on Te Kapotai at Waikare. They found the pā abandoned and destroyed it, along with the surrounding settlement, without engaging in any direct combat. At the British commander's request, Te Patukeha, Te Māhurehure, and Te Hikutū attacked the retreating Te Kapotai, with each side experiencing about 10 casualties.[119] Afterwards, all British soldiers temporarily returned to Auckland. In their absence, on 26 May, Rewa of Ngāi Tāwake and Repa of Te Māhurehure led another attack on Te Kapotai, destroying canoes and carrying away all their food.[120]

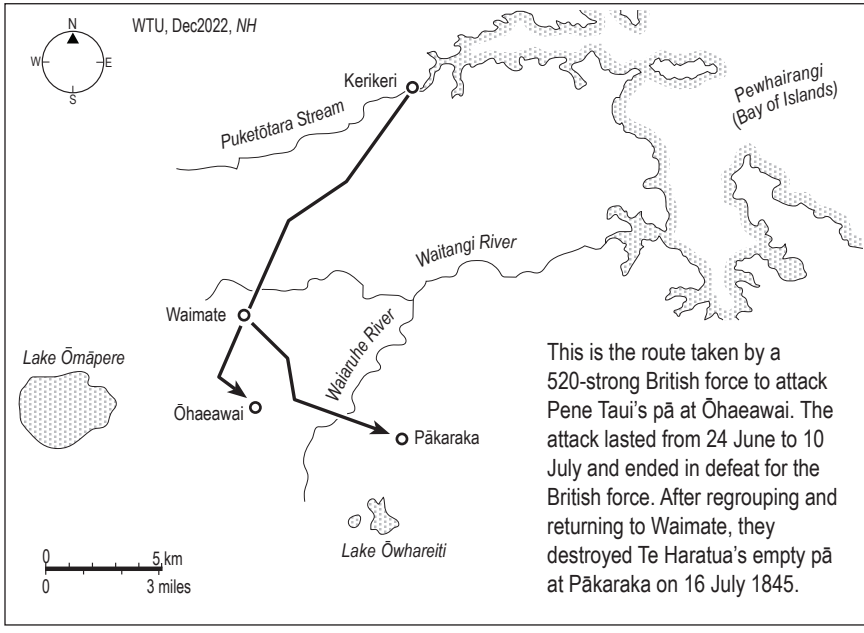
Meanwhile on 19 May, the naval blockade was extended to Whangaroa.[121] On 21 May, Heke wrote to FitzRoy denying responsibility for the destruction of Kororāreka and to ask the Governor if he was willing to meet and make peace.[122] FitzRoy received the letter on 29 May but did not reply.[123] Instead, on the same day, the Executive Council resolved to attack Heke again.[124]

By early June, British soldiers had begun to return to the Bay of Islands.[125] FitzRoy, who had by this time determined that Heke and Kawiti would have to forfeit land as a condition for peace, told one of his officers that any confiscated land would be divided among the 'loyal' Ngāpuhi.[126] While the troops were preparing for another attack, Nene and other Hokianga leaders had begun to move into the territories east of Ōmāpere, challenging the mana of Heke and his Taiāmai supporters. On 12 June, a major battle took place for control of a new pā Heke was building at Te Ahuahu. There was no British involvement. Heke lost the pā and was seriously wounded.[127]

On 24 June, British forces began a week-long bombardment of Ōhaeawai. The defence was led by Kawiti and Pene Tāui of Ngāti Rangi, while others involved included Ngāti Tautahi, Ngāti Kawa, Te Uri Taniwha, and Te Kapotai. Heke did not take part. On 1 July, British soldiers attempted to claim the pā, suffering heavy losses. Refusing Kawiti's offer of a temporary peace, the British force resumed its bombardment. The defenders evacuated the pā on 10 July, leaving the British to occupy and destroy it.[128] On 16 July, British soldiers left Ōhaeawai and marched to Te Haratua's pā at Pākaraka, which they found abandoned and also destroyed.[129]

From then until December there was no further fighting. The troops retreated to Waimate.[130] On 19 July, Heke wrote to Governor FitzRoy renewing his offer of

119. Johnson, 'The Northern War' (doc A5), pp 265, 267–270.
120. Johnson, 'The Northern War' (doc A5), p 271.
121. Johnson, 'The Northern War' (doc A5), pp 283–284.
122. Johnson, 'The Northern War' (doc A5), pp 257–259.
123. Johnson, 'The Northern War' (doc A5), pp 272–273.
124. Johnson, 'The Northern War' (doc A5), p 286.
125. Johnson, 'The Northern War' (doc A5), p 289.
126. Johnson, 'The Northern War' (doc A5), p 293.
127. Johnson, 'The Northern War' (doc A5), pp 289–291.
128. Johnson, 'The Northern War' (doc A5), pp 301–306, 309–310. For Te Kapotai involvement, see Te Kapotai claimants, 'Te Kapotai Hapu Korero: Mana, Rangatiratanga' (doc F25), pp 54–56.
129. Johnson, 'The Northern War' (doc A5), pp 311–312.
130. Johnson, 'The Northern War' (doc A5), pp 317–318.



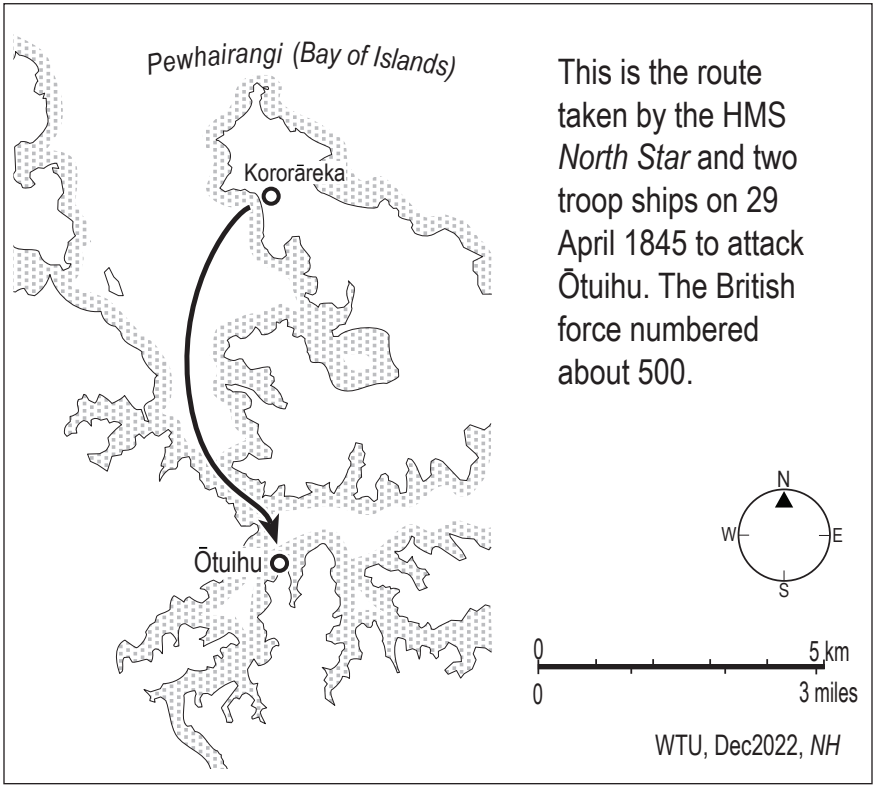
Map 5.4: Ōhaeawai and Pākaraka.

peace and to ask why FitzRoy had not responded to his earlier overture.[131] This time the Governor responded; he demanded that Heke 'offer an atonement' for the destruction of Kororāreka or face further military action. FitzRoy had already requested more military reinforcements from Sydney and he warned Heke that they were on their way.[132]

Heke correctly understood the Governor's request for 'atonement' to mean confiscation of land. On 29 August, Heke wrote back; he sought another meeting with FitzRoy to arrange peace, and questioned why he should atone when – in his view – the Governor and Nene were equally to blame for the war.[133] On 24 September, Kawiti wrote to the Governor also seeking peace.[134]

FitzRoy responded to Heke on 29 September and to Kawiti on 1 October, setting out his conditions for hostilities to end. One was that Māori forfeit significant tracts of southern Bay of Islands and Taiāmai land. Heke must atone because he was entirely responsible for the war, the Governor stated, and again he warned that more soldiers were coming; indeed, Britain could continue the war until Heke, Kawiti, and their allies 'were all destroyed'.[135]

131. Johnson, 'The Northern War' (doc A5), pp 319–320.
132. FitzRoy to Heke, 6 August 1845 (cited in Johnson, 'The Northern War' (doc A5), pp 313, 319–321).
133. Johnson, 'The Northern War' (doc A5), pp 323–326.
134. Johnson, 'The Northern War' (doc A5), pp 330–332.
135. FitzRoy to Kawiti, 1 October 1845 (cited in Johnson, 'The Northern War' (doc A5), pp 332–333).

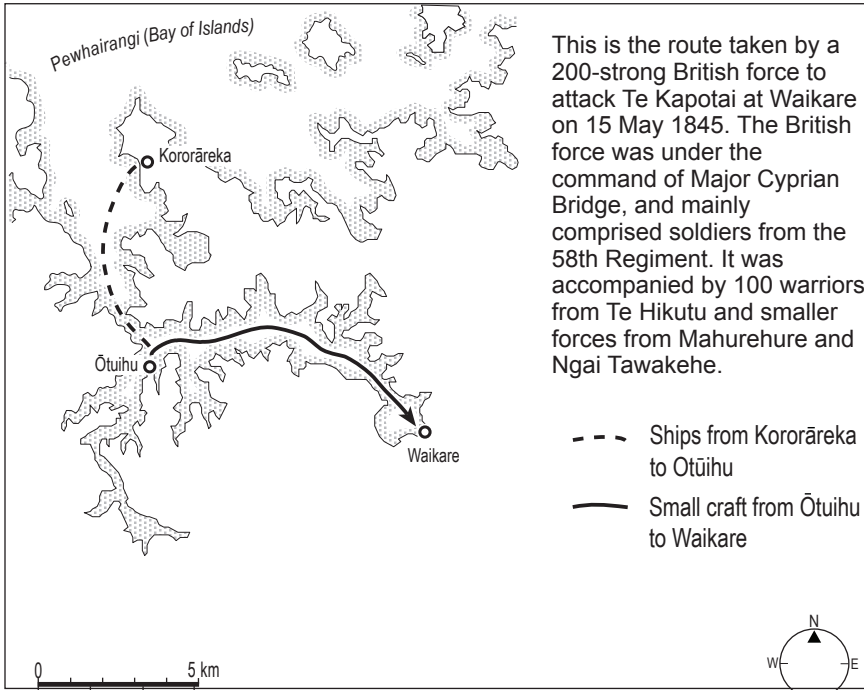


Map 5.5: The attack on Ōtuihu.

On 1 October, FitzRoy received notice that he was being recalled to Britain, in part because of his failure to resolve the conflict.[136] Six days later, Kawiti replied to the Governor's letter, saying he was willing to make peace but was not prepared to give up land.[137] FitzRoy, reluctant to negotiate, did not reply, but he instructed his troops to go to Okiato, to cut off Ngāti Hine access to the sea and prevent them from fishing. On 3 November, the missionary Henry Williams met with Heke and Kawiti, and reported that while they both wanted peace, they would fight if the Governor insisted on taking their lands.[138]

FitzRoy's replacement as Governor, George Grey, arrived on 14 November.[139] He travelled to the Bay of Islands and on 28 November, issued Heke and Kawiti with an ultimatum to accept the existing peace terms – including land confiscation – or

136. Johnson, 'The Northern War' (doc A5), pp 336–337.
137. Johnson, 'The Northern War' (doc A5), pp 337–338.
138. Johnson, 'The Northern War' (doc A5), pp 338–340.
139. Johnson, 'The Northern War' (doc A5), p 340.

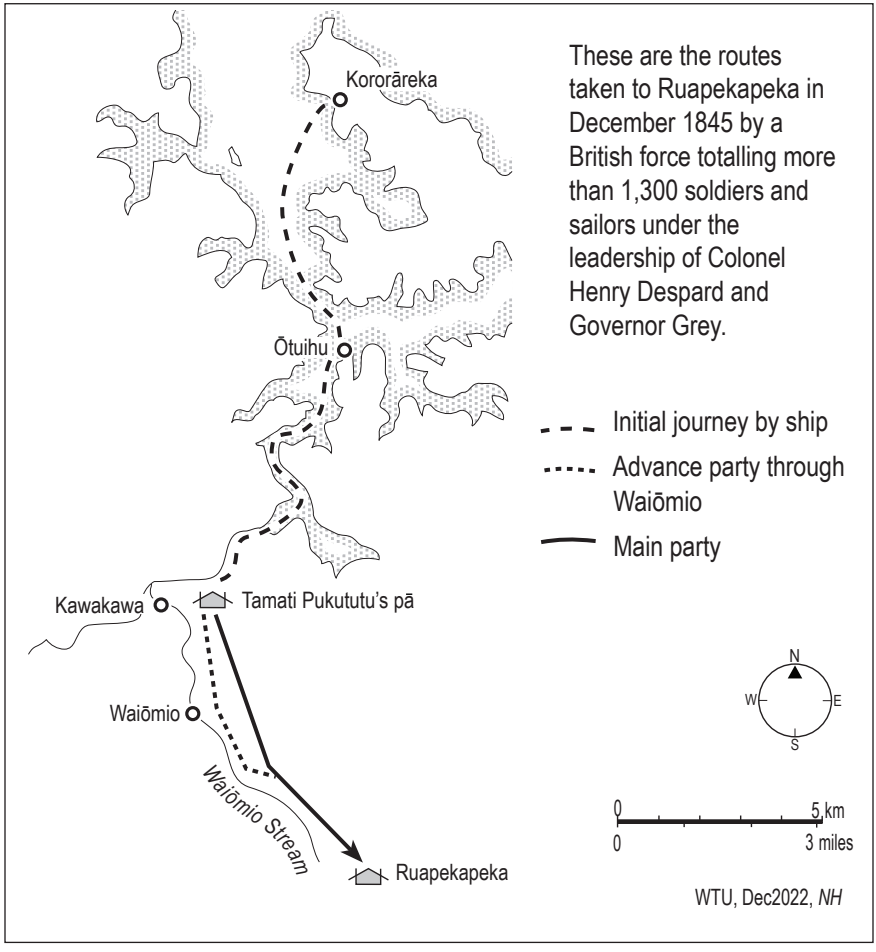


Map 5.6: The attack on Waikare.

face further military action.[140] The rangatira were given five days to reply. Both responded on 2 December, saying (again) that they wanted peace but would not accept land confiscation.[141]

On 5 December, Governor Grey ordered his troops to attack Kawiti's pā at Ruapekapeka.[142] About 20 to 25 of its defenders were killed and 12 British soldiers. Grey returned to the Bay of Islands on 18 December to lead the campaign, with the objective to 'crush' one or both of Heke and Kawiti. By this time reinforcements had arrived to swell the British force to 1,300, against a maximum of 400 defenders.[143] On 24 December, after several weeks of preparations, the British began to fire on the pā with heavy artillery.[144] On about 8 January 1846, after a fortnight of sustained shelling, the pā's defenders began a planned evacuation. Finally, on 11 January the pā was breached, allowing the British forces to storm it and attack the retreating Ngāpuhi.[145] Of the British forces, 12 were killed and 29 wounded.

140. Johnson, 'The Northern War' (doc A5), pp 344–346.
141. Johnson, 'The Northern War' (doc A5), pp 346–347.
142. Johnson, 'The Northern War' (doc A5), p 348.
143. Grey to Stanley, 10 December 1845 (cited in Johnson, 'The Northern War' (doc A5), p 360); Johnson, 'The Northern War' (doc A5), pp 360–362, 377–380.
144. Johnson, 'The Northern War' (doc A5), pp 363–365.
145. Johnson, 'The Northern War' (doc A5), pp 367–371.



Map 5.7: The Battle of Ruapekapeka

Estimates of casualties among those defending the pā range from nine to 25 killed and about 30 wounded.[146]

Both Heke and Kawiti escaped unharmed. Yet again they sought peace but this time they approached Pōmare II to act as mediator. On 19 January 1846, Kawiti wrote to Governor Grey seeking peace, and Pōmare also wrote to assure the Governor of Heke and Kawiti's sincerity. On 21 January, a major hui was held at Pōmare's Karetū Pā, where peace was cemented between Heke, Kawiti, and Nene. Pōmare and Nene then travelled to Auckland, where they told the Governor that Heke and Kawiti would no longer fight.[147] On 23 January, Grey issued a formal

146. Johnson, 'The Northern War' (doc A5), pp 377–380.
147. Johnson, 'The Northern War' (doc A5), pp 391–393.

peace proclamation and a full pardon to all involved in the 'rebellion.'[148] On 29 January, Kawiti wrote to Grey to confirm he consented to peace, on behalf of himself and Heke. With this act, the war was at an end.[149] The blockade was lifted on 1 February 1846.[150]

After the conflict, British troops remained at Waitangi.[151] On 4 December 1857, Ngāti Hine, under the leadership of Maihi Parāone Kawiti, built a new flagstaff atop Maiki Hill, naming it Kotahitanga and gifting it and the surrounding land to the Government.[152]

5.4 The Road to War: July 1844 to March 1845

5.4.1 Introduction

On four separate occasions from 8 July 1844 to 11 March 1845, supporters of the rangatira Hōne Heke Pōkai entered Kororāreka and felled the flagstaff on Maiki Hill.[153] The Government regarded each of these events as an affront to the sovereignty it presumed to exercise over Te Raki. It responded accordingly, sending for troops in preparation for armed conflict with Heke and his allies, while it also maintained dialogue with other sections of Ngāpuhi.[154] From early January, tensions rapidly increased, culminating in a fourth and final attack on 11 March 1845, during which Heke, Kawiti, Pūmuka, and their allies clashed with Crown forces, leading to casualties on both sides.[155]

Claimants and the Crown had very different views of these events. Claimants told us that the Crown caused the conflict, firstly by asserting its authority over Te Raki Māori,[156] and then by failing to respond appropriately to Heke's protests,[157] instead pursuing a divisive and punitive course that made war inevitable.[158] In the Crown's view, all of its actions during this period were reasonable, and it was Heke

148. Johnson, 'The Northern War' (doc A5), pp 394–395.
149. Johnson, 'The Northern War' (doc A5), pp 397–398.
150. Johnson, 'The Northern War' (doc A5), pp 397.
151. Johnson, 'The Northern War' (doc A5), pp 398–399.
152. Johnson, 'The Northern War' (doc A5), pp 404–405.
153. Ralph Johnson described these events; see Johnson, 'The Northern War' (doc A5), pp 92–94, 157–166, 188–192.
154. Johnson, 'The Northern War' (doc A5), pp 99–100, 117–118, 135–141, 155–157, 178–180, 211–213, 224–225.
155. Johnson, 'The Northern War' (doc A5), pp 188–192.
156. Claimant closing submissions (#3.3.219), pp 18–19, 24–25, 81–84; closing submissions for Wai 1477 (#3.3.338), pp 6–7, 11; closing submissions for Wai 2059 (#3.3.296), p 27.
157. Claimant closing submissions (#3.3.219), pp 27, 33–35, 86, 89, 91–94; closing submissions for Wai 1477 (#3.3.338), pp 11–12, 43; submissions in reply for Wai 1477 (#3.3.547), pp 31–32; joint submissions in reply for Wai 1522 and Wai 1716 (#3.3.548), pp 31–32; draft closing submissions for Wai 1514 (#3.3.357), pp 52, 54; closing submissions for Wai 2059 (#3.3.296), p [27].
158. Claimant closing submissions (#3.3.219), pp 34–35, 49–50; Claimant closing submissions (#3.3.220), p 31; closing submissions for Wai 1477 (#3.3.338), pp 11–13, 43; submissions in reply for Wai 1477 (#3.3.547), pp 31–32; joint submissions in reply for Wai 1522 and Wai 1716 (#3.3.548), pp 31–32; draft closing submissions for Wai 1514 (#3.3.357), pp 52, 54; closing submissions for Wai 2059 (#3.3.296), p [27].

who escalated tensions and initiated violence.[159] Heke's 11 March 1845 attack on the flagstaff amounted to 'a declaration of war on the Crown and those Ngāpuhi who had sworn to maintain the peace'.[160]

In this section, we therefore consider the following issue questions:

- What prompted the first (8 July 1844) attack on the flagstaff and did the Crown take all reasonable steps to resolve tensions with Te Raki Māori?
- Did the Crown take all reasonable steps to resolve tensions in the period between the September 1844 Waimate hui and the second (10 January 1845) attack on the flagstaff?
- Did the Crown cause or provoke the fourth (11 March 1845) attack on the flagstaff?

5.4.2 The Tribunal's analysis

5.4.2.1 *What prompted the first (8 July 1844) attack on the flagstaff and did the Crown take all reasonable steps to resolve tensions with Te Raki Māori?*

The first attack on the Maiki Hill flagstaff took place on 8 July 1844.[161] Governor FitzRoy responded by sending troops to the Bay of Islands and ordering that the flagstaff be rebuilt. He demanded that Heke pay utu for his actions or face military action. Heke declined. Faced with the threat of military invasion, other Ngāpuhi leaders then stepped in and negotiated with FitzRoy, and on Heke's behalf, paid the utu in return for concessions to ease their concerns about land and trade.[162]

In the claimants' view, the underlying sources of conflict were the Crown's illegitimate claim of authority over Te Raki, and its attempts to extend its practical authority into the district.[163] In their view, Heke and his people attacked the flagstaff in a legitimate act of resistance against Crown authority.[164] Claimants told us that the Governor had failed to meet Heke or address his valid concerns, and instead had responded in an unreasonable manner that escalated tensions.[165] The Crown argued that all of its responses were reasonable and rather it was Heke who had acted unreasonably and had caused tensions to mount.[166] We consider these divergent perspectives in the following sections.

159. Crown closing submissions (#3.3.403), pp 7–8, 69–70, 72–74, 90–91, 98–99, 105–108, 110, 125–126, 128–129.

160. Crown closing submissions (#3.3.403), pp 93–94.

161. Johnson, 'The Northern War' (doc A5), pp 90–91, 93; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 329.

162. Johnson, 'The Northern War' (doc A5), pp 115–116, 121–122.

163. Claimant closing submissions (#3.3.219), pp 18–19, 24–25, 81–84; closing submissions for Wai 1477 (#3.3.338), pp 6–7, 11; closing submissions for Wai 2059 (#3.3.296), p 27.

164. Claimant closing submissions (#3.3.219), pp 49–51, 56, 57, 60, 89–91; Claimant closing submissions (#3.3.220), p 6; closing submissions for Wai 1477 (#3.3.338), pp 6–7; submissions in reply for Wai 120, Wai 966, Wai 1837, and Wai 2217 (#3.3.521), p 9.

165. Claimant closing submissions (#3.3.219), pp 27, 33–35, 86, 89, 91–94;closing submissions for Wai 1477 (#3.3.338), pp 11–12, 43;submissions in reply for Wai 1477 (#3.3.547), pp 31–32; joint submissions in reply for Wai 1522 and Wai 1716 (#3.3.548), pp 31–32; draft closing submissions for Wai 1514 (#3.3.357), pp 52, 54; closing submissions for Wai 2059 (#3.3.296), p 27.

166. Claimant closing submissions (#3.3.403), pp 7–8, 69–70, 72–74, 90–91, 98–99, 105–108, 110, 125–126, 128–129.

5.4.2.1.1 The reasons for the 8 July 1844 attack on the flagstaff

The 8 July 1844 attack on the Maiki Hill flagstaff took place after a three-day muru raid in Kororāreka. During this time, according to settler accounts, about 50 or so of Heke's people occupied and plundered a settler's home, captured an escaped slave, took pigs and food, and broke into other houses, threatening and alarming some of the settler women.[167] According to Phillipson, Heke's party also made speeches threatening violence against Pākehā.[168] Heke met with the Crown officials and missionaries to relate 'the grievances of the natives, from the death of French explorer Marion Du Fresne to the present time, and particularly mentioned the manner the chiefs had been entrapped into signing the treaty of Waitangi'.[169] Heke also blamed the flagstaff for driving away shipping, which had caused Māori 'to have no trade'.[170]

The first attack on the flagstaff took place early in the morning of 8 July. Heke's party split into three groups: one took a waka to Waihihi, another acted as a covering party in Kororāreka, while a third climbed the hill to fell the flagstaff, then chopped it up and set alight the pieces. Police Magistrate Thomas Beckham and others watched on, judging themselves powerless to intervene. According to Ngāti Kawa sources, Heke was not present when the flagstaff came down as he had delegated the task to a close Ngāti Kawa relative, Te Haratua.[171] According to Beckham, no violence occurred during Heke's time in Kororāreka, other than one minor incident which, the police magistrate said, arose from a misunderstanding.[172] Nor, according to the former British Resident James Busby, was there any plunder of the town's shops, despite them being 'filled with every article on which the natives set a value'.[173] Having fulfilled their mission, Heke's party returned to Kaikohe.[174]

The kuia Emma Gibbs-Smith (Ngāti Kawa, Ngāti Rāhiri) told us that the decision to cut down the flagstaff was made by Ngāti Kawa collectively at a hui at Waitangi, after Heke had sought permission from the hapū. Although the Crown later focused its response on Heke, Ms Gibbs-Smith said the main organiser was the Ngāti Rāhiri and Ngāti Kawa rangatira Te Kēmara, who was too old to

167. Johnson, 'The Northern War' (doc A5), pp 90–93; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 329.
168. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 329.
169. Hector to FitzRoy, 8 July 1844 (cited in Johnson, 'The Northern War' (doc A5), p 93).
170. Weavell to Wilson, 25 January 1846 (cited in Johnson, 'The Northern War' (doc A5), p 91).
171. Emma Gibbs-Smith (doc W32), p 24; Freda Rankin Kawharu, 'Hone Wiremu Heke Pokai', *The Dictionary of New Zealand Biography*, vol I, p 185 (cited in Johnson, 'The Northern War' (doc A5), pp 93–94). Also see T Lindsay Buick, *New Zealand's First War: ot the Rebellion of Hone Heke* (Wellington: Government Printer, 1926), pp 36–38 (Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 329). As noted in section 8.4.2.1.5, in September 1844 another rangatira, named Hihiatoto, said he had cut down the flagstaff. We have received no evidence from claimants about Hihiatoto.
172. Johnson, 'The Northern War' (doc A5), p 94.
173. Busby to Hope, 17 January 1845 (Johnson, 'The Northern War' (doc A5), p 94).
174. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 329; Johnson, 'The Northern War' (doc A5), p 94.

participate in the action but retained considerable influence. Te Haratua was from the 'fighting arm' of Ngāti Kawa and he cut the flagstaff down on this and other occasions.[175] Ms Gibbs-Smith told us:

> The Crown focused its rīri on Hone Heke to try and isolate him but it wasn't his decision alone. That is not how our people carry out those sorts of activities. It was the hapū that decided to take the flag down. Putting flags up and then chopping them down are moments of great weight. You don't get individuals in our society doing those sorts of things alone.[176]

She told us that the flagstaff belonged to Heke's Ngāti Kawa hapū. Under Heke's supervision, they harvested the pou from one of their forests in 1834, and fashioned and erected it at Waitangi with the intention that it fly the 1834 flag of the United Tribes. At some point, the flagstaff was moved to Maiki, where ships would see it as they entered the harbour. After the signing of the treaty, Crown officials took down the 1834 flag and raised the Union Jack.[177]

In her view, the first action against the flagstaff was not intended as a threat to the Crown, but rather as a protest or complaint over Crown actions that had harmed Māori interests, including the loss of anchorage fees, loss of trade, loss of land, and loss of the capital to Auckland.[178] Overarching these issues were questions about the treaty relationship and the relative mana of the Crown and rangatira. Ms Gibbs-Smith said that Hōne Heke had supported the treaty but afterwards 'he came to realise that the British were not true to their word'; he found out he 'wasn't a rangatira anymore. . . . He was under the Queen and so was everyone else.'[179] He organised the removal of the flagstaff because of the 'attack on our mana that hoisting the [British flag] represented'.[180]

Historian Ralph Johnson said the Kawiti family had given him access to a document from the family archives that also described the attack as motivated by concerns about the treaty relationship. Titled 'Te Tapahanga Tuatahi o Maiki Pou Kara' ('The first cutting of the Maiki flagpole'[181]), the manuscript affirmed that 'The government and the Treaty of Waitangi had lowered his [Heke's] mana', and for that reason he had decided the flagstaff 'should be brought down'.[182]

175. Emma Gibbs-Smith (doc w32), pp 21, 23–24; see also Phillipson, 'Bay of Islands Maori and the Crown' (doc a1), pp 93–94.
176. Emma Gibbs-Smith (doc w32), p 24.
177. Emma Gibbs-Smith (doc w32), pp 22–23; see also Johnson, 'The Northern War' (doc a5), p 109.
178. Emma Gibbs-Smith (doc w32), pp 24–25.
179. Emma Gibbs-Smith (doc w32), pp 23–24.
180. Emma Gibbs-Smith (doc w32), pp 24–25.
181. Tribunal's translation.
182. 'Te Tapahanga Tuatahi o Maiki Pou Kara' (cited in Johnson, 'The Northern War' (doc a5), pp 96–97).

Te Raki Māori had particular concerns about the decline in Bay of Islands trade,[183] about the Government's land policies,[184] about settler transgressions against tikanga,[185] and about the Crown's attempts to enforce its laws against Māori.[186] All of these issues had directly affected Heke and his people. He and his hapū (which included Ngāti Rāhiri, Ngāi Tāwake, Ngāti Tautahi, Te Matarahurahu, Te Uri o Hua, as well as Ngāti Kawa) had significant territorial interests from Waitangi and Paihia inland to Kaikohe and Tautoro.[187] They had benefited significantly from anchorage fees at Paihia and Waitangi until the Crown prohibited them and imposed customs duties.[188] Heke was a 'prime mover' on land issues among Ngāpuhi rangatira. According to Dr Phillipson and Mr Johnson, this reflected Heke's obligation to fulfil his uncle Hongi Hika's ōhākī (dying wish): 'Children, and you my old comrades, be brave and strong in your country's cause. Let not the land of your ancestors pass into the hands of the pakeha.'[189]

Heke regarded the inquiries of the Lands Claims Commission into pre-treaty land claims (see chapter 4, section 4.4, and chapter 6, section 6.4) as Crown interference in relationships between rangatira and settlers.[190] More particularly, he resented the Crown's policy of retaining 'surplus' lands from those claims (that is, lands that settlers claimed but were not awarded to them because the acreage exceeded what was allowed under the law; the Crown retained this 'surplus' for itself instead of returning the land to Māori).[191] Heke had also been frustrated by increasingly frequent settler transgressions against tikanga and tapu at places such as Ōmāpere,[192] and by the attempts of Crown officials to impose their legal system on Māori as had occurred with the arrest and trial of Maketū in 1843 (which we discussed in section 4.4.2).[193]

183. Johnson, 'The Northern War' (doc A5), pp 65–73, 96; Emma Gibbs-Smith (doc W32), pp 24–25.
184. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 314–319; Johnson, 'The Northern War' (doc A5), pp 48–49; see also Crown document bank (doc W48), pp 332–333.
185. Johnson, 'The Northern War' (doc A5), pp 62–64.
186. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 322; Johnson, 'The Northern War' (doc A5), pp 53–54.
187. Merata Kawharu (doc E50), p [3].
188. Johnson, 'The Northern War' (doc A5), pp 65, 97.
189. T Lindsay Buick, *New Zealand's First War*), p 29 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 315).
190. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 316.
191. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 314–315; Johnson, 'The Northern War' (doc A5), pp 73–74.
192. Johnson, 'The Northern War' (doc A5), pp 62–64; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 316.
193. Johnson, 'The Northern War' (doc A5), pp 53–54, 56–57.

We discussed the continued use of taua muru during this period as a manner of enforcing Māori law and dispute resolution.[194] In many instances, Māori–settler conflicts caused by breaches of tikanga were a cause of muru, but were settled by officials or missionaries with the payment of utu. For instance, when settlers breached the rāhui at lake Ōmāpere to take ducks in 1843 and 1844, Heke arrived with a taua muru and demanded utu for the breaches of tikanga. In both instances, he accepted payment from the Anglican Bishop of New Zealand, George Augustus Selwyn, as compensation.[195] Heke's Kororāreka muru occurred when a young woman named Kōtiro – a Taranaki war captive – ran away with a settler, thereby challenging Heke's mana.[196] As discussed in chapter 4, these incidents reflected different Māori and Pākehā interpretations of the treaty. Māori believed te Tiriti preserved their independent authority, preserved their lands, protected them from uncontrolled settlement, and provided a basis for ongoing mutually beneficial relationships with the Crown and settlers.[197] Rangatira had signed te Tiriti only after receiving assurances that they and the Governor would be equals, and that Britain would use its power to protect them and their interests, not subjugate the Māori people.[198] Furthermore, during the early 1840s Te Raki Māori had continued to govern themselves in accordance with their tikanga, and manage Māori–Māori and also Māori–settler conflicts with minimal Crown intervention (see chapter 4).[199] In this period, muru were much loathed by settlers as contrary to their laws of property and protection of person but tolerated while the colonial Government had insufficient troops to control Māori communities.[200]

Conversely, the Crown believed it had acquired sovereignty over Māori territories and people, and had a right to enforce its laws over them.[201] Since 1840, the Crown had acted accordingly by proclaiming its sovereignty and gradually seeking to extend its practical authority.[202] Lieutenant-Governor William Hobson had been instructed by successive Colonial Secretaries, including Lord Normanby, Russell, and Stanley, to 'tolerate' Māori customs that were 'not directly injuri-

194. See Vincent O'Malley and John Hutton, The Nature and Extent of Contact and Adaptation in Northland, c1769–1840' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2007) (doc A11), pp 235–238; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 48, 51, 75–76, 81–83, 92; O'Malley, 'Northland Crown Purchases, 1840–1865' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2006) (doc A6), pp 68–71. We discussed these mutual adjustments and accommodations in our stage 1 report: see Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 241–242, 253–254.

195. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 76; Johnson, 'The Northern War' (doc A5), p 89.

196. Johnson, 'The Northern War' (doc A5), pp 90–91.

197. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 518, 528–529; see also Crown document bank (doc W48), pp 331–333.

198. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 518.

199. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 321, 324.

200. Phillipson, 'Responses to Post-Hearing Questions' (doc A1(g)), p 2.

201. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 529.

202. Johnson, 'The Northern War' (doc A5), p 53; see also Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 306.

ous'.[203] As we discussed in chapter 4, Stanley had responded to Hobson's request for more soldiers, following Heke's October 1840 muru on George Black, with the recommendation that the colony establish legal protections for Māori (see section 4.4.2.1). In particular, he considered that severe penalties could be imposed on settlers who desecrated wāhi tapu. By giving Māori recourse under the colony's laws, he observed, they would be more inclined to trust the Crown's authority and feel less need to take matters into their own hands.[204] However, settlers and the colonial Government were generally more intolerant than imperial authorities of Māori customary law.[205] No legal recognition was provided for Māori custom, and tensions had emerged when the Crown and settlers overstepped what the treaty had granted and increasingly asserted authority over Māori in respect of trade, resources, and land, and transgressed against tikanga. Indeed, in many cases their actions neglected the relationship altogether.[206]

For years, settlers had warned or taunted rangatira that the Crown's understanding of the treaty did not match that of rangatira. Some had said that Māori had lost their mana and had become 'enslaved' as a result of the treaty, and some said also that the Crown was waiting until it had sufficient practical power to seize their lands, as it had in other nations.[207] As discussed in chapter 4, Heke had on occasion raised these issues with the Chief Protector of Aborigines, George Clarke senior, or with missionaries.[208]

Consistently, Heke explained his actions against the flagstaff in terms of the treaty relationship, and in particular his belief that the Crown had deceived Māori into signing, by failing to explain its intentions fully. As noted earlier in this section, Heke told officials at Kororāreka that Māori had been 'entrapped' into signing te Tiriti.[209] In 1845, he wrote that he had not initially believed settler warnings about the Crown's understanding of the treaty, but gradually he came to believe them, and 'at once approached [the] Flagstaff, and cut it asunder that it might fall'.[210] Later that year, he referred to the treaty as 'soft soap', reflecting his view that its meaning in te reo was good but its English meaning was elusive.[211] In 1849, Heke wrote to the Queen to say that Hobson had misled him by failing to explain that the 1834 flag of the United Tribes would be replaced by a British ensign. This

203. Russell to Hobson, 9 December 1840, BPP, vol 3, p 150; Normanby to Hobson, 15 August 1839, BPP, vol 3, pp 91, 93.

204. Stanley to Hobson, 5 October 1842, as quoted in Waitangi Tribunal, *The Kaipara Report*, Wai 674, p 91.

205. McHugh, brief of evidence (doc A21), p 77.

206. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 315–316, 321; Johnson, 'The Northern War' (doc A5), p 96; Johnson, presentation summary (doc A5(f)), p 3.

207. Johnson, 'The Northern War' (doc A5), pp 74, 110, 130; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 315–316.

208. Johnson, 'The Northern War' (doc A5), pp 74–75.

209. Hector to FitzRoy, 8 July 1844 (cited in Johnson, 'The Northern War' (doc A5), p 93).

210. Heke to FitzRoy, 21 May 1845 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 316).

211. Reverend R Burrows, diary (cited in Johnson, 'The Northern War' (doc A5), pp 321–322).

was literally true but was also intended figuratively, a reflection of Hobson's failure to explain clearly that Britain's offer to protect Māori was conditional on their submission to the Crown's authority. Heke told the Queen that he and other rangatira had 'in our folly' consented to the treaty '[n]ot understanding the authority which accompanied the appointment of governors'.[212]

Crown officials also recognised that differing interpretations of the treaty lay behind Heke's concerns. Governor FitzRoy and other officials typically blamed this on 'bad and designing' settlers leading Heke astray,[213] though some officials were aware that Māori did not see themselves as having submitted to the Crown's laws or authority.[214] Busby wrote in 1845 that the conflict had begun because Māori believed the Crown had misled them at Waitangi, particularly over its intention to fund colonisation through profits from trade in Māori land.[215] Tāmati Waka Nene wrote in 1847 that Heke's opposition to the Crown arose from settlers' words to Māori, 'taurekareka kua riro te mana o to koutou whenua' (which we translate as 'Slave, your authority over your country is gone').[216] The missionary Henry Williams, in response to Nene, acknowledged that the war had been caused because Pākehā were telling Ngāpuhi: 'the sovereignty [mana] of your country is gone'.[217]

212. Heke to Queen Victoria, 10 July 1849 (cited in Johnson, 'The Northern War' (doc A5), pp 402–403).

213. FitzRoy to Gipps, 4 September 1844 (cited in Johnson, 'The Northern War' (doc A5), p 135); Johnson, 'The Northern War' (doc A5), pp 278–280. In particular, Crown officials seem to have been concerned with the role played by the acting American consul Henry Green Smith (see http://nzetc.victoria.ac.nz/tm/scholarly/tei-WilNewZ-t1-g1-t1-body-d2.html) and his trading partners William Mayhew and Charles Waetford. Heke met Smith on several occasions before attacking the flagstaff: Johnson, 'The Northern War' (doc A5), pp 278–279; Phillippa Wyatt, 'The Old Land Claims and the Concept of "Sale": A Case Study' (doc E15), MA thesis, University of Auckland, 1991, p 247. For a discussion of Smith's career including his connections with Heke, see Joan Druett, 'The Salem Connection: American Contacts with Early Colonial New Zealand', *Journal of New Zealand Studies*, no 8, 2009, p 185.

214. See Johnson, 'The Northern War' (doc A5), pp 60–61; Swainson to the Officer administering the Government, 27 December 1842, enclosed in Willoughby Shortland to Stanley, 31 December 1842, BPP, vol 2, minutes of evidence, pp 470–471; Clarke's answers to the Executive Council, 29 December 1842 enclosed in Willoughby Shortland to Stanley, 31 December 1842, BPP, vol 2, minutes of evidence, pp 459–460; George Clarke, 'The Chief Protector's Report for the Half-Year Ending 30 April 1842', CO 209/16, facing p 115, p 115 (Crown document bank (doc W48), pp 168–169).

215. Busby to Stanley, 1 July 1845 (cited in Johnson, 'The Northern War' (doc A5), pp 342–343).

216. Nene to Williams, 12 October 1847 (cited in Hugh Carleton, *The Life of Henry Williams, Archdeacon of Waimate*, 2 vols (Auckland: Wilsons and Horton, 1877), vol 2, p 200); see also Orange, *The Treaty of Waitangi*, p 122. Carleton translated Nene's words as 'slave, your right [mana] over the land is gone', and explained that the issue was not loss or sale of land, but 'that the country was taken from them, by passing under the Queen's sovereignty'.

217. Williams to Nene, 15 October 1847 (cited in Carleton, *The Life of Henry Williams*, vol 2, p 201). Williams also argued that loss of sovereignty had been a necessary price for Māori to protect their lands and personal security from foreign and settler threats, though that protection extended only to Māori who 'sat quietly' and 'kept straight'.

Heke chose the flagstaff as his target because he recognised it – and the ensign it flew – as symbols of the Crown's claim of authority.[218] To Heke, that authority had driven away shipping, impoverished his people, and subverted his mana.[219] Later, on several occasions he elaborated on his understanding of the flag as a symbol of authority and control. Explaining his actions to Governor FitzRoy, he wrote that Māori lands would be seized by the Governor and the people destroyed or exterminated, as had occurred in other colonies.[220] 'Ko te kara te kai tango wenua', he wrote.[221] The missionary Thomas Forsaith translated this as: 'The Ensign (or Color) takes possession of the Land.'[222] Another missionary, James Kemp, translated it as: 'The flag is the sign of conquest.'[223] Heke also explained that the flag must be seen in the context of the long-standing relationship between Ngāpuhi and the Crown. In 1820, Heke's uncle Hongi Hika had met King George IV. King George had assured Hongi that Britain would never seize possession of New Zealand unless the British flag was flying here. When Busby had arrived with a flag in 1834, that had not been a challenge to Ngāpuhi mana, but when Hobson arrived with the Queen's flag, Heke knew that King George had spoken the truth.[224]

Heke's understanding of the flag and flagpole as a symbol of authority was inevitably shaped by the Māori tradition of pou rāhui – carved sticks that were used as markers of territorial rights, especially when those rights were contested. Just as raising a pou rāhui was an assertion of rights, cutting it down signalled rejection of that claim. During the 1830s, Te Rarawa had used a British ensign for exactly this purpose, and Ngāpuhi had felled the pole from which it flew.[225] In an 1856 account of the war, the Eastern Sub-Protector of Aborigines Edward Shortland described the relevant tikanga:

> When two tribes contest the right to any place, one of them will set up their post: their antagonists will soon after come and cut it down: but, probably, either party will take care not to meet the other on the disputed ground till the post has been cut down and re-erected several times: when, if neither party will yield, the dispute at last ends in a fight.[226]

218. Johnson, 'The Northern War' (doc A5), pp 95, 96; Atholl Anderson, Judith Binney, and Aroha Harris, *Tangata Whenua: A History* (Wellington: Bridget Williams Books, 2014), p 207.

219. Johnson, 'The Northern War' (doc A5), p 91; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 312; see also Ani Taniwha (doc G3), p 12; Reuben Porter (doc S6), pp 36–37.

220. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 315–316; see also doc A5(a), vol 1, pp 237, 246.

221. Heke to FitzRoy, 21 May 1845 (doc A5(a), vol 1, p 227).

222. Heke to FitzRoy, 21 May 1845, translation by Thomas Forsaith (cited in doc A5(a), vol 1, p 235).

223. Heke to FitzRoy, 21 May 1845, translation by James Kemp (cited in doc A5(a), vol 1, p 246).

224. Edward Shortland, *Traditions and Superstitions of the New Zealanders: With Illustrations of their Manners and Customs* (London: Longman, Brown, Green, Longmans, and Roberts, 1856), pp 264–265; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 315; see also Heke to Queen Victoria, 10 July 1849, translation by John Johnson (interpreter, Civil Secretary's Office) (Crown document bank (doc W48), pp 346–347).

225. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 315–316; Anderson, Binney, and Harris, *Tangata Whenua*, p 207.

226. Shortland, *Traditions and Superstitions*, pp 264–265.

According to Ms Gibbs-Smith, the Crown committed a 'grave insult' to Ngāti Kawa when it removed the 1834 flag and replaced it with the British ensign. Heke and his people therefore determined to act.[227] Te Haratua felled the flagstaff on Heke's behalf, because 'you don't remove your [own] pou'.[228] This account accords with Heke's own explanation. Soon after felling the flag, he wrote to the Governor, 'The pole that was cut down belonged to me. I made it for the Native flag and it was never paid for by the Europeans.' By arranging for the flagstaff to be felled, he was asserting his mana and that of his hapū over the pou and all it represented.[229]

After the flagstaff was downed, Heke offered to erect two flagpoles on Maiki Hill, so as to symbolise the dual authority of the Crown and rangatira.[230] Later, he offered other means by which he could assert his mana while also acknowledging the Crown's kāwanatanga. The dual flagpoles are in contrast with Heke's proposal after the second felling in January 1845 (discussed later), when he offered to rebuild the lower part of the flagstaff, symbolising 'his right to the Mana (chieftainship) of the country', while the Government would build the part above and hoist its flag.[231]

In sum, we see the felling of the flag as a carefully organised and controlled action in which Heke, Te Haratua, and others sought to signal their resistance to Crown actions that impinged on their chiefly authority, including attempts to control Te Raki lands, trade, and criminal justice.[232] Heke and his supporters resorted to this action after previous attempts at engaging with the Crown had proved fruitless, as discussed in chapter 4.[233] We do not believe that the Crown's actions up to that point had fatally weakened the tino rangatiratanga of Ngāpuhi hapū; on the contrary, those hapū largely continued to govern themselves.[234] But the Crown did assume it possessed sovereign authority over the north and had attempted to exert practical authority in a manner that had damaged Ngāpuhi interests. This caused Heke and other rangatira to question the Crown's understanding of the treaty.[235] We agree with Dr Phillipson that Heke's goal was to challenge the Crown's claim of authority over Te Raki and its people,[236] and to press the Governor to acknowledge their tino rangatiratanga.[237]

227. Emma Gibbs-Smith (doc w32), p 23.
228. Emma Gibbs-Smith (doc w32), p 24; see also 'Te Tapahanga Tuatahi o Maiki Pou Kara' (Johnson, 'The Northern War' (doc a5), p 97).
229. Johnson, 'The Northern War' (doc a5), p 104.
230. Cotton, journal, 7 September 1844 (cited in Johnson, 'The Northern War' (doc a5), p 131).
231. Grant Phillipson, summary of 'Bay of Islands Maori and the Crown' (doc a1(d)), pp 18–19; Johnson, 'The Northern War' (doc a5), p 158.
232. Johnson, 'The Northern War' (doc a5), p 95.
233. Johnson, 'The Northern War' (doc a5), p 96.
234. Phillipson, 'Bay of Islands Maori and the Crown' (doc a1), p 321.
235. Phillipson, summary of 'Bay of Islands Maori and the Crown' (doc a1(d)), pp 18–19.
236. Phillipson, 'Bay of Islands Maori and the Crown' (doc a1), pp 328–329; Phillipson, answers to questions of clarification (doc a1(e)), pp 6–7.
237. Phillipson, answers to questions of clarification (doc a1(e)), pp 7–8.

5.4.2.1.2 Crown and Ngāpuhi responses to the first felling

The action by Heke and his people represented a challenge not only to the Crown but also to neighbouring hapū with interests in Kororāreka.[238] During the 1830s and early 1840s, Heke had asserted rights over land at the foot of Maiki Hill, leading to disputes with the section of Ngāi Tāwake and Te Patukeha living at Te Rāwhiti.[239] By orchestrating the attack, Heke was asserting his claim over the flagstaff and its land, and so was also renewing his challenge to those hapū.[240] Within hours of the flagstaff being cut, about 400 Te Rāwhiti Māori descended on Kororāreka.[241] According to police magistrate Beckham, they were incensed at Heke's conduct. The Te Rāwhiti people declared that the flagstaff had been erected under their authority, not that of Heke or his people. They therefore erected a temporary flagstaff, offering to protect it until a permanent replacement could be built, and 'determined to punish [Heke] for the outrages he had committed'.[242] The Crown presented this as evidence that 'many within Ngapuhi disagreed with Heke's actions'.[243] In fact, as we will see, many within Ngāpuhi (including Te Patukeha leader Rewa) shared Heke's concerns about the treaty relationship, even if they did not necessarily support his methods.[244] In this initial response, Te Rāwhiti Māori were defending their own authority over the flagstaff, land, and the Crown–Māori relationship.[245]

Fearing a general outbreak of war, Beckham persuaded Te Rāwhiti Māori to take no action against Heke until the Governor's wishes were known. Bishop Selwyn then intervened, inviting all Bay of Islands and Hokianga rangatira to a hui

238. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 330; Johnson, 'The Northern War' (doc A5), pp 100–101.

239. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 135, 330; see also Emma Gibbs-Smith (doc W32), pp 22–23; Johnson, 'The Northern War' (doc A5), pp 101, 109. For further detail on Heke's land interests, see Bruce Stirling with Richard Towers, '"Not with the Sword but with the Pen": The Taking of the Northland Old Land Claims, Part 1: Historical Overview' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2007) (doc A9), pp 77, 110; Johnson, 'The Northern War' (doc A5), pp 161–162. Heke's interests in Maiki may have derived from his Ngāi Tāwake or Whangaroa ancestry, or from other lines of descent.

240. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 330.

241. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 329–330.

242. Beckham to Colonial Secretary, 10 July 1844 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 330).

243. Crown closing submissions (#3.3.403), pp 69, 119.

244. Johnson, 'The Northern War' (doc A5), pp 162, 213–214. Leaders expressed their concerns at subsequent hui and in letters to the Governor: Johnson, 'The Northern War' (doc A5), pp 101–103, 106–108; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 331, 344, 349–350. For general discussions about the motivations of various Ngāpuhi hapū and leaders, see Vincent O'Malley, 'Northland Crown Purchases, 1840–1865' (doc A6), p 82; Henare, Petrie, and Puckey, '"He Whenua Rangatira": Northern Tribal Landscape Overview' (doc A37), pp 466–467; Belich, *The New Zealand Wars*, p 30; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 320.

245. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 329–330. It is also notable that Te Rāwhiti Māori did not respond to the taua muru – on the contrary, they allowed it to continue for three days without interference, which suggests they saw it as a legitimate enforcement of tikanga. They became involved only once their mana over the flagstaff, hill, and Crown–Māori relationship were challenged: Johnson, 'The Northern War' (doc A5), pp 90–93, 100–101.

at the Waimate mission on 18 July 1844.[246] Governor FitzRoy appears to have heard of Heke's actions on 9 or 10 July, through reports from Beckham; the Northern Sub-Protector of Aborigines, Henry Tacy Kemp; and some Kororāreka settlers.[247] While he acknowledged that Heke's actions had alarmed Kororāreka residents,[248] in our view, his subsequent words and actions made clear that his main concern was the attack on the flagstaff – which he understood as a symbolic attack on the Crown's sovereignty.[249]

Although the flagstaff had been taken down without serious violence,[250] Governor FitzRoy determined that a show of military force was needed to demonstrate that rangatira could not dishonour the flag or harass settlers without consequence. FitzRoy made this decision without seeking input from the Colonial Office in London, nor did he conduct any inquiry into the facts or seek Heke's view; instead, he relied on advice from Kororāreka settlers and local officials.[251] On 10 July, FitzRoy sent a contingent of 30 soldiers and one officer from Auckland to Kororāreka. He instructed Beckham to wait for the troops' arrival in a few days and then to re-erect the flagstaff in the same position as before.[252]

This initial force was to remain in Kororāreka and act only in a defensive capacity.[253] But FitzRoy also planned to send a much larger force, with a punitive purpose in mind. His plan, which he discussed with the Executive Council, was to send a warship and a contingent of troops to the Bay of Islands, and demand some form of compensation or atonement from Heke. By this means, he intended to show Heke and indeed all Māori 'that outrages cannot be committed with impunity' and that colonial laws would be enforced. If Heke would not comply with the Governor's demands and 'make atonement for his conduct', then 'compulsory measures would be employed to oblige him to do so'.[254]

FitzRoy, furthermore, determined to co-opt other Ngāpuhi leaders to assist him in his action against Heke. On 12 July, he instructed Crown officials in the Bay of Islands to call the district's leading rangatira together and ask for their assistance 'in obliging Heke to make such compensation and atonement as I shall deem necessary'. FitzRoy emphasised 'that Heke is alone considered blameable; that it is from him that atonement will be demanded; and that the concurrence of all other chiefs is desired and expected, in obliging him peaceably to acknowledge and make compensation for his misconduct'. His view that Heke acted alone appears to have derived from initial settler and official accounts.[255]

246. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 330.
247. Johnson, 'The Northern War' (doc A5), p 92.
248. Crown document bank (doc W48), p [187].
249. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 345–346, 349; Grant Phillipson, transcript 4.1.26, Turner Events Centre, pp [207]–[210].
250. Johnson, 'The Northern War' (doc A5), p 94.
251. Crown closing submissions (#3.3.403), p 71.
252. Crown document bank (doc W48), p [193].
253. Crown document bank (doc W48), p [193].
254. Executive Council Minutes, 11 July 1844 (Johnson, 'The Northern War' (doc A5), p 100). The term 'compel' is crossed out in the minutes, and the '[*sic*]' is Johnson's.
255. FitzRoy to Beckham, 12 July 1844 (Crown document bank (doc W48), p [193]).

Accordingly, on 13 July FitzRoy wrote to Governor Gipps in Sydney, asking for a warship and two companies of soldiers, together with artillery, ammunitions, and provisions for three months. These reinforcements would join the HMS *Hazard* (already in New Zealand) and the troops now at Waitangi, before moving against Heke.[256] FitzRoy told Gipps he had gone to 'the utmost pains and precaution . . . to avert the necessity of making a hostile display', but had reached the point where 'there is no longer any alternative'. Either the Government must accept that it could not defend settlers or the honour of the flag, or it had to take military action to 'restore respect for our flag, and ensure tranquillity in the colony'.[257]

Here, FitzRoy made it plain that he was targeting Heke with a broader purpose in mind. Heke's attack on the flagstaff coincided with land disputes between Māori and settlers in Taranaki and Wellington, both of which had threatened to erupt into violence. In FitzRoy's view, a 'timely demonstration of power' was needed. The greater the display, the more effective such action would be at restoring the Crown's authority and, through that, maintaining order. The Governor therefore sought to make an example of Heke with an 'overpowering' military display, hoping that the 'moral effect' would be felt throughout the country. FitzRoy sought 'at least' two companies of soldiers, as well as 'two light field pieces, a howitzer, some rockets and hand grenades, and a supply of provisions for three months'.[258] Governor Gipps responded in August by sending an officer and 150 soldiers aboard the *Sydney*, with the proviso that the troops must return once their task was complete.[259]

FitzRoy's response may also have been influenced by the relentless criticism he continued to face over his refusal to arrest Ngāti Toa leaders for their roles in the Wairau Incident. While the Governor was determining how to counter Heke, Nelson settlers were circulating a petition to the House of Commons which they hoped would force his resignation. FitzRoy had refused to take enforcement action against Ngāti Toa because the New Zealand Company had provoked the conflict. But he also believed that any action would lead to a war, which the Crown, with its meagre military resources, would inevitably lose.[260] The action by Heke and his people provided an opportunity to strengthen the Crown's hand at a time that, according to newspaper reports, the British government was offering FitzRoy a much larger force should it be needed.[261]

In contrast to Wairau, the Governor was now committed to a punitive course, under which Heke would be forced to atone for his own challenge to the Crown's authority and to serve as an example for other Māori. Furthermore, the Governor

256. Crown document bank (doc w48), pp [194]–[195].
257. FitzRoy to Gipps, 13 July 1844 (Crown document bank (doc w48), pp [194]–[195]).
258. FitzRoy to Gipps, 13 July 1844 (Crown document bank (doc w48), pp [194]–[195]).
259. Crown document bank (doc w48), p [195].
260. Johnson, 'The Northern War' (doc A5), pp 88, 410–411; see also Robert FitzRoy, *Remarks on New Zealand: in February 1846* (London: W and H White, 1846), pp 19–20; 'Nelson', *New Zealand Gazette and Wellington Spectator*, 19 June 1844, p 3.
261. 'English New Zealand Intelligence', *New Zealand Gazette and Wellington Spectator*, 5 June 1844, p 2.

had decided to act immediately and without making any proper attempt to inquire into the facts or understand Heke's motives. We agree with Mr Johnson that the Governor was not interested in conciliation; rather, his aim was 'to buttress [the Crown's] claim to sovereign authority in the Bay of Islands and New Zealand as a whole'.[262] Punitive action was not necessary to secure peace in Kororāreka as Heke's party had left without committing any acts of serious violence, Rewa of Te Patukeha was protecting the town, and troops were on their way to supplement the town's defence.[263]

During our hearings, we asked Dr Phillipson whether he was surprised at the strength and urgency of FitzRoy's reaction to Heke, given his earlier, more considered, and lenient approach towards the rangatira involved in the Wairau killings. The difference, in his view, was that 'there was no attack on the Queen and the Queen's sovereignty in what happened at Wairau':

> [FitzRoy] saw it purely as a land dispute in which the New Zealand Company was clearly in the wrong. And although it resulted in significant killing of people, he therefore took a view that was quite different when he felt that the Queen and the sovereignty of the Queen and the Queen's flag was being attacked.[264]

Even if a punitive military response had been necessary, FitzRoy was required first to exhaust all non-violent means of securing peace and good order.[265] Yet the Governor had made no attempt to find out why Heke had felled the flagstaff, let alone opened any dialogue with Heke. Though FitzRoy did seek dialogue with other Ngāpuhi leaders, it was only for the purpose of forcing Heke into compliance. Had he sought to understand Heke's concerns, FitzRoy might have also understood the signal he was giving by sending troops and ordering the flagstaff rebuilt.[266] As we will see in later sections, each of FitzRoy's initial decisions – to rebuild the flagstaff, demand atonement from Heke, threaten force if Heke did not comply, and seek assistance from other rangatira to force Heke's compliance – would push the Crown and Ngāpuhi closer to conflict.

It is notable, in this context, that the Crown had not considered military responses to previous taua muru in Te Raki or elsewhere.[267] As discussed extensively in chapter 4, the Crown's policy in 1840 had been one of tolerance (for the time being) of most Māori laws and customs, as a first step towards assimilation,

262. Johnson, 'The Northern War' (doc A5), p 100; see also pp 410–411.

263. Johnson, 'The Northern War' (doc A5), pp 93–94, 112, 160; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 329–330. The initial contingent of soldiers arrived from Auckland on 17 July.

264. Grant Phillipson, transcript 4.1.26, Turner Events Centre, p 254.

265. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pp 444–446. For an example of the application of this principle, see Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, Wai 201, pp 216–217.

266. Johnson, 'The Northern War' (doc A5), p 100.

267. Taua muru had occurred on many occasions in Te Raki and elsewhere since 1840 without the Crown considering a military response: Johnson, 'The Northern War' (doc A5), pp 87–88, 91; O'Malley, 'Northland Crown Purchases' (doc A6), pp 11, 68–71.

except in cases of 'atrocities' such as cannibalism. Since 1840, there had been many discussions among colonial officials about how to provide for customary law within the colony's legal system. In practice, the colonial Government had done little to intervene in cases of settler–Māori conflict except where serious violence was involved (as it had been when the Crown sought Maketū's arrest). Even then, the Crown had negotiated with rangatira to resolve matters instead of relying on its own enforcement powers.

To some degree this policy reflected the humanitarian underpinnings of British policy makers; however, it also reflected the pragmatic acknowledgement that the colonial Government lacked the resources or military power to assert its will over large, well-armed Māori populations. Chief Protector Clarke had long advocated for the principal rangatira in each district to be recognised in the colonial justice system as judges and enforcers of law, both for internal Māori disputes and for those between Māori and settlers. As we have seen, the Native Exemption Ordinance 1844 enacted a watered-down version of this policy, providing for rangatira to be recruited as agents for the enforcement of colonial laws, and for utu to be paid (instead of imprisonment) in cases of 'theft'. This measure came into effect on 16 July, three days after the Governor called for more troops, and was not popular among the growing settler population.[268] It is no exaggeration to see FitzRoy's request for troops as a significant departure from the previous Crown approach. He was determined to ensure that the Crown's laws were enforced and its authority respected, though he would remain open, at least for the time being, to rangatira enforcing law on the Government's behalf.

5.4.2.1.3 The July 1844 Waimate hui

Ngāpuhi leaders had long held concerns about the prospect of Britain or any other European power sending soldiers into their territories. While they had confidence in their own military abilities, they were also aware – from their travels to London and Sydney, and from previous incidents of European-Māori violence – of the threat posed by Europe's larger armies and military hardware.[269] During the treaty debates in 1840, Rewa, Kawiti, Tāreha, and others explicitly rejected any arrangement in which British soldiers were sent to New Zealand.[270] They and other rangatira signed te Tiriti only after receiving explicit assurances that the Crown would

268. These matters are discussed extensively in chapter 4; see also Alan Ward, 'Law and Law Enforcement on the New Zealand Frontier, 1840–1893', *New Zealand Journal of History*, 1971, vol 5, no 2, pp 129, 132–134; Merata Kawharu, 'Te Tiriti and its Northern Context' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2008) (doc A20), p 150; Alan Ward (doc A19), pp 94–95; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 322; Vincent O'Malley, 'Runanga and Komiti: Maori Institutions of Self-government in the Nineteenth Century' (doctoral thesis, Victoria University, 2004) (doc E31), fols 16–18; Johnson, 'The Northern War' (doc A5), pp 137–138.

269. Johnson, 'The Northern War' (doc A5), pp 110–111; Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 362.

270. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 358, 361, 362.

not use its military power to deny their mana and make them 'slaves', and would instead use that power only to protect them from other foreign threats.[271]

By signing te Tiriti, they had taken a calculated risk that the Crown would be true to its word and would exercise its power in a manner that protected their tino rangatiratanga.[272] When news of FitzRoy's military plans reached Te Raki, it seemed to Ngāpuhi that this promise was to be broken, and that the Crown's guns were to be turned on some of their own.[273] In spite of their misgivings about the Crown's exercise of kāwanatanga, most rangatira did not want to become embroiled in a potentially messy conflict that would further upset trading relationships and, regardless of how well they fought, could ultimately lead to their being overwhelmed.[274]

FitzRoy had instructed sub-protector Kemp to call Ngāpuhi leaders together to deliver his message about the compensation he required from Heke.[275] But ultimately it was Bishop Selwyn, together with missionaries and Ngāpuhi leaders, who organised the hui.[276] Selwyn invited at least 52 senior Ngāpuhi rangatira to meet at Waimate on 18 July 1844.[277] The day before, the first contingent of soldiers arrived from Auckland aboard the *Sydney*,[278] and rangatira began to gather at Horotutu Beach near Paihia.[279] According to the Whangaroa kaumātua Nuki Aldridge and witness in our inquiry:

> The arrival of the troops was a breach of the Māori understanding of what they essentially believed was a treaty of peace. It is clear that there was nothing in the Treaty that warned Māori of the threat of war or of a British military presence in New Zealand.[280]

Among the 300 or so recorded as attending the Waimate hui were Makoare Te Taonui and Tāmati Waka Nene of Waihou, Paratene Te Kekeao of Taiāmai, Waikato of Rangihoua, and Wiremu Hau, Rāwiri, and Heke of Kaikohe.[281] Rewa of Kororāreka chose not to attend, presumably because of his dispute with Heke over Maiki Hill. It is not clear from the available evidence whether Ngāti Hine leader

271. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 362–365, 367.
272. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 528.
273. Johnson, 'The Northern War' (doc A5), pp 102, 105, 111. Settler fears were reflected in the comments of James Kemp and the urgency with which Bishop Selwyn travelled to Taranaki to meet FitzRoy. Māori fears were reflected in the appeals of Heke and others to keep soldiers out of the district.
274. Johnson, 'The Northern War' (doc A5), pp 103–105, 108, 115–116; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 331–333. For a settler perspective on the prospects of Crown military success, see 'Successful and Amicable Settlement of the Native Disturbance at the Bay of Islands', extract from *Daily Southern Cross*, 7 September 1844 (Crown document bank (doc W48), p 197).
275. Crown document bank (doc W48), p 187.
276. Johnson, 'The Northern War' (doc A5), p 101.
277. Johnson, 'The Northern War' (doc A5), p 101.
278. Johnson, 'The Northern War' (doc A5), p 112.
279. Johnson, 'The Northern War' (doc A5), p 101.
280. Nuki Aldridge (doc AA167), pp 36–37.
281. Johnson, 'The Northern War' (doc A5), p 102.

Kawiti, who did not attend, was invited.[282] The bishop's chaplain, William Cotton, recorded some details of the proceedings. Most speakers, he said, were 'peaceably disposed', and all were against 'the sending for the [British] soldiers'.[283] As he had at Kororāreka, Heke gave a long speech about the impacts of Pākehā in the north, and 'made a great grievance' about the Crown replacing the 1834 flag with its own ensign. According to Cotton, Heke had felled the flagstaff because it was erected 'for the New Zealand flag & not for the Queen's'. Heke's other concern was that a Church of England service had been amended after 1840, replacing a prayer for rangatira with a prayer for the Governor and Queen.[284] Both of Heke's concerns, in other words, arose from his perception that the Crown had usurped the mana of Ngāpuhi rangatira.[285]

Having called the hui, Selwyn intended to visit the Governor immediately afterwards with a message from the rangatira. He was aware of the Governor's plan to attack Heke and of the potential for any conflict to engulf all of Ngāpuhi; he hoped that a suitably worded letter would appease the Governor and secure peace.[286] During the hui, the missionary Robert Maunsell drafted a letter to FitzRoy setting out Heke's main points, and 'all the chiefs' signed it. This suggests that other rangatira present, including Tāmati Waka Nene, shared Heke's concerns about Crown and Pākehā challenges to Māori authority and about the Crown's replacement of the 1834 flag with its own.[287]

Selwyn was not happy with the letter and refused to convey it to the Governor. He encouraged the rangatira present to find wording that expressed their concerns less directly and would therefore appease FitzRoy and prevent conflict.[288] The morning after the hui, Selwyn met with several 'principal Maori chiefs' in his study and drafted 'a more satisfactory letter'.[289] This second letter appears to have been written in Māori and then translated into English by the Auckland Sub-Protector of Aborigines, Thomas Forsaith.[290] According to Johnson, British archival records contain several versions of the translated letter, with very slight variations. Some were signed by Heke alone, and others by Kainga Tuanga, Wiremu Hau, and Te Hira Pure.[291] The version published in British Parliamentary Papers was signed by Heke alone, and read:

282. Johnson, 'The Northern War' (doc A5), p 102.
283. W C Cotton, journal of a residence at St John's College, Te Waimate, 2 March 1844 – 25 August 1844, p 191 (cited in Johnson, 'The Northern War' (doc A5), p 102).
284. Cotton, journal, p 193 (cited in Johnson, 'The Northern War' (doc A5), pp 102–103).
285. Johnson, 'The Northern War' (doc A5), p 102.
286. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 331.
287. Cotton, journal, 18 July 1844 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 331); Johnson, 'The Northern War' (doc A5), p 103.
288. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 331.
289. Cotton, journal, p 193 (cited in Johnson, 'The Northern War' (doc A5), p 103).
290. 'Successful and Amicable Settlement of the Native Disturbance at the Bay of Islands', *Southern Cross*, 7 September 1844, p 2.
291. Johnson, 'The Northern War' (doc A5), pp 104–105.

> Friend governor, this is my speech to you. My disobedience and rudeness is no new thing – I inherit it from my parents, from my ancestors, do not imagine that it is a new feature in my character – but I am thinking of leaving off my rude conduct towards the Europeans. Now I say that I will prepare another pole, inland at Waimate, & I will erect it at its proper place at Kororarika in order to put an end to our present quarrel. Let your soldiers remain beyond Seas, and at 'Waitemata', do not send them here. The pole that was cut down belonged to me. I made it for the Native flag and it was never paid for by the Europeans.
>
> From your friend, Hone Heki Pokai'[292]

This letter was far more conciliatory in tone than Heke's speech had been, and less clear about the concerns he shared with other Ngāpuhi rangatira. It contained what Dr Phillipson described as 'a somewhat ambivalent apology',[293] and offered to restore balance by re-erecting the flagstaff. Whereas on other occasions Heke had made statements that openly challenged the Crown's claim of authority over Māori, here he framed his cause narrowly as an argument about rights in the flagstaff itself. His only clear assertion of mana was to insist that he, not the Government, would reinstall the flagstaff. Crucially, the letter contained a clear appeal for peace.[294] It was thus a significant compromise on Heke's part and indicated the lengths to which he and other rangatira would go to avoid armed conflict. Bishop Selwyn later said that Tāmati Waka Nene 'almost compelled John Heke to sign that letter of apology'.[295]

In Bishop Selwyn's view, the letter from Heke would prevent a war.[296] He therefore took it with great haste to Auckland, just missing the Governor, who had departed aboard the HMS *Hazard* on 20 July. FitzRoy was bound for New Plymouth where a dispute arising from a New Zealand Company land claim was threatening to erupt into bloodshed.[297] Ironically, while on its way to Taranaki, the *Hazard* called in briefly at the Bay of Islands. FitzRoy remained on board, telling no one of his presence, but nonetheless assuring himself that 'tranquillity was restored' in Kororāreka.[298] Having arrived in Auckland to find the Governor absent, Selwyn continued overland with the aim of meeting him in Taranaki,

292. Heke to Governor, 19 July 1844 (cited in Johnson, 'The Northern War' (doc A5), p 104).
293. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 331.
294. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 331–332; Johnson, 'The Northern War' (doc A5), pp 104–105.
295. Selwyn to FitzRoy, November 1845 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 331).
296. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 331. Selwyn and others at the hui appear to have been aware of the Governor's intention to require compensation from Heke using military force if necessary: Johnson, 'The Northern War' (doc A5), p 100.
297. Johnson, 'The Northern War' (doc A5), p 105; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 331; FitzRoy, Remarks on New Zealand, pp 29–30.
298. FitzRoy to Stanley, 20 August 1844 (cited in Johnson, 'The Northern War' (doc A5), p 105).

covering the distance 'in only 7 days instead of the usual fortnight' and delivering the letter around the end of July or beginning of August.[299]

On 22 July, several Ngāpuhi rangatira sent another letter to FitzRoy. This was signed by Te Hira Pure, Te Pakira, Hohaia Waikato, Anaru Aa, Tamati Wāka Nene, and Rapata Tahua. These rangatira represented territories from inland Hokianga and Kaikohe to Rangihoua and Whangaroa. In contrast to Heke's letter, theirs was assertive in tone and set out the points that – in the interests of peace – Heke had agreed to remove from his letter to the Governor. This new letter called on the Crown to recognise and honour its pre-treaty commitment to Māori independence and asked that the Governor agree to a new flag for rangatira:

E mara e te kawana

Tenei ta matou kupu ki a kupu ki a koe.

E mahara ana matou ki te korero a Kingi Wiremu i mua. Tena ma te karaka e korero atu ki a koe. I te kainga o te Puhipa te Komiti.

I whakaetia i reira te tahi kara ma te tangata Maori

Tae rawa mai te Kawana Tuatahi

Ka pehia ta matou kara i Waitangi, kawea ketia ana ki Kororareka

Heoi e mea ana matou kia whakaaetia e koe te tahi kara me matou ma nga rangatira Maori

Te Hira Pure
Na te Pakira
Hotoaia [Hohaia] Waikato
Anaru Aa [Ai?]
Tamati Waka Nene
Rapata Tahua[300]

There is no surviving contemporary translation of this letter, but Ngāpuhi kaumātua Rima Edwards provided a modern translation:

Dear governor,

These are our words to you.

We recall and remember the words of King William before. Clarke [the Chief Protector of Aborigines] will explain/speak to you.

The Committee is [was] at Puhipi's [Busby's] home.

It was agreed that there would be a flag for the Maori people.

299. Johnson, 'The Northern War' (doc A5), pp105–106. Johnson said that FitzRoy probably received the letter before the end of July. The Crown said he received it in early August: Crown closing submissions (#3.3.403), p17. The difference is not significant.

300. Te Hira Pure and others to FitzRoy, 22 July 1844 (cited in Johnson, 'The Northern War' (doc A5), pp107–108).

When the first governor arrived, our flag was denied at Waitangi.
It was instead taken to Kororareka.
We are saying [asking] that you agree to a flag for us, the Maori rangatira.

Signed
Te Hira Pure, Te Pakira, Hohaia Waikato, Anaru Aa, Tamati Waka Nene, Rapata Tahua[301]

The 18 July hui and the letters that followed were significant for several reasons. First, the hui appears to have been widely attended, and there is no evidence of significant tension or division.[302] Secondly, the rangatira present, including Tāmati Waka Nene, explicitly shared Heke's concerns about the British ensign replacing the 1834 flag. But they were also unanimous in wanting peace and in opposing the presence of any British troops in their lands. Thirdly, Selwyn did not believe the Governor could be persuaded to keep the peace if Heke and other rangatira honestly expressed their views about the treaty relationship and the flag. Fourthly, Heke was prepared to compromise his views and sign a letter of contrition in order to secure peace; as he said, he hoped that his offer to restore the flagstaff would be sufficient to 'put an end to our . . . quarrel'.[303] Finally, other Ngāpuhi rangatira, including Nene, felt strongly enough about the flag to send a separate letter expressing their views.[304] Having sent their letters, Ngāpuhi now waited to see how FitzRoy would respond.[305]

5.4.2.1.4 The Governor's response to letters from rangatira

It is not clear when FitzRoy received the letter sent by Nene and others, or how he responded.[306] As noted earlier, he was in possession of Heke's letter around the end of July or early in August 1844,[307] and he understood Heke to be apologising and offering atonement for his earlier actions.[308] Nonetheless, FitzRoy made no changes to his plans. He did not reply to Heke,[309] nor did he cancel his request for additional troops from Sydney or rescind the order for Beckham to rebuild the flagstaff.[310] After visiting Taranaki, FitzRoy continued to Wellington and then Auckland, where he arrived on 19 August.[311]

During this period, two significant developments had occurred in the Bay of Islands. Together, they created the impression that the Crown had rejected Heke's

301. Rima Edwards (Johnson, 'The Northern War' (doc A5), p 108).
302. Ralph Johnson, transcript 4.1.24, Oromāhoe Marae, p 589.
303. Heke to Governor, 19 July 1844 (cited in Johnson, 'The Northern War' (doc A5), p 104).
304. Johnson, 'The Northern War' (doc A5), pp 102–103.
305. Johnson, 'The Northern War' (doc A5), p 109.
306. Neither Mr Johnson (doc A5) nor Dr Phillipson (doc A1) provided any evidence on this point.
307. Johnson, 'The Northern War' (doc A5), pp 105–106; Crown closing submissions (#3.3.403), p 17.
308. Johnson, 'The Northern War' (doc A5), p 121.
309. Johnson, 'The Northern War' (doc A5), p 109.
310. Johnson, 'The Northern War' (doc A5), p 110.
311. Johnson, 'The Northern War' (doc A5), pp 105, 113.

overtures for peace and was instead preparing for war. First, Beckham and the Auckland soldiers rebuilt the flagstaff. The exact timing of this event is not clear.[312] The missionary William Williams recorded Heke reacting to the rebuilding of the flagstaff on 16 August, about a fortnight *after* FitzRoy received Heke's letter.[313] Irrespective of the exact timing, the flagstaff was rebuilt on FitzRoy's orders, which were made before he had attempted to communicate with Heke or any other Ngāpuhi leaders.[314]

To Heke, it appeared that FitzRoy had rejected his conciliatory offer and was persisting in his claim of authority over Ngāpuhi and their territories.[315] We noted earlier that he later wrote to FitzRoy explaining that he had felled the flagstaff because he had been told that the Crown intended to destroy Māori and seize their territories, and because he saw the flag as a symbol of the Crown's claim of authority or conquest over those territories. After the flagstaff was rebuilt, he and other rangatira 'concluded it was true inasmuch as it was persisted in', and they therefore determined to defend their territories or die trying.[316] As we have discussed, this was consistent with the tikanga under which any decision to rebuild a pou rāhui was seen as a clear assertion of territorial sovereign authority, and could lead to war if neither party backed down.[317]

Several missionary and official observers saw this as a critical moment in the trajectory towards war and commented on FitzRoy's failure to engage in dialogue before the flagstaff was rebuilt. In Selwyn's view, Heke's letter would have been enough to secure peace 'if the Flag Staff had not been erected, without further communication between the Government and the Ngapuhi Chiefs'.[318] Another missionary, James Shepherd, wrote in 1848 that the subsequent war had been caused by a Ngāpuhi belief that the Government intended to seize their terri-

312. Dr Phillipson said that the flagstaff had been rebuilt before Heke's letter reached FitzRoy, but his sources were ambiguous at best. Phillipson's first source was a letter from Selwyn to FitzRoy in November 1845, in which Selwyn recorded that Heke's letter 'would I believe have secured the peace of the country, if the Flag Staff had not been erected, without further communication between the Government and the Ngapuhi Chiefs'. This does not tell us when the flagstaff was rebuilt, only that the Governor failed to communicate with Ngāpuhi about the matter. Phillipson's second source is William Cotton's journal for 29 July 1845: Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 331.

313. Johnson, 'The Northern War' (doc A5), p 110.

314. Johnson, 'The Northern War' (doc A5), p 99.

315. Johnson, 'The Northern War' (doc A5), p 110; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 315–316.

316. Heke to FitzRoy, 21 May 1845 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 316). Forsaith translated the passage as: 'it [the flagstaff] was erected again, then indeed we concluded it [the allegation that the Crown would destroy Māori and take their territories] was true inasmuch as it was persisted in. We agreed that we would die upon our land which was delivered to us by God': Ralph Johnson, supporting papers (doc A5(a)), vol 1, p [236]. James Kemp translated this passage as: 'It was again erected. This at once convinced us of the truth of their statements, and we determined to die for the country provided for us by the Almighty': Johnson, supporting papers (doc A5(a)), vol 1, pp 246–247.

317. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 315–316.

318. Selwyn to FitzRoy, November 1845 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 331).

tories, 'and the putting up of the flagstaff time after time confirmed the natives in that opinion'.[319] Williams recorded that Heke was 'much incensed' because the Governor had acted without waiting for or responding to his peace proposal.[320]

The second significant development was the arrival on 18 August of a ship from New South Wales, with 150 soldiers and an officer aboard to supplement the 30 soldiers earlier sent from Auckland.[321] Ngāpuhi leaders had been waiting for a response from the Governor and were much alarmed when a large contingent of soldiers preceded him and set up camp at Kororāreka.[322] As Bishop Selwyn wrote in 1845, 'the whole body' of Ngāpuhi suspected Britain's intentions, 'and the arrival of the soldiers led them to believe that all their suspicions of old standing were then to be fulfilled, by an attempt on our part to subjugate the people'. In other words, FitzRoy's orders appeared to be proving Heke right.[323] Many rangatira gathered at Horotutu Beach to debate this new development and consider how to respond if hostilities broke out.[324]

Meanwhile, after circumnavigating the North Island, FitzRoy reached Auckland on 19 August and made immediate plans to continue on to the Bay of Islands,[325] where he arrived, six days later, aboard the HMS *Hazard*. Its crew of 50, together with further reinforcements from Auckland, brought the total number of troops at FitzRoy's command to 250,[326] making it the biggest British military force so far assembled in New Zealand.[327]

FitzRoy's intention, he wrote to Secretary of State for War and the Colonies, Lord Stanley, in London, was 'to make an immediate demonstration' of military power sufficient to 'overawe the ill-disposed, and encourage others who are friendly'.[328] He gave orders that the soldiers under his command be taken by ship to Te Puna Inlet, in preparation for landing at Kerikeri and an overland march to Heke's pā at Kaikohe.[329] Mr Johnson understood these actions to mean that FitzRoy intended 'a short and sharp attack' on Heke and his supporters, and

319. Shepherd to Colonial Secretary, 24 January 1848 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 315).

320. W Williams, journal, 16 August 1844 (cite din Johnson, 'The Northern War' (doc A5), p 110).

321. Johnson, 'The Northern War' (doc A5), pp 112–113. FitzRoy later informed the New South Wales Governor that the ship had arrived on 14 August, but Williams' journal recorded it as arriving on 18 August.

322. Johnson, 'The Northern War' (doc A5), pp 110, 113.

323. Selwyn to FitzRoy, November 1845 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 332–333).

324. Johnson, 'The Northern War' (doc A5), pp 110, 112–113.

325. Johnson, 'The Northern War' (doc A5), p 113.

326. FitzRoy informed Gipps that this comprised 210 soldiers and 40 seamen: FitzRoy to Gipps, 4 September 1844 (Crown document bank (doc W48), p 191). Two years later, his memoir recorded that the 250 comprised 150 from New South Wales' 99th Regiment, 50 from Auckland's 96th Regiment, and 50 seamen and marines from the *Hazard*: FitzRoy, *Remarks on New Zealand*, p 31.

327. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 332.

328. FitzRoy to Stanley, 20 August 1844 (cited in Johnson, 'The Northern War' (doc A5), p 113).

329. Johnson, 'The Northern War' (doc A5), pp 113–115; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 332.

FitzRoy certainly prepared for such a possibility.[330] But FitzRoy's plan, approved by the Executive Council and outlined in letters to other Government officials, was to demand compensation first and use force only if Heke did not comply.[331] Peace, in other words, was conditional on Heke accepting the Governor's non-negotiable terms and submitting to the Crown's authority. FitzRoy's faith in British firepower led him to hope that the mere threat of military intervention would be enough to secure Heke's compliance.[332] He had initially sought the troops for a maximum of three months,[333] and now hoped that they would soon return to New South Wales after 'proving that we do not take undue advantage of our strength'.[334]

While FitzRoy and his party had been travelling from Auckland, Ngāpuhi had been debating how they should respond to the arrival of troops.[335] Most rangatira shared Heke's concerns about the Crown's actions and intentions,[336] and at that point were likely to side with Heke if he were attacked.[337] But they were also anxious to avoid war if they could, due to its uncertain outcomes and inevitable cost to trading relationships.[338] On 26 August, FitzRoy stopped at Kororāreka where he was met by 70 Māori including the senior rangatira Nene, Te Kēmara, Tāreha, Rewa, and Moka.[339] Nene was from the inner Hokianga, and the others represented northern Bay of Islands hapū.[340] The surviving records do not mention southern Bay of Islands hapū such as Te Kapotai, Ngāti Manu, and Ngāti Hine as being present.[341]

The rangatira told FitzRoy they did not want war and asked what compensation he sought.[342] According to one missionary account, FitzRoy demanded that Heke

330. Johnson, 'The Northern War' (doc A5), p 113.
331. Johnson, 'The Northern War' (doc A5), p 100; Crown document bank (doc W48), pp 187, 188–189.
332. Johnson, 'The Northern War' (doc A5), p 100; Crown document bank (doc W48), pp 187, 188–189.
333. Crown document bank (doc W48), pp 188–189.
334. FitzRoy to Stanley, 20 August 1844, BPP, vol 4, p 304.
335. Johnson, 'The Northern War' (doc A5), pp 113–114.
336. Johnson, 'The Northern War' (doc A5), pp 103, 106–108.
337. See comments by Bishop Selwyn, James Kemp, and William Cotton: Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 332–333); Johnson, 'The Northern War' (doc A5), p 111.
338. Johnson, 'The Northern War' (doc A5), pp 110–111, 113–114; Belich, *The New Zealand Wars*, p 32.
339. Johnson, 'The Northern War' (doc A5), p 114; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 332.
340. Te Kēmara was of Te Matarahurahu and Ngāti Rāhiri, and exercised mana at Waitangi: Kawharu (doc E50), pp 4–5. Tāreha was of Ngāti Rēhia, who exercised mana over much of the northern Bay of Islands coast: doc R2, p 36; Tai Tokerau District Māori Council, 'Oral History Report', 2016 (doc AA3), pp 165–166. Rewa and Moka were of Te Patukeha and Ngāi Tāwake, and exercised mana over Kerikeri and Te Rāwhiti, while sharing Kororāreka with others: Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 384–388.
341. Johnson, 'The Northern War' (doc A5), p 114; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 332.
342. Johnson, 'The Northern War' (doc A5), p 114.

'give up ten guns and the axe with which the flagstaff was cut'.[343] Another report stated that FitzRoy also asked for Heke's waka and demanded that Heke meet him in person and apologise. If Heke complied with these terms, 'all will be settled'; if not, the 200 troops would march on Kaikohe.[344] Yet another account recorded FitzRoy requiring that Heke and his supporters make a promise of future good conduct.[345] According to William Cotton, the rangatira were 'quite delighted with the easy terms, saying "Kotahi ka ora tatou. Now for the first time we are saved."' They acknowledged that '[a]n utu may be payed' to atone for Heke's actions. But, Cotton observed, 'had John Heke's person been demanded, very many natives would have joined him'.[346]

Following the meeting between Heke and FitzRoy, Chief Protector Clarke and three or four senior rangatira visited Heke at Kerikeri and attempted to persuade him to agree to the Governor's terms. The missionary William Williams also visited Heke, and Clarke returned the following day (August 27) for further discussions.[347] Heke refused to agree to terms 'while the British flag was up',[348] and was determined 'not to see the Governor unless it is agreed to take away the flagstaff'.[349] Later, the rangatira Ruhe said that Heke had understood 'ten guns' to mean the confiscation of 10 miles of land between Ahuahu and Kaikohe, though no other sources support this.[350] In essence, this was a contest for mana. Heke had set out his terms in his letter to FitzRoy, who (from Heke's point of view) had ignored or rejected them and imposed his own terms, demanding that Heke comply or face military action. As Johnson observed, Heke was unlikely to allow his rangatiratanga to be trampled in this manner.[351] Heke was also unimpressed with the British military contingent that was supposed to force him into submission. According to one settler, 'It is said that John H laughed at the idea of 200 coming to oppose him and well he may.'[352]

In the absence of a positive response from Heke, FitzRoy pressed ahead with his plan to march on Kaikohe. An army captain was sent on foot to determine whether artillery could be moved inland, while FitzRoy ordered the troops back

343. Cotton, journal, 26 August 1844 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 332).

344. Marianne Williams, journal, 26 August 1844 (cited in Johnson, 'The Northern War' (doc A5), p 114 n). William Williams' journal for 26 August 1844 also recorded FitzRoy as demanding that Heke meet him.

345. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 332.

346. Cotton, journal, 26 August 1844 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 332).

347. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 332; Johnson, 'The Northern War' (doc A5), p 114.

348. M Williams, journal, 27 August 1844 (cited in Johnson, 'The Northern War' (doc A5), p 114).

349. W Bambridge, journal, 26 August, 2 September 1844 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 338).

350. Johnson, 'The Northern War' (doc A5), p 122.

351. Ralph Johnson, answers to post-hearing questions (doc A5(g)), p 25; see also Johnson, 'The Northern War' (doc A5), p 115.

352. W Bambridge, journal, 2 September 1844 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 338).

onto ships in preparation for a landing at Kerikeri on 28 August.[353] As an indication of just how high tensions were, troops at Kororāreka very nearly opened fire on Te Patukeha warriors who were performing a haka to signal their support.[354]

A day before the planned invasion, Nene and several other rangatira met the Governor. They proposed a compromise that did indeed secure immediate peace but ultimately, and seriously, deepened existing divisions within Ngāpuhi. They offered to pay the utu FitzRoy had demanded and to answer for Heke's future conduct. In turn, they insisted that British troops 'must not enter Ngapuhi territory armed'. They warned the Governor that any troop landing would be a significant provocation that would 'confirm Ngapuhi suspicions and result in a general uprising'.[355] Nene also questioned whether Heke's actions had been serious enough to justify a military response. He pointed out that felling the flagstaff was Heke's first act of defiance against the Government, and said Ngāpuhi 'do not look upon the cutting down of the flagstaff in the same light you do, we cannot regard it of so dreadful a nature as to call for the sacrifice of life'. Nonetheless, Nene confirmed, if Heke transgressed again there would be cause to act against him.[356] In order to secure peace, Nene and his supporters proposed a hui where the Crown and Ngāpuhi leaders could meet, unarmed, and resolve their differences.[357]

In making this overture, Nene and the other rangatira were taking a significant risk. They were presuming to speak for Heke – a clear insult to his mana.[358] They were also staking their own mana on Heke's future conduct, placing themselves on a potential collision course with him. We agree with Mr Johnson that FitzRoy's actions pressured Nene into taking this step. Nene was not motivated by any direct request from the Governor 'but by a perceived threat' arising from FitzRoy's determination to punish Heke.[359] If the Crown invaded Ngāpuhi territories at that time, the evidence suggests that most Ngāpuhi would have lined up alongside Heke to begin a war with likely immense costs for both sides in terms of casualties and impacts on trading relationships. Nene sought to 'avoid the entry of the soldiers into Ngapuhi lands' and these potentially disastrous outcomes.[360]

353. Johnson, 'The Northern War' (doc A5), p 115.
354. Crown document bank (doc W48), p 8.
355. Johnson, 'The Northern War' (doc A5), p 115.
356. Burrows, manuscript, 'The War in the North, 1845' (cited in Johnson, 'The Northern War' (doc A5), pp 115–116).
357. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 332; Johnson, 'The Northern War' (doc A5), p 115.
358. Johnson, 'The Northern War' (doc A5), pp 115, 152; Crown document bank (doc W48); see also Murray Painting (doc V12), pp 25–26; Jack Lee, *I Have Named it the Bay of Islands* (Auckland: Hodder and Stoughton, 1983), p 254. Heke soon afterwards expressed his anger at Nene's action and threatened reprisal: 'Successful and Amicable Settlement of the Native Disturbance in the Bay of Islands', *Daily Southern Cross*, 7 September 1844, p 2.
359. Johnson, answers to post-hearing questions (doc A5(g)), p 2.
360. Johnson, 'The Northern War' (doc A5), p 116; see also Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 332–333. The Crown, in its closing submissions, emphasised that the initiative for peace had come from Nene, not from FitzRoy: Crown closing submissions (#3.3.403), p 73.

It was not only Ngāpuhi who sought to avoid war. Clarke, as Chief Protector, also opposed FitzRoy's plans for military engagement, as did sub-protector Kemp and several Bay of Islands missionaries.[361] Whereas FitzRoy was confident that British troops would prevail,[362] Clarke and the missionaries shared Nene's awareness of the potential risks. According to Dr Phillipson, it was Clarke who persuaded the Governor to accept Nene's proposal and order his troops back to Kororāreka.[363]

Later, various settler commentators acknowledged how close the colony had come to disaster. In early September, the *Daily Southern Cross* observed that while British forces might ultimately have prevailed, they would have first become embroiled in a long and messy campaign in which they had neither much hope of capturing Heke or his supporters nor of protecting settlers from retaliation. War at that time would have had the effect 'of endangering the lives of every European in the country, and destroying the Colony itself for many years to come'.[364] Bishop Selwyn looked back on this episode in November 1845, after the Northern War had been under way for several months. In his view, had FitzRoy proceeded with his planned attack, 'the British Government would not . . . have had a single native ally North of the Waitemata'. Furthermore, military officers had told him 'if that body of men had marched against Heke in September 1844, not one of them would have returned'.[365] FitzRoy later acknowledged how risky his planned invasion had been, but at the time he showed no such insight.[366] As the Crown acknowledged, the evidence is clear that it was Nene who took the initiative for peace when the Governor was determined to pursue war.[367]

5.4.2.1.5 The September 1844 Waimate hui

After FitzRoy agreed to call off his planned invasion, Bishop Selwyn, Chief Potector Clarke, and Ngāpuhi leaders pressed ahead with plans for a hui at Waimate to formalise Nene's peace agreement. Selwyn and Clarke sent out separate

361. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 332–333; Johnson, 'The Northern War' (doc A5), p 115.

362. Soon after the aborted attack, FitzRoy claimed that the mere sight of British forces had led Ngāpuhi to back down: Crown document bank (doc W48), p 191. This was in stark contrast to reports that Heke laughed at the size of the British force: Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 338.

363. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 332; see also FitzRoy, *Remarks on New Zealand*, pp 33–34.

364. *Southern Cross*, 7 September 1844, p 2.

365. Selwyn to FitzRoy, November 1845 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 332–333).

366. FitzRoy, *Remarks on New Zealand*, pp 33–34. In these memoirs FitzRoy also made the contradictory claim that he had been aware of the risks all along and therefore deliberately courted Nene and others: FitzRoy, *Remarks on New Zealand*, pp 31–32. Yet he claimed no such insight at the time, reporting to Gipps that the mere sight of British forces had cowed Ngāpuhi into submission: Crown document bank (doc W48), p 191. Had he truly understood the potential consequences, his decision to land troops at Kerikeri was an extraordinary act of brinkmanship: Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 332.

367. Crown closing submissions (#3.3.403), p 73; Johnson, answers to post-hearing questions (doc A5(g)), p 2.

invitations, making the hui 'a joint Government and Church-sponsored affair'.[368] Three hundred Ngāpuhi attended – about the same number as at the July hui.[369] They included many leading rangatira from inland Hokianga (Nene, Patuone, Mohi Tāwhai, and Makoare Te Taonui),[370] the Bay of Islands coast (Rewa, Moka, Wharerahi, Tāreha, Kaitara, and Waikato), and Waimate–Taiāmai (Wiremu Hau, Paratene Te Kekeao, and Wai). Ruhe (Ngāti Rangi, Ngāti Hineira) also attended.[371]

Heke was invited to the hui but did not attend.[372] There is no record of any rangatira attending from coastal or northern Hokianga, nor from Whangaroa, Kaikohe, nor from the major southern Bay of Islands hapū such as Ngāti Hine, Ngāti Manu, and Te Kapotai.[373] The hui therefore could not speak for all or even most of Ngāpuhi, even if its attendees did include many significant rangatira. The historian Merata Kawharu described those present as 'the major leaders of the Waitangi-Hokianga region', but even that is questionable in light of the apparent absence of Te Kēmara and other Ngāti Rāhiri leaders.[374] FitzRoy attended with his Private Secretary and his two senior military officers, Lieutenant-Colonel William Hulme (of the 96th Regiment in Auckland) and Captain David Robertson (of the HMS *Hazard*).[375] Due to Nene's warning that landing armed soldiers would lead to a Ngāpuhi uprising, FitzRoy and his officers did not bring soldiers or carry arms.[376]

The hui began with a lengthy speech by FitzRoy in which he defended the flag against claims that its presence harmed Māori interests. Describing the flag as 'sacred', FitzRoy told the assembled rangatira that it flew as a guarantee of the Crown's protection of their freedom and security. Through the flag, Māori had protection against lawless settlers and colonisation by other European powers, a guarantee that their lands were secure, and a guarantee that they were 'perfectly free'. They also possessed 'all the advantages of English laws' while retaining the right to live according to their own, so long as their actions did not affect settlers. Whereas the flagstaff was 'a mere stick', the British ensign was 'of very great importance' and stood as 'a signal of freedom, liberty, and safety',[377] protecting Māori from the same fate as had occurred in Tahiti, which France had annexed in 1843.[378] This was the first of several occasions in the months before the war in which the Crown or its

368. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 333.
369. Johnson, 'The Northern War' (doc A5), p 117.
370. Nene, Patuone, and Te Taonui all lived in the Waihou River valley, and Tāwhai at Waimā.
371. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 333–337; Crown closing submissions (#3.3.403), pp 75–76.
372. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 338.
373. Phillipson listed those who spoke and made no mention of the leading rangatira from these hapū and locations: Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 333–337.
374. Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 186.
375. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 335; Johnson, 'The Northern War' (doc A5), p 117.
376. Johnson, 'The Northern War' (doc A5), p 126.
377. 'Successful and Amicable Settlement', *Daily Southern Cross*, 7 September 1844, p 2 (Crown document bank (doc W48), pp 194–195); Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 333–334.
378. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 333.

representatives would emphasise the flag's protective intent while saying nothing of the Crown's claim of authority over Māori communities. FitzRoy's emphasis on the flag as a symbol of British protection presumably reflected, in part, his former career as a naval officer.[379]

The Governor's claims about the benefits of British sovereignty contrast markedly with Heke's concerns about Crown and settler transgressions against Māori authority. As if to prove this point, the Governor acknowledged that the Crown had harmed the economy for Ngāpuhi and settlers alike by prohibiting anchorage fees and imposing customs duties. He announced that he had rescinded those regulations, allowing Ngāpuhi hapū once again to trade freely with passing ships.[380] Later, FitzRoy would acknowledge in his memoir that this decision was unauthorised, since it was made without Executive Council approval (that came later). Nonetheless, he had acted because Ngāpuhi had complained of their 'ruined trade' and in his view, the 'obnoxious customs regulations' were the main source of their discontent.[381] In fact, FitzRoy had other reasons for removing customs duties: they had depressed trade throughout New Zealand at a time when the colony was in a parlous financial position, and were highly unpopular among settlers. The Government had already been considering other options for raising revenue and had sought permission from the British government to make changes. The Governor may have used the crisis in the north as a pretext to implement a new policy without seeking authorisation.[382]

Turning then to Heke's actions, FitzRoy warned that any threat to settlers would drive them away, leaving Ngāpuhi destitute. He said it had made his heart sick 'to be obliged to bring soldiers and war-ships here, on account of bad conduct', but he could not 'allow such behaviour, or such insults as those of Heke, to pass unatoned for'. In such matters he promised to act 'in concert with the principal Chiefs', presumably excluding Heke himself. 'My wish is for peaceable measures', FitzRoy said, 'although I am prepared to act otherwise.' But with the help of the rangatira present and 'God's providence, we shall succeed in our object of restraining the ill-conducted and checking the bad men'.[383]

379. FitzRoy had joined the Royal Navy aged 13, and had spent more than 25 years in its service before his appointment as Governor: Ian Wards, 'Robert FitzRoy', Dictionary of New Zealand Biography, https://teara.govt.nz/en/biographies/1f12/fitzroy-robert, accessed 2 April 2020.

380. Crown document bank (doc w48), pp 194–195; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 334.

381. FitzRoy, *Remarks on New Zealand*, pp 31–32. On 16 September, FitzRoy informed Lord Stanley of this decision and called a meeting of the Executive Council which approved the removal of customs duties throughout New Zealand: Crown document bank (doc w48), pp 164–166.

382. Crown document bank (doc w48), pp 164–166; see also Johnson, 'The Northern War' (doc A5), p 135; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 312; 'Customs', *Auckland Chronicle*, 24 January 1844, p 2; 'Estimates', *New Zealand Gazette and Wellington Spectator*, 12 June 1844, p 2; 'The House and Land Tax', *Daily Southern Cross*, 8 June 1844, p 2; FitzRoy, *Remarks on New Zealand*, pp 32, 34.

383. 'Successful and Amicable Settlement', *Daily Southern Cross*, 7 September 1844, p 2 (Crown document bank (doc w48), pp 194–195); Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 334.

FitzRoy then acknowledged for the first time that Heke had 'written me a letter of apology about the flag-staff, and has offered to put up another'. The only remaining thing he required, he said, was that 'a certain number of guns be . . . immediately given up to me, as atonement for the misconduct of Hone Heke'.[384] At this point, according to a newspaper report of the occasion, 'Several chiefs sprung up, went away to their places and brought about twenty guns, and many tomahawks, which they laid at the Governor's feet, telling him he might have more if he chose.'[385] FitzRoy, in response, said the Government did not wish to profit from Heke's 'crimes', and had asked for the guns only as acknowledgement of his error. To demonstrate that the Government did not want their land or property, he returned the guns and indicated that he would send the soldiers away, saying he trusted 'that no future disturbance would occur', while warning that soldiers might return if their future conduct was not good.[386]

In all, 24 rangatira gave speeches in response.[387] According to the *Daily Southern Cross*, they indicated that they accepted the Governor's assurances, desired peace, and wanted Europeans to remain among them – although they also wanted the Government's soldiers to leave. Some expressed concerns about land and especially wished to know the Governor's policies on Crown pre-emption and surplus lands (matters we discussed in chapter 4 and return to in chapter 6).[388] Hokianga rangatira took a prominent role, alternately criticising Heke and emphasising their desire for the troops to go. Anaru of Ngāti Korohue said that Heke took after his uncle Hongi and 'has always been troublesome'. Makoare Te Taonui told the Governor he was glad that conflict had been avoided: 'when I heard of the guns and soldiers being landed, my heart was dark – Ngapuhi, live in peace! peace! peace!'[389] Mohi Tāwhai appealed to FitzRoy to handle any future troubles by meeting peacefully with senior rangatira instead of arriving 'with guns and soldiers'.[390]

Patuone, an acknowledged diplomat and peacemaker, was reported to have told the Governor 'you are come in peace, and you are welcome', apparently meaning that the Governor was gladly received so long as he did not have soldiers. Patuone said that Heke's conduct had been wrong, and the Governor was right;

384. 'Successful and Amicable Settlement', *Daily Southern Cross*, 7 September 1844, p 2 (Crown document bank (doc w48), pp 194–195); Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 334.

385. 'Successful and Amicable Settlement', *Daily Southern Cross*, 7 September 1844, p 2 (Crown document bank (doc w48), pp 194–195); Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 334.

386. 'Successful and Amicable Settlement', *Daily Southern Cross*, 7 September 1844, p 2 (Crown document bank (doc w48), p 195); Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 334.

387. Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 187.

388. 'Successful and Amicable Settlement', *Daily Southern Cross*, 7 September 1844, p 2 (Crown document bank (doc w48), pp 195–197); Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 336–338.

389. 'Successful and Amicable Settlement', *Daily Southern Cross*, 7 September 1844, p 2 (Crown document bank (doc w48), p 196).

390. 'Successful and Amicable Settlement', *Daily Southern Cross*, 7 September 1844, p 2 (Crown document bank (doc w48), p 196).

nonetheless, he considered the Governor should leave and take his soldiers with him: 'You're welcome, go and return again to Auckland; we will endeavour to maintain peace here.'[391] Nene also extended the promise to defend the flag, saying, 'Governor, if that flag staff is cut down again, we will fight for it.' He was sorry for what had occurred but assured FitzRoy that he could now take his soldiers away: 'Return, Governor, we will take care of the flag.'[392] Other speakers, likewise, said they would 'quarrel' with Heke if he attempted to attack the flagstaff again.[393]

Other rangatira also spoke at the hui, urging settlers to stay and the Governor and his troops to leave, and urging all parties to be kind to each other. One rangatira, named in the newspaper account as Hihiatoto, said that it was he who had felled the flagstaff: 'I am the man who cut the staff down, do not look after that man Heke, take me as payment. Who is Heke?' Ngāti Kawa tradition is that Heke remained at Waihihi or Kororāreka while Ngāti Kawa leaders climbed Maiki and felled the flagstaff.[394] Ruhe (Maketū's father) also spoke, surprising those present by saying that he did not stand with Heke. He said he had urged Heke to attend the hui but Heke refused on the grounds that 'he has nothing to say with you [the Governor]'. According to Ruhe, Heke 'understood . . . the request for guns to mean land, the Ahuahu he thought was to be the butt-end of them, and the Kaikohe the barrels, the distance of ten miles'. Heke, through Ruhe, also delivered a warning to Nene: 'Tell Waka I shall go and have a quarrel with him for the active part he has taken.'[395]

It is not clear whether the *Daily Southern Cross* had a reporter at the hui or relied on Crown officials for its account. Another description of the event was provided by the schoolteacher William Bambridge, whose brief account suggests the Governor met with a less positive response than the newspaper report claimed. According to Bambridge, during the hui a 'young man rose and said that all their talking was of no use, and all they were doing was nothing because John Heke was not present.'[396]

The hui was a critical juncture for Ngāpuhi. In effect, Nene and other rangatira offered an undertaking that they would protect the flagstaff from any future attack in return for certain concessions by the Crown to give better effect to their understanding of the treaty agreement and the Governor sending his soldiers

391. 'Successful and Amicable Settlement', *Daily Southern Cross*, 7 September 1844, p 2 (Crown document bank (doc w48), p 196).

392. 'Successful and Amicable Settlement', *Daily Southern Cross*, 7 September 1844, p 2 (Crown document bank (doc w48), p 196).

393. See Tuwakawa, Wapuku, and Wakarua in *Daily Southern Cross*, 7 September 1844, p 2 (Crown document bank (doc w48), pp 196–197).

394. 'Successful and Amicable Settlement', *Daily Southern Cross*, 7 September 1844, p 2 (Crown document bank (doc w48), p 196).

395. 'Successful and Amicable Settlement', *Daily Southern Cross*, 7 September 1844, p 2 (Crown document bank (doc w48), p 197).

396. Bambridge, journal, 2 September 1844 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 338).

away and agreeing to leave them in peace to manage their own affairs.[397] By this means, Nene and others (particularly rangatira from the inner Hokianga) were challenging Heke in a manner that meant neither side could subsequently back down without loss of mana.[398] As discussed in the preceding section, this situation had arisen because of the pressure created by FitzRoy's threat of invasion.[399]

Dr Phillipson regarded the hui as a renegotiation of the treaty alliance, under which FitzRoy delegated Patuone, Nene, and other rangatira to govern the north on the Crown's behalf.[400] The Governor and missionaries might have seen it that way. Bishop Selwyn wrote in 1845 that Nene had been appointed 'as guardian of the peace',[401] and another missionary drew a comparison with the British practice of governing through indigenous elites in other colonies.[402] We do not believe that Patuone, Nene, and others saw themselves as consenting to govern on the Crown's behalf; rather, they were attempting to fulfil their side of the treaty agreement and taking the pragmatic steps necessary to rid the north of the Crown's soldiers and therefore protect their own mana and tino rangatiratanga. The absence from the hui of senior rangatira such as Kawiti, Pōmare, Rewa, and Te Kēmara (as well as Heke) means the hui was not a negotiation between the Crown and all of Ngāpuhi. Nor was it a free and open negotiation, since it was conducted under the threat of military invasion, which Ngāpuhi leaders were all anxious to avoid.

On 3 September, the second day of the hui, FitzRoy met privately with several rangatira for further discussions. Those in attendance included Te Taonui, Patuone, Te Hira Pure, Turau, Rāwiri, Noa, and Repa. Others may have been present but were not named in the missionary accounts.[403] Rangatira made two requests: that the Crown return surplus lands from settlers' pre-treaty land claims, and that it provide a flag for Ngāpuhi. These requests show that Heke's concerns were shared throughout Ngāpuhi, even by those who were concerned by his tactics.[404] FitzRoy said he would provide a new flag for the rangatira, '[a]n English ensign with the motto Hoa Tiaki o Nui Tireni – Allied Guardians of New Zealand'.[405] While missionary accounts of the hui indicate that rangatira were satisfied with this, they do not say how the proposal was explained to them. Rangatira may have seen the agreement as signifying Crown recognition of their independence, whereas FitzRoy intended the new flag to signify the status of Nene

397. Johnson, 'The Northern War' (doc A5), p 152; see also claimant generic closing submissions (#3.3.219), p 53.
398. Johnson, 'The Northern War' (doc A5), p 152.
399. Johnson, answers to post-hearing questions (doc A5(g)), p 2; see also Phillipson, answers to questions of clarification (doc A1(e)), p 12.
400. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 328.
401. Selwyn to FitzRoy, November 1845 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 333).
402. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 328, 339.
403. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 339; Johnson, 'The Northern War' (doc A5), p 130.
404. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 339.
405. W Cotton, journal, 3 September 1844 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 339).

and others as indigenous agents of the Crown, charged with managing their section of the empire on Britain's behalf.[406]

The Waimate hui, in our view, was a turning point. It preserved peace for the time being. FitzRoy agreed to send his troops away in return for a promise that Nene and other rangatira would control Heke and keep the peace. FitzRoy had offered solutions to several concerns expressed by rangatira. He had removed the much-despised customs duties, promised a new flag, and the return of surplus lands. He had also seemed to acknowledge the authority of the rangatira although it soon became clear that his basic assumption that the Crown had the overarching right to impose its laws was unchanged. The hui formalised the division between Heke's people and the inner Hokianga coalition led by Nene, while failing to settle any of the underlying issues concerning the relative authority of rangatira and the Crown. With these matters unresolved, the seeds were sown for later conflict.[407]

The agreements reached at Waimate were binding on the Governor and on those rangatira who attended and consented to the arrangements made. Heke, Kawiti, Pōmare, Rewa and other prominent rangatira did not attend and were therefore not a party to the agreement.[408] While the Waimate hui was underway, Heke staged his own hākari at a location recorded as being close to Waimate but still within Heke's rohe. The hākari platform had one central pou, taller than the rest, which had 'a rudely carved head on the top . . . which the natives called "Te Kawana", and in insult put a rope around its neck'.[409] As Dr Phillipson observed, this was a 'graphic' challenge to the Governor's authority.[410] In Johnson's view, it was also an assertion that Heke's authority was equal to that of the Governor, since in the British system of government only governors had the power to hang people.[411]

5.4.2.1.6 Heke's reasons for staying away from the Waimate hui

Heke gave several explanations for his decision to stay away from Waimate. Prior to the hui, he said he would not meet the Governor unless the replacement flagstaff was removed.[412] During the hui, Ruhe explained that Heke was not attending as he had nothing to say to those present. The record is not clear as to whether Heke intended this message for the Governor, or for Nene and other rangatira, or both. Ruhe's account also suggested that Heke believed the Governor intended to take his land and had been angered by Nene's offer to challenge him, and expected

406. Specifically, Lieutenant-Colonel Hulme described the offer of a flag as being 'in accordance with English policy towards the native princes of India': Cotton, journal, 3 September 1844 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 339).

407. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 331–335, 341–342; see also Murray Painting (doc V12), pp 25–26.

408. Phillipson, answers to questions of clarification (doc A1(e)), pp 11–12.

409. Cotton, journal, 24 October 1844 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 338); see also Johnson, 'The Northern War' (doc A5), p 128.

410. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 338.

411. Johnson, 'The Northern War' (doc A5), p 128.

412. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 338.

it to lead to conflict.[413] Soon after the hui, Heke visited Waimate, apparently telling Bishop Selwyn and others that

> he did not wish to treat the Governor with contempt in not coming to the meeting . . . On the contrary he sent a message to His Ex. requesting that he would remain at the Waimate 2 or 3 days longer, because he could not leave the party whom he had invited to feast with him at Kaikohe, lest they be offended.[414]

In September, Heke wrote to FitzRoy saying, 'The reason I did not attend the meeting at Waimate was for fear of a collision (or quarrel) with the natives.'[415]

Despite Selwyn's account, we do not think that Heke stayed away because he could not leave his guests at Kaikohe. As Dr Phillipson observed, this explanation was 'disingenuous at best', since the hākari was clearly intended as 'a competitive display of mana'.[416] Nonetheless, Heke's note was significant; it indicated that he was willing to meet, albeit not at a time and place determined by Nene and his allies.

Nor is there clear evidence that Heke genuinely believed FitzRoy wanted to take his land at that time (though the Governor would later seek confiscation). We accept the Crown's submission that no one other than Ruhe made this claim, and there is no evidence of Heke raising this concern with missionaries or anyone else.[417]

Heke's other reasons for staying away from the hui must be considered in context. As described earlier, after the June hui Heke had invited the Governor to visit and offered peace so long as he could restore the flagstaff himself. From Heke's point of view, FitzRoy had rejected these terms by rebuilding the flagstaff, arriving with troops, making a non-negotiable demand for atonement, and threatening to march on Kaikohe. All of this had occurred in advance of the hui.[418] FitzRoy had then reached a deal with other rangatira by which they would respond with force to any further attempts by Heke on the flagstaff, as the price for the Governor's agreement to withdraw his forces. Heke clearly wanted to meet FitzRoy on his own, away from Nene and others who might push him publicly to comply with the Governor's demands.

The final reason Heke gave for staying away from the hui was that he feared conflict with other rangatira. The Crown did not regard this as a valid explanation, submitting that Heke had attended the June hui without the outbreak of fighting

413. Johnson, 'The Northern War' (doc A5), p 122.
414. Bambridge, journal, 2 September 1844 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 338).
415. Heke to FitzRoy, [September 1844] (cited in Johnson, 'The Northern War' (doc A5), p 135).
416. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 338.
417. Crown closing submissions (#3.3.403), pp 82–83.
418. Nene's offer was delivered to FitzRoy on 28 August, five days before the hui began. During those days, Heke was in constant communication with rangatira and missionaries who were seeking to persuade him to accept FitzRoy's terms: Johnson, 'The Northern War' (doc A5), pp 114–115.

and that steps had been taken to ensure that the September hui was peaceful.[419] In fact, circumstances had changed significantly since the June hui, principally because Nene had offered to answer for Heke's conduct. Heke was understandably angered by this affront to his mana and warned Nene to stay out of his affairs, or the pair would 'quarrel'.[420] Later events confirm that Heke saw Nene's intervention not only as a personal affront but also as a challenge to te kawa o Rāhiri, the code that bound Ngāpuhi hapū together while also guaranteeing the autonomy of each.[421] During the hui, Māori clearly had access to arms, which they were able to present when FitzRoy called for them to pay utu on Heke's behalf. The threat of armed conflict was therefore real, either at Waimate or afterwards.[422] On this basis, we agree with Dr Phillipson that Heke stayed away from the hui 'lest it result in an open breach and fighting among Ngāpuhi'.[423]

5.4.2.2 *Did the Crown escalate tensions in Te Raki between September 1844 and January 1845?*

5.4.2.2.1 FitzRoy's response to Heke's request to fly two flags

Governor FitzRoy and his party left the Waimate hui shortly after noon on 3 September 1844 to return to their ships. The Governor sent the 99th Regiment back to Sydney and departed for Auckland with the remaining troops, while Chief Protector George Clarke remained behind so he could travel to Hokianga, address any remaining concerns and further explain to Māori the deal that had been reached at Waimate.[424] At Waimā and the Hokianga headlands, rangatira promised to maintain peace with settlers and expressed a wish for the Governor to visit.[425] At Māngungu, several Hokianga rangatira including Nene, Patuone, Makoare Te Taonui, and Te Hira Pure expressed their concerns about both the treaty relationship and the declining economy. They felt the Government had treated them poorly, and they had heard from Europeans 'that they were enslaved, and the Government were their oppressors'. In spite of these considerable misgivings, they said they were determined to treat settlers well.[426] Here was further evidence that Heke's concerns were shared, even among those who had promised to oppose him by protecting the flagstaff.

419. Crown closing submissions (#3.3.403), pp 80–81.

420. Ruhe attended the Waimate hui and warned Nene that Heke planned to 'quarrel' with him because of this affront to his mana: *Daily Southern Cross*, 7 September 1844, Crown document bank (doc w48), p 197. Burrows later recorded Heke as saying: 'Let Waka keep to his own side of the Island, Hokianga, and not interfere with me': Reverend R Burrows, *Extracts from a Diary*, pp 8–9 (doc w48(a)).

421. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 359.

422. Crown document bank (doc w48), p 196.

423. Phillipson, summary of 'Bay of Islands Maori and the Crown' (doc A1(d)), p 21.

424. Johnson, 'The Northern War' (doc A5), pp 129, 130; Crown document bank (doc w48), pp 419; see also 'Shipping List', *Daily Southern Cross*, 7 September 1844, p 2.

425. Crown document bank (doc w48), p 276; Johnson, 'The Northern War' (doc A5), p 129.

426. Clarke to Colonial Secretary, 30 September 1844 (Crown document bank (doc w48), p 276); Johnson, 'The Northern War' (doc A5), p 129.

On 7 September, Heke visited Waimate with a party numbering between 150 and 250. He asked for details of the Governor's speech from the previous week's hui and was read a brief summary. Heke said he had sent a message asking the Governor to remain after the Waimate hui so they could meet separately.[427] Heke is then recorded as saying that 'he wanted the governor to come and visit him and take down the present flag staff and then erect two, side by side, one for the English and one for the Maori flag'.[428] This was a clear appeal for the Governor to recognise the dual and equal authority of the Crown and rangatira, in accordance with the Ngāpuhi understanding of te Tiriti. As Phillipson observed, Te Raki rangatira had signed te Tiriti only after insisting that they would be the Governor's equals – a condition famously symbolised 'by Patuone holding his two index fingers up, side by side'.[429] According to Johnson, Heke was also making the point that the Governor had acted unilaterally by rebuilding the flagstaff, 'and therefore it was the governor's responsibility to come and remove it, and then to act in concert with the chiefs or re-erect poles to embody a partnership and dual authority'.[430]

Soon afterwards, Heke drafted two letters to the Governor. Bishop Selwyn, not liking Heke's tone, refused to receive them 'nor . . . allow any one from the Mission to write one for him'.[431] This was the second time the Bishop had refused to convey Heke's message to the Governor – the first having occurred at the previous Waimate hui in July when he had demanded that Heke and other rangatira redraft their letter in a more conciliatory tone.[432] Notwithstanding Selwyn's refusal, at some time during September both Heke and Te Hira Pure again wrote to the Governor, making it clear that there were outstanding matters to resolve.[433]

Te Hira Pure wrote that the 'evil' over the flag had not yet been settled. FitzRoy had been hasty in calling for soldiers, and in restoring the flag – this was 'he karanga riri' ('a hostile act'). If FitzRoy had called a hui before restoring the flagstaff, Heke would have attended and shaken the Governor's hand, they would have discussed their differences, and 'kua mai te rongo i reira' ('peace would have been established'). Te Hira Pure therefore asked the Governor to return to the Bay of Islands, take down the British ensign, and call another hui: 'you will then see the good resulting from it'. But the ensign had to be removed first, 'because it has been the root of all this evil (and is equal to the taking [of] our country from us)'.[434]

427. Johnson, 'The Northern War' (doc A5), pp 130–131.
428. Cotton, journal, 7 September 1844 (cited in Johnson, 'The Northern War' (doc A5), p 131).
429. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 326.
430. Johnson, 'The Northern War' (doc A5), p 131.
431. Colenso to Church Missionary Society, 19 November 1844 (cited in Johnson, 'The Northern War' (doc A5), p 131).
432. Johnson, 'The Northern War' (doc A5), pp 103–104.
433. Johnson, 'The Northern War' (doc A5), p 132.
434. Te Hira Pure to Governor FitzRoy, [September 1844] (Crown document bank (doc W48), p 317); Johnson, 'The Northern War' (doc A5), p 132. The letter was translated by George Clarke senior, presumably after the Governor had received it. Mr Johnson provided a full text of the English translation and some quotations from the original in te reo.

Heke, too, asked the Governor to visit him at Waimate. He asked the Governor to explain the significance of the flagstaff, so he could understand the great wrongs ('nga henga he nunui') he was supposed to have committed. We believe that Heke understood the significance of the flagstaff as a symbol of territorial authority but saw FitzRoy's immediate threat of war as a disproportionate response, and therefore sought to understand the Governor's reasoning. Heke expressed his clear desire for peace: '[E] whai atawhai ana koe, ka whai atawhai ano hoki matou ki a koe' ('if you thus show your love to us, we will show our peace and love to you').[435] But Heke also made clear that the question of the flagstaff remained unresolved and that matters could only be settled by the Governor visiting and taking joint action over the flagstaff with him:

> Ki te whakaae koe ki te haere mai tika tonu mai ki te Waimate korero ai, ka mutu ka haere atu taua ki Kororareka.
>
> If you will consent to come, do come direct to Waimate, and there let us talk, and when we have finished our talk let us go to Kororarika, and there let the matter end.[436]

If the Governor did not come, the existing 'raru' (which George Clarke senior translated as 'confusion') would remain forever, and there would be fighting among Ngāpuhi.[437]

Johnson understood this as a conciliatory letter in which Heke genuinely wanted peace, while also making clear that the Governor had as much responsibility as he did to secure that peace.[438] We agree, but also observe that the letter came with a warning. Heke was not backing away from his original commitment to shared authority; if the Governor failed to come to Waimate and negotiate directly with Heke, conflict was likely, at least among Ngāpuhi.

FitzRoy had failed to respond to Heke's previous letter but this time he wrote back. He said that Heke had been deceived by 'ill-disposed Europeans'. FitzRoy said he would meet with him, but not until summer when he planned to visit the Bay of Islands. He was confident that once they had spoken, Heke would see his good intentions. As he had at Waimate, FitzRoy gave a long explanation of the flag's importance as a symbol of the Crown's status as 'defender of New Zealand' and 'guardian of the rights of the chiefs and people'. The flag also bound New Zealand to the rest of the British empire 'for mutual advantage and security', whereas other nations would not recognise a Māori flag. For these reasons, FitzRoy said, the

435. Hone Heke Pokai to FitzRoy, [September 1844] (cited in Johnson, 'The Northern War' (doc A5), pp 133–135). The letter and translation were published in British Parliamentary Papers.
436. Hone Heke Pokai to FitzRoy, [September 1844] (cited in Johnson, 'The Northern War' (doc A5), pp 133–134).
437. Hone Heke Pokai to FitzRoy, [September 1844] (cited in Johnson, 'The Northern War' (doc A5), pp 133–134).
438. Johnson, 'The Northern War' (doc A5), p 135.

Hōne Heke's September 1844 Letter to the Governor

E hoa e te Kawana,

Ka karangatia atu ana a koe e au. Kia haere mai ne? ae, haere mai, kei riri koe, na nga ngutu o te tangata o te pakeha, na i riri [nui?] ai tenei kino e takoto ake nei, me aha ranei ka pirau ai tenei mea, koia ahau ka mea atu nei ki a koe. kia haere mai koe, ki konei; tana ata korero ai, kia tika ai a tana korero, ki te mea e kore koe e tae mai; heoi ra ka mea atu ahau e kore e oti tenei mea. e werewere ana taku, e werewere ana tau, e werewere ana ta Ngapuhi. E karanga ana ta Ngapuhi ki te poka, e karanga ana ta matou ki te poka, e karanga ana tau ki te poka. Koia matou ka mea atu nei, ma wai ranei Wakaoti e tanu? na, ke kai wakarite koe no nga he nunui Mau ano hoki tenei e wakaoti, haere mai koe kia korero taua ki te ritenga o te rakau: e kore ahau e mohio, engari kia tae mai koe, kia korero taua; ki te mea e kore koe e tae mai, ka mau tonu tenei pou raru ki te ao, ake tonu atu, mehemea e kore koe e tae mai ka piri te namunamu nei he tangata maori, he tangata maori a nga ra e takoto ake nei. Mehemea ka oti tenei mea, ka mea ahau he aroha tau, he atawai tou. Ki te mea e whai aroha ana koe, ka whai aroha ano hoki matou ki a koe, ki te mea e whai atawai ana koe, ka whai atawhai ano hoki matou ki a koe ki nga Mihanare katoa kaua ki nga pakeha kino kaua ki nga tangata kino. Ki te whakaae koe ki te haere mai tika tonu mai ki te Waimate korero ai, ka mutu ka haere atu taua ki Kororareka. Ma ka oti i konei ki te mea e kore [?] koe e tae mai, heoi ano, ka mutu aku whakaaro titiro atu ki tau kupu pai. katahi ano ahau ka mea hiahia nga tatau o raro. kia pakaru mai te pouritanga ki konei ki te ao. Ki te pai koe, ki te haere mai, tuhituhia mai tetahi pukapuka ki au, kia matau ai ahau e kore koe e tae mai, kia matau ai ranei e tae mai koe.

Ta te mea hoki ahau te tae atu ai ki to huihuinga i te Waimate e tupato ana ahau, kei whawhai matou te tangata Maori

Signed, Na H H Pokai[1]

Friend governor,

I write to you to come to me; will you come? Do come, and do not be angry. It is by the lips of the Europeans that the late proceedings were increased and aggravated; in what way [how] can we extinguish this evil? In order that it may be extinguished, I ask you to come here, that we two may quietly and equitably adjust this offence;

1. Hone Heke Pokai to FitzRoy, [September 1844] (cited in Johnson, 'The Northern War' (doc A5), pp 133–134). Mr Johnson provided the transcript, noting that the letter is stored in microfilm and is difficult to read clearly, and the transcript may therefore contain errors.

but if you do not come I say it will not be extinguished; we shall all remain in doubt without confidence. The Ngapuhi are calling out to have this evil buried; you and I are calling out the same. I say, who is to adjust and bury it? You are appointed to adjust these affairs, and bring to nothing great evils (or crimes). You only [only you] can adjust and bring to a conclusion this affair about the flag-staff, the evil of which I do not yet know; do therefore come, that we may talk these matters over; but if you will not come this confusion will remain in the world for ever; if you will not come this evil will adhere like a blister-plaster, and the end of it will be native (fighting) native; but if the affair is amicably adjusted, it will be a mark of your love and peaceable feeling towards us; and if you thus show your love to us, we will show our peace and love to you, and to the missionaries, but not to bad Europeans and mad natives. If you will consent to come, do come direct to Waimate, and there let us talk, and when we have finished our talk let us go to Kororarika, and there let the matter end; but if you will not come, I have nothing more to say than this, that I shall cease to look and think favourably of your good words; then I shall call to the infernal gates to burst and deluge the world with darkness; but if you will be pleased to come, write me a letter, and if you decide on not coming, write in order that I may know that you will not come.

The reason I did not attend the meeting at Waimate was for fear of a collision (or quarrel) with the natives.[2]

2. Hone Heke Pokai to FitzRoy, [September 1844] (cited in Johnson, 'The Northern War' (doc A5), pp 134–136).

British flag was 'sacred' and cutting it down was 'an insult'.[439] FitzRoy was blunter in his response to Te Hira Pure. He said there were 'several objectionable things' in Te Hira Pure's letter, which did 'not read so well as Heke's'. Nonetheless, FitzRoy enclosed a copy of his letter to Heke and said he would meet Te Hira Pure to discuss matters at leisure when he next came to Waimate.[440]

In our view, although FitzRoy was eventually open to meeting Heke and Te Hira Pure, he was not amenable to discussing the substantive questions they raised

439. FitzRoy to Heke Pokai, 5 October 1844 (Crown document bank (doc W48), p 316); see also Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 345–346. Mr Johnson wrote that FitzRoy 'delayed his reply to Heke', not responding until 5 October 1844: Johnson, 'The Northern War' (doc A5), p 140. During hearings, he acknowledged that there was no record of when FitzRoy received the letter, and therefore it could not be said that there was any excessive delay: Ralph Johnson, transcript 4.1.24, Oromāhoe Marae, p 605; Andrew Irwin, transcript 4.1.32, Waitaha Events Centre, p 130. The Crown submitted that FitzRoy replied as soon as he could: claimant closing submissions (# 3.3.403), pp 86–87. This also cannot be known for certain.

440. FitzRoy to Hira Pure, 5 October 1844 (Crown document bank (doc W48), p 317); see also Johnson, 'The Northern War' (doc A5), pp 140–141.

about dual flags or dual authority. Nor was he willing to meet soon, even though both rangatira had warned him that the dispute remained unresolved, and that conflict was likely within Ngāpuhi if he did not take steps to settle it. Nor was the Governor willing to be seen to raise Heke's status by negotiating with him directly. In accordance with the arrangement he had made at Waimate, FitzRoy therefore left Nene to deal with Heke in the meantime, despite Heke's warnings that this approach would also lead to conflict within Ngāpuhi. In effect, the Governor was rejecting the resolution proposed by Heke and Te Hira Pure, under which two flags would fly at Maiki. Certainly, his letter did nothing to moderate Heke's concerns; soon after receiving the reply, Heke wrote to the trader Gilbert Mair, warning him not to fly the British flag on land he was transacting at Whāngārei.[441] Dr Phillipson saw the Governor's decision to delay as 'the crucial decision that would lead to war in March 1845', since it left Heke with an unresolved grievance and Ngāpuhi divided.[442] While war was not yet inevitable, we agree the Governor missed a crucial opportunity to enter dialogue and seek resolution.

5.4.2.2.2 Taua muru and increasing tensions: September to October 1844

In the months after the Waimate hui, the Bay of Islands did not remain tranquil. On the contrary, a series of events escalated tensions between Ngāpuhi and settlers, and between Heke and the Crown. Ultimately, those tensions would lead to Heke felling the flagstaff for a third and fourth time.

The first event was another clash between colonial and Māori systems of law enforcement. On 21 September 1844, police magistrate Beckham attempted to arrest a settler (Joseph Bryers) in his home. During the arrest, one of the constables used his cutlass and cut the hand of Bryers' wife Kohu, who was a rangatira – the granddaughter of Ngāti Hine rangatira Kawiti and the daughter of Ngāti Manu rangatira Te Whareumu.[443] Although the cut was not deep, she was a woman of high birth and shedding her blood was a serious matter. Her brother Hori Kingi Tahua visited Beckham and the sub-protector Kemp seeking compensation.[444] The officials dismissed the matter as 'trifling' and refused to pay, even though they were aware that Kohu 'would according to native custom have become entitled to some compensation'.[445]

Their dismissal of Kohu and Hori Kingi Tahua's legitimate claim had inevitable repercussions; it reignited existing tensions about law enforcement and provided further evidence to Māori that colonial authorities would not respect their laws or protect them from Pākehā transgressions. Nene and Pōmare II considered the matter so serious that they travelled to Auckland to meet the Governor. Hori Kingi Tahua visited Beckham for a second time and asked for a horse. When he was again refused, he led a muru against a nearby settler, Captain John Wright,

441. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 1699.
442. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 346–347.
443. Johnson, 'The Northern War' (doc A5), pp 141–142; Arapeta Hamilton (doc W7), p 7.
444. Johnson, 'The Northern War' (doc A5), pp 141–142.
445. Kemp to Clarke, 4 October 1844 (cited in Johnson, 'The Northern War' (doc A5), p 141).

and took eight horses.[446] Wright had no direct involvement in the dispute, and Tahua later explained that he took the horses only to force Beckham and Kemp to negotiate.[447] Beckham and Kemp then attempted to reach a settlement, but by this time Ngāti Hine had a new grievance after settlers desecrated a wāhi tapu at Okiato. In mid-October, the Governor sent Chief Protector Clarke aboard a warship to mediate. Together with Henry Williams, Clarke senior visited Tahua and negotiated the utu to be paid. Tahua, in turn, agreed to compensate Wright.[448]

Clarke left the Bay of Islands on 17 October, having spent just two days there. Although he believed the dispute with Tahua was over, he also observed that there was a general feeling of 'distrust and insecurity' between Māori and settlers.[449] The number of taua muru was growing as Māori became increasingly frustrated with settler transgressions against tikanga and the failure of colonial officials to address these matters.[450] According to the Wesleyan missionary Walter Lawry, many of the tensions arose because of newer settlers who 'do not understand the native language, make great blunders, and . . . draw very false conclusions', and in their ignorance and fear, adopted hostile attitudes towards Māori.[451] Clarke blamed 'misguided' settlers who told Māori that the Government's offers of protection were insincere.[452] Younger Māori were responsible for many of the muru that occurred, and Clarke felt this reflected declining influence on the part of senior rangatira. Mr Johnson provided evidence, however, that many of the muru were sanctioned by senior leaders and that 'in the politically charged climate of late 1844, chiefs were no longer willing to simply "turn the other cheek" to constant and in some cases, deliberate, injuries'.[453]

Clarke recommended two measures: first, that settler officials provide 'speedy redress' for any transgressions against tikanga; and secondly, that the Government should take steps to strengthen the influence of senior rangatira and reward them for their roles in keeping peace.[454] There is no record of Governor FitzRoy responding to the first recommendation. He showed some sympathy for the second, and sought permission to offer salaries and uniforms to senior Ngāpuhi rangatira.[455] These measures were not adopted, though the Crown later provided gifts of flour, blankets, tobacco, and other items to rangatira who supported it during the war.[456]

Instead of accepting Clarke's advice regarding breaches of tikanga, it appears that FitzRoy's position on muru was hardening. On 19 October 1844, he wrote to

446. Johnson, 'The Northern War' (doc A5), p 142.
447. Johnson, 'The Northern War' (doc A5), p 142.
448. Johnson, 'The Northern War' (doc A5), p 144.
449. Clarke to FitzRoy, 19 October 1844 (Crown document bank (doc W48), pp 168–169).
450. Crown document bank (doc W48), pp 168–169; Johnson, 'The Northern War' (doc A5), pp 144–147.
451. Lawry to Hobbs, 24 September 1844 (Crown document bank (doc W48), p 317).
452. Clarke to FitzRoy, 19 October 1844 (Crown document bank (doc W48), pp 168–169).
453. Johnson, 'The Northern War' (doc A5), pp 145–146.
454. Clarke to FitzRoy, 19 October 1844 (Crown document bank (doc W48), pp 168–169). Clarke sent the same letter to the Colonial Secretary (Crown document bank (doc W48), p 319).
455. FitzRoy to Stanley, 19 October 1844, BPP, vol 4, p 412.
456. Johnson, 'The Northern War' (doc A5), pp 215–216, 358–359.

Stanley expressing what he considered to be the dangers posed by muru, which he described as 'retaliation on unoffending persons, settlers in the interior, or at a distance from the principal settlements'. Whereas Clarke had recognised the Kohu affair as arising from the insensitivity of local officials to tikanga, the Governor saw it as evidence of the 'unsettled and lawless, if not insurrectionary, disposition' of many Bay of Islands Māori, blaming this on the influence of American and French agitators against the British government. He expressed concern that if a taua muru came into conflict with settlers, then 'in all probability the lives of persons unconnected with the affray would be taken; and a personal quarrel, or mere chance-medley, might lead to a general rupture between the races'.[457] FitzRoy made no reference to the role of muru in enforcing tikanga and the resolution of disputes, often through negotiated payment of utu; indeed, his willingness to rely on rangatira to manage affairs and resolve conflicts in their own territories was rapidly diminishing. His other response was to call for military reinforcements, and he requested two warships and a full regiment of soldiers, to be stationed permanently in New Zealand. While the Governor said he hoped not to use these options, in his view their presence was necessary to deter misconduct by Europeans and Māori alike. Without them, minor conflicts between Māori and settlers could quickly escalate, with any loss of life causing a general Māori uprising. Such an outcome could only be prevented by the presence of such a large force 'that organized resistance to it might be quite hopeless'.[458]

FitzRoy then took a series of steps that caused alarm among both Kororāreka settlers and Ngāpuhi.[459] On 21 October 1844, he wrote to Beckham to warn him that the Government might use force in response to any future muru, and to suggest that settlers leave the Bay of Islands so they were not harmed by any military activity.[460] In the following month, some settlers did depart from the Bay of Islands and also Hokianga.[461] The departure of several long-serving missionaries during October, and the closure of an agriculture school associated with the Waimate mission, also contributed to a perception that Europeans were abandoning the district.[462] From late October, Tahua conducted a series of taua muru in Kororāreka, particularly targeting the town's jailhouse. In a move that further escalated tensions, Ruku of Te Uri Ngongo took six horses from a Kawakawa settler named Hingston after a dispute about a foal.[463]

Kororāreka settlers responded by petitioning the Governor for a military force and by threatening to take matters into their own hands if they were not protected.[464] In this, they received backing from settler newspapers in Auckland. One

457. FitzRoy to Stanley, 19 October 1844, BPP, vol 4, pp 412, 413.
458. FitzRoy to Stanley, 19 October 1844, BPP, vol 4, pp 412, 413.
459. Johnson, 'The Northern War' (doc A5), p 147.
460. Johnson, 'The Northern War' (doc A5), p 146.
461. For example, see 'Shipping Intelligence', *Auckland Chronicle and New Zealand Colonist*, 21 November 1844, p 2.
462. Johnson, 'The Northern War' (doc A5), pp 131, 150–151.
463. Johnson, 'The Northern War' (doc A5), pp 147–149.
464. Johnson, 'The Northern War' (doc A5), p 147.

opined that the Governor had been far too lenient on Heke, and that he and other rangatira 'ought to be taught that the laws are not to be broken with impunity';[465] it also advocated that settlers should not pay taxes until the Government could protect them from taua muru and punish the 'offenders.'[466]

FitzRoy sent the HMS *North Star* (which was passing through Auckland) to the Bay of Islands as a warning to those who were conducting taua muru.[467] Tensions continued to rise until Pōmare II intervened by persuading Tahua to desist and return some of the goods he had taken. From that point, the muru in Kororāreka ceased.[468] FitzRoy nonetheless pressed ahead with plans to remove settlers from the Bay of Islands, sending a message in early November that all government protection would be withdrawn from them at the end of December.[469] To Māori and settlers alike, it appeared that FitzRoy was preparing for war.[470]

5.4.2.2.3 Ngāpuhi seek reassurance on the treaty: September 1844 to March 1845

In this environment of distrust and heightened tension, rangatira turned their attention to the treaty, seeking further assurances about its meaning. At Waimate, FitzRoy had presented the treaty as an agreement through which Māori retained their independence under British protection. However, events since that hui – including Thomas Beckham's handling of the offence against Kohu and the Governor's preparations for a military response to taua muru – had caused considerable uncertainty. In early November, several rangatira wrote to the Chief Protector seeking clarification of the treaty's meaning,[471] to which Clarke responded by organising a printing of 50 copies of the te reo text and sending them to Bay of Islands rangatira.[472] A very brief covering letter from FitzRoy warned against the influence of 'nga tangata kino' (bad people) and expressed a desire for peace. The unnamed 'tangata kino' were presumably those who warned rangatira that the Crown claimed authority over their lands.[473]

At about the same time, and in a move that may have been coordinated with Clarke's, the missionary Henry Williams organised a much larger reprinting of 400 copies of the treaty.[474] According to historian Dame Claudia Orange, Williams' immediate goal was 'to avert a major Maori uprising which he was sure would result in a Maori victory'. He also was facing personal criticism: claims

465. *Auckland Chronicle and New Zealand Colonist*, 31 October 1844, p 2.
466. *Auckland Chronicle and New Zealand Colonist*, 7 November 1844, p 2.
467. Johnson, 'The Northern War' (doc A5), p 147.
468. Johnson, 'The Northern War' (doc A5), pp 148–149.
469. Johnson, 'The Northern War' (doc A5), p 149.
470. Johnson, 'The Northern War' (doc A5), p 149.
471. Johnson, 'The Northern War' (doc A5), p 149.
472. Johnson, 'The Northern War' (doc A5), p 149.
473. Phil Parkinson and Penny Griffith, *Books in Māori, 1815–1900: An Annotated Bibliography / Ngā Tānga Reo Māori: Ngā Kohikohinga me ōna Whakamārama* (Auckland: Reed, 2004), p 134 (Johnson, 'The Northern War' (doc A5), p 149).
474. Orange, *The Treaty of Waitangi*, p 121. Mr Johnson said it was not known which language Williams had printed, but Orange said it was te Tiriti in te reo Māori: Johnson, 'The Northern War' (doc A5), p 150.

from Māori that he had deceived them at Waitangi, and from settlers that he had failed to secure informed Māori consent for Britain's assertion of sovereignty.[475] Williams, in a letter to Busby, the former British Resident, explained that he had returned to Te Raki on 16 September (after spending two months at Tūranga) to find all Bay of Islands and Hokianga Māori in a state of agitation about the treaty's meaning and intentions, '[it] having been declared as the origin of all the existing mischief by which the Chiefs had given up their Rank, Rights, and Privileges as Chiefs, with their lands and all their possessions.'[476]

According to Dr Phillipson, from September 1844 to March 1845, Henry Williams, Robert Burrows, Richard Davis, and other missionaries were busy attending numerous coastal and inland hui, 'advocating for the Treaty and the alliance, and waging a war of words with Heke for the minds and hearts of Nga Puhi'.[477] Williams had told the chiefs that the treaty was their 'Magna Charta' [*sic*], under which 'their Lands, their Rights and Privileges were reserved for them'. On the basis of this campaign, he reported, Nene and other rangatira put aside their concerns and 'admitted that the Treaty was Good'.[478]

Williams also described the treaty as a 'sacred compact between the British Government and the chiefs of New Zealand', under which neither the Queen nor the Governor would tolerate any deception of Māori people.[479] Yet, as Orange observed, by reprinting and distributing the Māori text to disseminate, Clarke and Williams engaged in 'a deliberate blurring of the meaning of sovereignty' and played down the 'significant loss of Maori power' inherent in the English text. If Ngāpuhi at this time had fully comprehended Britain's understanding of the treaty, she said, 'the future would have been placed at great risk'.[480]

In our stage 1 report we concluded that the Crown and its agents chose not to explain the full meaning of the 'sovereignty' they were seeking, and instead presented the treaty in terms that were 'most calculated to win Māori support', giving emphasis to the Crown's authority to control settlers and protect Māori from foreign threat, and the retention by Māori of their independence and tino rangatiratanga.[481] In 1844, Clarke and Williams adopted the same approach. In the face of Māori concerns that their mana had been signed away, the Chief Protector and the treaty's principal translator chose to reassure Māori by presenting them with the Māori text only.[482]

475. Orange, *The Treaty of Waitangi*, p 121; Carleton, *The Life of Henry Williams*, vol 2, pp 88–89.
476. Williams to Busby, 4 January 1847 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 344); see also Johnson, 'The Northern War' (doc A5), p 150.
477. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 344.
478. Williams to Busby, 4 January 1847 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 344); see also Johnson, 'The Northern War' (doc A5), p 150.
479. Williams to Bishop of New Zealand, 20 February 1845 (cited in Carleton, *The Life of Henry Williams*, vol 2, pp 88–89); Orange, *The Treaty of Waitangi*, p 121.
480. Orange, *The Treaty of Waitangi*, p 122.
481. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 514–515, 518.
482. Orange, *The Treaty of Waitangi*, p 122.

5.4.2.2.4 Tensions escalate further: early January 1845

Having warned Bay of Islands settlers that they would need to leave the district, Governor FitzRoy further escalated tensions by threatening to return with his soldiers. FitzRoy communicated this intention in a letter dated 17 December 1844 and published in *Te Karere Maori* on 1 January 1845. We do not have definitive evidence of when rangatira saw it, but mid-January seems likely (the trading schooner *John Franklin* left Auckland for the Bay of Islands on the ninth, and other vessels followed in the next few days; the journey typically took about one day).[483] FitzRoy's letter was addressed to rangatira of Hokianga and 'Tokerau'. It chastised them – in particular Pōmare II, Kawiti, Tamati Pukututu, and Mohi Tāwhai – for failing to prevent tahae (thefts) from Europeans, and for failing to suppress 'hunga tutu' (rebels). He claimed the rangatira had not fulfilled promises made at Waimate. FitzRoy had agreed to take his soldiers away from Te Raki and return later with flags for rangatira, but he could not honour these promises if they would not restore order and return goods to Europeans. If they could not fulfil their part of the agreement, they should write to him so he could take action: 'e kore ahau e tuku i te kino kia tupu' ('I will not let the evil happen').[484]

This was a provocative act on several levels. It was an attack on the mana of Te Raki rangatira, especially for the four who were named – two of whom (Pōmare and Kawiti) had not been at Waimate and so were not party to the agreement made there. It was the first time the Governor is recorded as using the term 'hunga tutu' (rebels) to describe his Te Raki Māori opponents. By dismissing taua muru as mere thefts and labelling any Māori as rebels who had taken part in raids, FitzRoy's language demonstrated his contempt for Māori systems of law enforcement. Most significantly, the Governor threatened to withdraw from the Waimate deal and return with soldiers if rangatira did not prevent future muru. Later, in his memoirs, he would claim – without evidence – that Heke had been behind all of the raids, with the deliberate goal of 'bring[ing] about a collision with the government'.[485] It appears that FitzRoy had become preoccupied by taua muru and was considering them evidence of Māori opposition to the Crown.

Soon after sending this letter, FitzRoy learned of a report by a British House of Commons select committee that also threatened to destabilise Crown–Māori

483. Johnson, 'The Northern War' (doc A5), pp 153–154; 'Shipping Intelligence', *Auckland Chronicle and New Zealand Colonist*, 16 January 1845, p 2. How long the journey took depended on the conditions and the size and speed of the vessel. Mr Johnson recorded one voyage in which the HMS *Victoria* completed the journey in less than a day, and numerous other occasions in which events in the Bay of Islands were discussed in Auckland two days later: Johnson, 'The Northern War' (doc A5), pp 156, 157, 160. The *Victoria* was larger and slower than some of the coastal trading schooners that regularly made the Bay of Islands run.

484. Robert FitzRoy, 'Ki Nga Rangatira o Tokerau, o Hokianga', *Te Karere Maori*, vol 4, no 1, 1 January 1845; Johnson, 'The Northern War' (doc A5), pp 153–154.

485. FitzRoy, Remarks on New Zealand, p 37.

relations.[486] Heavily influenced by the New Zealand Company, the report described the treaty as 'little more than a legal fiction', and declared that indigenous people had no property rights in any lands they did not occupy and cultivate. It therefore recommended that the Government claim title to all unoccupied Māori lands. Though not Government policy, its findings carried the authority of the House of Commons. Stanley, FitzRoy, and Clarke were all highly alarmed. Once made public, the report, they believed, would confirm Māori suspicions that the Crown intended to seize their lands. Chief Protector Clarke considered that war would inevitably follow once Māori learned of its contents, and the Governor consequently did all he could to delay publication.[487] He appears to have succeeded for a short time – its contents were not published in New Zealand until mid-February.[488]

Meanwhile in early January 1845, Te Parawhau of Whāngārei and Ngāti Rongo of Mahurangi conducted muru against settlers Thomas Millon and George Patten at Matakana. The muru appears to have occurred because of an old land claim dispute, concerning the payment of Ngāti Paoa while ignoring the claims of the earlier Ngāti Rongo occupants (who were close kin to Te Parawhau).[489] The Government neither verified the facts independently nor considered Māori views before deciding on its course of action – which was to receive letters from the affected settlers, and then call an Executive Council meeting where the settlers described their experiences in person.[490] At this meeting, which took place on 8 January, just two days after the Matakana muru, it passed a resolution to seek additional military

486. Johnson, 'The Northern War' (doc A5), p 173. According to Johnson, FitzRoy received a despatch from Lord Stanley describing the report's contents late in December, but the report itself did not reach New Zealand until early 1845. However, Lord Stanley's despatch, dated 13 August, referred to a copy of the report being sent to FitzRoy at the end of July. It would presumably have reached FitzRoy either before or at the same time as Stanley's despatch: Johnson, 'The Northern War' (doc A5), pp 170, 173; Crown document bank (doc W48), pp 205–211.

487. 'Report of the Select Committee of the House of Commons on New Zealand', *Daily Southern Cross*, 15 February 1845, p 2; Johnson, 'The Northern War' (doc A5), pp 170–172.

488. The *Daily Southern Cross* published an analysis of the report on 15 February 1845, taking its account from British newspapers. Three days later, FitzRoy wrote to Henry Williams enclosing Lord Stanley's advice and seeking Williams' assistance to calm Māori concerns. Then, on 24 February, George Clarke senior wrote to FitzRoy indicating that the report was sure to be circulated among Māori (indicating it had not yet been): Clarke to FitzRoy, 24 February 1845 (Johnson, 'The Northern War' (doc A5), pp 173–174); FitzRoy to Williams, 18 February 1845 (Carleton, *The Life of Henry Williams*, vol 2, pp 87–88). The Crown referred to evidence that Heke was aware of the report by 14 January. Its source was Dr Phillipson, who appears to have relied on a letter sent by Henry Williams to James Busby on 14 January *1847*: Claimant closing submissions: Northern War (#3.3.403), p 101; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 318.

489. Peter McBurney, 'Traditional History Overview of the Mahurangi and Gulf Islands Districts' (commissioned research report, Wellington: Mahurangi and Gulf Islands District Collective and Crown Forestry Rental Trust, 2010) (doc A36), pp 389–391; 'Disturbance with the Natives', *Daily Southern Cross*, 11 January 1845; O'Malley, 'Northland Crown Purchases' (doc A6), p 73; Dr Barry Rigby, 'The Crown, Maori and Mahurangi, 1840–1881: A Historical Report', 1998 (doc E18), pp 33, 90–91.

490. Johnson, 'The Northern War' (doc A5), pp 154–156; O'Malley, 'Northland Crown Purchases' (doc A6), pp 72, 74.

FitzRoy's 8 January 1845 Proclamation

'I THE GOVERNOR do hereby proclaim and declare, that until all the property taken away from Mr Hingston, at the Bay of Islands, and from Mr Millon and others, at Matakana, is restored to them, until sufficient compensation is made for the injuries sustained, and until the chiefs Parehoro, Mate and Kokou [Koukou] are delivered up to justice, I will not consent to waive the government's right of pre-emption over any land belonging to the Kawakawa or Wangarei tribes, or to any tribe which may assist or harbour the said chiefs.

'I also hereby warn all persons, European or Native, that their assisting or harbouring the said chiefs, or other persons concerned in committing outrages, will render themselves liable to be proceeded against according to law. And I further proclaim that the strongest measures will be adopted ultimately, in the event of these methods being found insufficient.'[1]

1. Proclamation, 8 January 1845 (cited in Johnson, 'The Northern War' (doc A5), pp 155–157).

forces to prevent a repetition of what it regarded as unlawful outrages.[491] FitzRoy also issued a proclamation condemning the muru; this offered a £50 reward for the capture of three rangatira – Parihoro, Koukou, and Mate – and demanded that they return all property taken from the settlers and, in addition, offer them compensation for the harm done.[492]

The Governor responded not only to the Matakana and Kawau muru but also those in October against Hingston, and he consequently included all Kawakawa hapū in his punitive response. His proclamation stated that he would not issue any pre-emption waivers (see chapters 4 and 6) for Whāngārei or Kawakawa tribes until his demands were met. If that was not sufficient to force compliance, 'the strongest measures will be adopted'.[493] In a note to Colonial Secretary Andrew Sinclair, the Governor described these stronger measures to include a naval blockade of the harbour, the removal and destruction of canoes, and 'further punishment . . . if necessary'. In other words, he was preparing for a military response. Someone should be sent, he added, to warn settlers 'and demand *compensation* from the natives' (emphasis in original). He considered similar action against Bay of Islands rangatira but decided to hold off at that point.[494]

491. O'Malley, 'Northland Crown Purchases' (doc A6), p 72; see also Johnson, 'The Northern War' (doc A5), p 156.

492. Johnson, 'The Northern War' (doc A5), p 157; O'Malley, 'Northland Crown Purchases' (doc A6), pp 72–73.

493. Proclamation, 8 January 1845 (cited in Johnson, 'The Northern War' (doc A5), p 157).

494. FitzRoy to Sinclair, 8 January 1845 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), pp 73–74); see also Johnson, 'The Northern War' (doc A5), p 156.

In effect, the issue of this proclamation marked an end to the Government's policy of tolerating Māori customary law and working through rangatira to resolve Māori–settler conflicts. For Te Raki Māori, the Government's threats likely came out of the blue. As we have discussed, muru had previously led to negotiations between rangatira, officials, and sometimes local missionaries, and had largely been resolved peacefully. With FitzRoy's January 1844 proclamation, this policy of engagement with rangatira regarding their settler breaches of Māori tikanga was suddenly reversed.

It soon turned out that the settler accounts of events at Matakana had not been altogether reliable. One of the settlers had named Mate of Ngāti Hine as involved in the muru, but this was false. Mate rode to Auckland with an armed party, met the Governor, and protested his innocence so convincingly that FitzRoy acknowledged the offending testimony 'was unworthy of any degree of credit'. As well as cancelling the order to arrest Mate, he compensated him with two horses and some blankets.[495] Notwithstanding this, the Governor pressed ahead with action against Parihoro and Koukou and demanded land from them. Mate appears to have brokered a deal under which the two rangatira would give up 1,000 acres of the southern Whāngārei headlands (known as Te Poupouwhenua) in return for FitzRoy agreeing not to arrest them.[496] According to historian Dr Vincent O'Malley, FitzRoy imposed this 'land penalty' in contravention of previous instructions from Lord Stanley, 'and seemingly without prior investigation into Parihoro's very real grievances'. From Parihoro's perspective, 'his lands at Matakana had already been sold from under his feet. Now further lands were to be taken from him for responding to this in accordance with Māori tikanga.'[497] We cannot determine whether there was any substance to the Governor's assumption that Bay of Islands hapū played some role in the muru. But it is clear that the Government's reaction to the muru at Matakana, while hasty and ill-advised, embodied a major policy decision.

5.4.2.2.5 The second attack on the flagstaff, 10 January 1845

We do not know exactly when FitzRoy's 8 January proclamation reached the Bay of Islands,[498] but – as we mentioned in the preceding section – we do know that there were frequent (almost daily) voyages between Auckland and the Bay of Islands at that time,[499] and the journey could be completed in less than one

495. *New Zealand Spectator and Cook's Strait Guardian*, 8 March 1845 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 74).

496. O'Malley, 'Northland Crown Purchases' (doc A6), pp 71, 75–78; 156; Guy Gudex (doc 114), pp 3–6.

497. During February the goods were returned, and the land transferred. In March, FitzRoy cancelled his 8 January proclamation: O'Malley, 'Northland Crown Purchases' (doc A6), pp 71, 75, 77; see also Johnson, 'The Northern War' (doc A5), p 156.

498. Ralph Johnson, transcript 4.1.24, Oromāhoe Marae, pp 619–621; Johnson, 'The Northern War' (doc A5), pp 157, 159.

499. See, for example, 'Shipping list', *Daily Southern Cross*, 10 January 1845, p 2.

day.[500] It was common for events in the north to be discussed in Auckland two days after they occurred; for example, FitzRoy responded to the 8 July 1844 felling of the flagstaff on 10 July, and the Executive Council discussed the 6 January 1845 Matakana muru on 8 January.[501] In Johnson's view, Heke very likely became aware of the proclamation on 9 January.[502]

What we do know is that, early in the morning on 10 January, Heke attacked the flagstaff for the second time.[503] The flag itself was not flying at the time. The only settlers present when Heke's party arrived were the signalman James Tapper and his son, who were trapped in their house by a rope tied to the door.[504] After the flagstaff was felled, Heke knocked on the door, shook hands with Tapper, 'and told him that he had not come to hurt him; but only to cut the Flag Staff down.'[505] Heke and his party then departed, taking the rigging with them. Tapper and his son emerged from the house to find the flagstaff cut up and burned.[506]

The attack took Crown officials by surprise.[507] The police magistrate, Beckham, immediately notified FitzRoy, making it clear that no violence had occurred, and that Heke had not attempted to enter Kororāreka township.[508] Accounts of Heke's motives make no mention either of the proclamation or of FitzRoy's earlier letter chastising Bay of Islands rangatira for failing to control 'hunga tutu'.[509] We therefore cannot be certain that either was a trigger for Heke's actions, though it seems likely that Heke was at least aware of the earlier letter and the threat to return to the Bay of Islands with soldiers.

The evidence is clear, however, about Heke's general motivation, which was to challenge the Crown's understanding of the treaty and its claim of authority over Te Raki Māori. According to Beckham, Heke had spent 9 January with the acting American consul Henry Green Smith, 'where the merits of the treaty of Waitangi, and other political subjects connected with this colony were discussed'. After

500. Johnson, 'The Northern War' (doc A5), p 160.
501. Johnson, 'The Northern War' (doc A5), pp 99, 156–157.
502. Ralph Johnson, transcript 4.1.24, Oromāhoe Marae, pp 619–620.
503. Johnson, 'The Northern War' (doc A5), p 157.
504. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 347–348; Johnson, 'The Northern War' (doc A5), pp 157–158.
505. Tapper, sworn affidavit, 10 January 1845 (Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 348).
506. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 347–348; Johnson, 'The Northern War' (doc A5), pp 157–158.
507. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 348.
508. Johnson, 'The Northern War' (doc A5), p 157.
509. Ralph Johnson, transcript 4.1.24, Oromāhoe Marae, pp 619–621; Johnson, 'The Northern War' (doc A5), pp 157, 159.

felling the flagstaff, Heke flew an American ensign from his waka.[510] According to the Wesleyan missionary John Hobbs, Heke's reasons for this second attack were the same as for the first; 'that is, that the Mana of te Whenua, the power of the country might not be vested in the government, but partly in him (Heke), although he was one of the first to sign the Treaty of Waitangi ceding the sovereignty of the country to the Queen'.[511]

Heke subsequently offered to rebuild the lower part of the flagstaff, leaving the Government to build the upper part and fly its flag – a modification of his earlier request for Crown and Māori flags to fly side by side. As noted earlier, Hobbs explained that Māori considered the foundation of the flagstaff in the earth to be symbolic of Heke's 'right to the Mana (chieftainship) of the country'.[512] Heke, in other words, sought to challenge the Crown's claim of authority over Te Raki Māori, while asserting his own understanding of te Tiriti. By flying an American flag on his waka, meanwhile, he signalled his right as a rangatira to align with whomever he chose. If the Crown would not respect his mana, Heke would consider alternatives.

Heke's action must be seen in the context of the Governor's prior actions. Heke and Te Hira Pure had asked the Governor to remove the flagstaff and meet them to discuss the construction of dual flagpoles at Kororāreka, representing the coexistence of Māori and Crown authority. The Governor, unwilling to negotiate on this point, had chosen instead to leave matters unresolved. In the meantime, some settlers continued to advise rangatira that the British ensign was a symbol of the Crown's authority over them and meant that territorial authority had passed from Māori to the Crown. FitzRoy, Clarke, and missionaries had all told rangatira that the treaty guaranteed Māori independence, including possession of land and the continued exercise of Māori customary law.[513]

In Dr Phillipson's view, Heke remained uncertain about whom to believe and continued to hope that the Governor would disprove what his American advisors and others had been saying.[514] His suggestion that Māori rebuild the lower part of the flagstaff certainly indicated a willingness to compromise, though Heke, with justification, remained determined that the Crown must provide some recognition of Te Raki Māori territorial authority. He must have been giving up hope, how-

510. Beckham to FitzRoy, 10 January 1845 (cited in Johnson, 'The Northern War' (doc A5), p 158); see also T Lindsay Buick, *New Zealand's First War* (1926), p 54. An abridged version of Beckham's letter was published in British Parliamentary Papers, omitting any mention of American influence (presumably to avoid a diplomatic incident) and attributing Heke's actions to 'a general dislike to the British Government': Beckham to FitzRoy, 10 January 1845 (cited in Johnson, 'The Northern War' (doc A5), p 158). For a discussion of Smith's career, including his connections with Heke, see Joan Druett, 'The Salem Connection: American Contacts with Early Colonial New Zealand', *Journal of New Zealand Studies*, no 8, 2009, p 185.

511. John Hobbs, 'Journals in Methodist Church Archives', 15 January 1845 (cited in Johnson, 'The Northern War' (doc A5), p 158).

512. Hobbs, 'Journals', 15 January 1845 (cited in Johnson, 'The Northern War' (doc A5), pp 158–159).

513. Johnson, 'The Northern War' (doc A5), pp 120, 149–150; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 349–350.

514. Phillipson, answers to questions of clarification (doc A1(e)), pp 7–8.

ever, given FitzRoy's unwillingness to negotiate on this question and his repeated threats of military action against Māori who conducted taua muru or challenged the Crown.

Heke's action was also a challenge to Nene and other rangatira who had promised to respond with force to any further damage he inflicted on the flagstaff, and to Rewa and Moka, who claimed mana over Kororāreka and rejected any corresponding claim by Heke.[515] According to Hobbs, Nene and some others saw Heke's actions as 'a great insult' to them, and Nene sent letters to other Hokianga rangatira asking them 'to join him in attempting to punish Heke', though the missionary did not think it likely that they would join such an action at that time.[516] As they had after the first (8 July 1844) attack, Rewa and his people occupied Kororāreka to prevent further conflict and assert their own mana.[517]

After felling the flagstaff, Heke remained in the Bay of Islands, basing himself at Te Wahapū, the settlement of Ngāti Manu leader Pōmare II.[518] From there, according to Beckham, Heke conducted a series of muru against settlers which threw the district 'into the greatest state of alarm and excitement'.[519] On 13 and 15 January, Heke and his party landed at Kororāreka and threatened to tear down the jail and other Government buildings. The presence of Rewa's warriors deterred them, and they left for Te Wahapū having caused no damage.[520]

5.4.2.2.6 FitzRoy's responses to the second attack

FitzRoy responded to Heke's actions on 14 January by ordering Lieutenant-Colonel Hulme to send 30 troops and an officer to the Bay of Islands.[521] On 15 January, FitzRoy issued another proclamation in English and Māori in which he referred to the 'serious outrage' ('te mea kua tutu kino na') committed by Heke and his party 'in defiance of the Queen's Authority, and in opposition to Her Majesty's Laws' ('kua takahia e ratou te rangatiratanga o te Kuini me one ture hoki').[522] FitzRoy's reference to the Queen's 'rangatiratanga' is notable in this context, especially in light of recent assurances by FitzRoy, Clarke, and Henry Williams that the treaty guaranteed Ngāpuhi independence and authority.[523] FitzRoy offered a £100 bounty for Heke's capture and called on settlers and Māori to assist in this, warning that anyone who aided him 'will be proceeded against according to the law'.[524] When

515. Johnson, 'The Northern War' (doc A5), pp 161–162.
516. Hobbs, 'Journals', 15 January 1845 (cited in Johnson, 'The Northern War' (doc A5), p 161).
517. Johnson, 'The Northern War' (doc A5), pp 161–162.
518. Johnson, 'The Northern War' (doc A5), p 162. Mr Johnson says that Heke returned to the Bay of Islands after learning of FitzRoy's proclamation against him, but Beckham's accounts clearly show Heke in the Bay of Islands in the days before the 15 January proclamation.
519. Beckham to FitzRoy, 14 January 1845 (Crown document bank (doc W48), p 278).
520. Johnson, 'The Northern War' (doc A5), p 162.
521. Johnson, 'The Northern War' (doc A5), p 160.
522. FitzRoy, Wakarongo, 15 January 1845 (Johnson, supporting papers (doc A5(a)), vol 3, p [84]; FitzRoy, Proclamation, 15 January 1845 (Johnson, supporting papers (doc A5(a)), vol 3, p [85]).
523. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 349–350; Johnson, 'The Northern War' (doc A5), pp 120, 149–150.
524. FitzRoy, Proclamation, 15 January 1845 (Johnson, supporting papers (doc A5(a)), vol 3, p [85]).

Heke heard of the proclamation, he understood it to mean that FitzRoy wanted him taken dead or alive,[525] and asked, 'Am I a pig that I am thus to be bought and sold?'[526] He offered a reciprocal reward – an area of land – for the capture of FitzRoy.[527]

On the same day as he issued the proclamation, FitzRoy wrote to Beckham instructing him, as police magistrate, to issue a warrant for Heke's arrest 'according to usual English law and not through the intervention of the Protector of the District'.[528] In a separate despatch, FitzRoy advised Beckham that troops were on their way from Auckland and would remain to protect Kororāreka. He was instructed to form a 50-strong settler militia (a move the Governor had previously resisted on the grounds that it was likely to escalate conflict) and told to warn settlers that the Governor was contemplating a naval blockade of the Bay of Islands.[529] FitzRoy also instructed Beckham to build and erect a new flagstaff 'without delay'.[530] 'I have gone to the utmost limit of forbearance and moderation,' FitzRoy wrote, and 'shall now take a different course' under which 'Heke with those . . . who assist or countenance him, must prepare for the consequences'.[531]

The Auckland troops arrived aboard the *Victoria*, which anchored in the Bay of Islands on 17 January. They set up camp at Kororāreka. The *Victoria*'s big guns were cleaned and mounted, and small arms were distributed among the crew. As an assertion of mana and show of goodwill, Rewa responded to the troops' arrival by erecting a temporary flagstaff. The following day (18 January), the troops erected a new permanent flagstaff,[532] against the advice of Henry Williams, who believed this action would provoke Heke and might endanger settlers.[533] While Rewa's people remained in Kororāreka, Nene sent warriors to protect the new flagstaff. An arrangement was made by which Nene's forces and the colonial troops would guard it on alternate nights.[534] As tensions increased, a large group of Ngāti Manu – relatives of Kohu – travelled to Kororāreka where they challenged Rewa's people before withdrawing.[535] During these exchanges, some of Nene's people reportedly said they would 'put Heke in their pipes and smoke him' – that is, capture him, claim the reward money, and spend it on tobacco.[536] As Mr Johnson observed, '[s]uch statements were as much a challenge to Heke's authority and mana as the governor's actions'.[537]

525. Burrows, *Extracts*, p 9 (doc w48(a)).
526. Buick, New Zealand's First War, p 48.
527. Johnson, 'The Northern War' (doc A5), p 159.
528. Governor to Beckham, 15 January 1845 (cited in Johnson, 'The Northern War' (doc A5), p 159).
529. Johnson, 'The Northern War' (doc A5), pp 159–160.
530. FitzRoy to Beckham, 15 January 1845 (cited in Johnson, 'The Northern War' (doc A5), p 160).
531. FitzRoy to Beckham, 15 January 1845, BPP, vol 4, p 547 (cited in Johnson, 'The Northern War' (doc A5), p 160).
532. Johnson, 'The Northern War' (doc A5), pp 160–161.
533. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 348.
534. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 348.
535. Johnson, 'The Northern War' (doc A5), p 161.
536. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 348.
537. Johnson, 'The Northern War' (doc A5), p 167.

5.4.2.2.7 The third attack on the flagstaff: 19 January 1845

On 19 January, at about 2 am, Heke felled the flagstaff again.[538] According to Dr Phillipson,

> Challenge having been given, Heke walked up Maiki Hill . . . One member of Waka's party pointed his gun at the chief, but Heke brushed it aside and cut down the temporary flagstaff while they stood aside and let him. When it came to a choice of actually laying hands on a rangatira in defence of the Pakeha rahui, they would not do so.[539]

Settler accounts say Heke was accompanied by two or three others.[540] The officer on watch aboard the *Victoria* reported that Heke had been protected by Rewa's party;[541] and the missionary Richard Davis also believed that many Te Rāwhiti Māori supported Heke and therefore allowed the 'quiet removal' of the flagstaff.[542] Dr Phillipson's view is plausible: 'All that had happened . . . was that some young men had been surprised by Heke in the middle of the night.' Without a senior rangatira present, 'and in face of Heke's courage and mana, they did not dare lay hands on him'.[543] The missionary Charles Dudley described a scuffle in which one of Rewa's people took a shot at Heke, though no casualties resulted. Afterwards, Heke and his small party reached their waka and paddled to Waitangi.[544]

Soon after these events, Davis wrote that Heke 'has done much mischief by instilling into the minds of the natives that the mana of the Island is invested in the Queen of England, and that they are thereby made thoroughly poor men and slaves'. This was the view of 'nearly the whole of Nga Puhi', though most were not as forward as Heke in making their views known.[545] Heke continued to seek Crown recognition of Māori authority, which required the Crown to undo its claim of sovereignty over Te Raki and its people. According to Davis, Heke and his supporters had 'no anger' towards the Queen or Governor, but:

> seeing that they are a lost people – they and their children – for ever, they now wish to have undone what they ignorantly did, or to make an effort to save themselves and their children from ruin, or perish in the attempt. They say: 'It is for the Governor to save or destroy us. If the flagstaff be again raised it will be a sufficient indication to us

538. Johnson, 'The Northern War' (doc A5), pp 163–164; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 348.
539. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 348.
540. Johnson, 'The Northern War' (doc A5), pp 163–164. T Lindsay Buick, in his history of the Northern War, said that Heke acted alone: Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 348.
541. Johnson, 'The Northern War' (doc A5), p 164.
542. Davis to Clarke, no date (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 349).
543. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 349–350.
544. Johnson, 'The Northern War' (doc A5), pp 163–164.
545. Davis to Clarke (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 349).

as to what the Governor's intention is – namely, our destruction. Should he permit the flagstaff to remain down we are friends again.'[546]

Here, Heke acknowledged that his rejection of Crown authority could lead to conflict – but only if the Crown persisted in asserting its mana over Ngāpuhi territories by once again rebuilding the flagstaff. If that occurred, Davis wrote, Heke would not cut it down under cover of darkness but would return in daylight to complete the deed.[547] Henry Williams urged Beckham not to rebuild the flagstaff this time, warning of the possibility that most of Ngāpuhi would side with Heke.[548] In a private letter to another cleric, Williams remarked that Heke saw himself as a patriot, and as doing 'good work'; indeed, he carried a New Testament and prayer book at all times. Prior to the third attack (19 January), Heke 'asked a blessing on his proceedings', and then afterwards 'he returned thanks for having strength for his work'.[549] Ultimately, Colonial Secretary Sinclair (who was on board the *Victoria* on 19 January) instructed Beckham that the flagstaff should not be rebuilt for the time being.[550]

5.4.2.3 *Did the Crown cause or provoke the fourth (11 March 1845) attack on the flagstaff?*

5.4.2.3.1 The Government prepares for war

From this point, the Governor escalated his preparations for war. On 20 January 1845, he wrote to Lieutenant-Colonel Hulme saying there was 'no longer any doubt as to the necessity of employing the military in active operations' at the Bay of Islands and Whāngārei.[551] He instructed that blockhouses be prepared at Auckland ready for transportation to the Bay of Islands, and informed Beckham that the HMS *North Star* and HMS *Hazard* would soon arrive; in addition, troops would be requested from Sydney. FitzRoy also mentioned that he had written to Rewa and other Kororāreka rangatira, though no copy of the letter was included in published parliamentary papers.[552] In response to Beckham's concerns about the influence on Heke of the acting American consul, FitzRoy banned the raising of any non-British flag at the Bay of Islands – but then instructed Beckham not to proceed with the ban in case it caused an international incident.[553]

On 21 January, FitzRoy wrote to Governor Gipps in New South Wales asking for 200 soldiers and naval support, to be based permanently in New Zealand.[554] Four

546. Davis to Clarke (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 349).
547. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 349.
548. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 348–349.
549. Williams to Marsh, 24 January 1845 (cited in Carleton, *The Life of Henry Williams*, p 86).
550. Johnson, 'The Northern War' (doc A5), p 164.
551. FitzRoy to Hulme, 20 January 1845 (cited in Johnson, 'The Northern War' (doc A5), pp 164–165). FitzRoy also committed to military action at Port Nicholson.
552. FitzRoy to Beckham, 20 January 1845 (cited in Johnson, 'The Northern War' (doc A5), p 165).
553. Johnson, 'The Northern War' (doc A5), pp 169–170.
554. Johnson, 'The Northern War' (doc A5), p 165.

days later, FitzRoy sent another 10 soldiers from Auckland to the Bay of Islands.[555] He also sent instructions to Beckham about the flagstaff, saying it should be rebuilt with the first eight feet sheathed in iron 'to resist any axe'. When the blockhouse arrived from Auckland, it was to be put up near the flagstaff, with a deep ditch and palisade surrounding both. No one except soldiers on duty should be allowed within the palisade at any time.[556] FitzRoy's decision to rebuild and fortify the flagstaff reflected his view that it was sacred but also confirmed to Heke that the Governor intended to press ahead with the Crown's claim of authority over Te Raki by force if necessary.[557]

FitzRoy's actions reflected his belated realisation that Nene could not or would not forcibly prevent Heke's attacks on the flagstaff, and that the agreement made at Waimate was therefore ineffective.[558] As Dr Phillipson explained, the Governor therefore became 'intent on a military demonstration and the suppression of what he saw as rebellion'.[559] Johnson described this as 'almost an emotional response' in which the Governor saw any attack on the flagstaff as 'an attack on the Queen'. FitzRoy was facing escalating difficulties (not all of his own making). There were settler demands for reprisals following the conflict in Wairau in 1843 (discussed in chapter 4) and an exodus of settlers from the Bay of Islands back to Auckland.[560] FitzRoy expressed his fear in his 19 October 1844 despatch to Stanley that taua muru might result in people being killed and a 'rupture between the races', and that would lead to a wider Māori uprising.[561] At the same time, the 1844 report of the select committee of the House of Commons reflected pressure from the New Zealand Company and parts of the imperial government for the Crown to claim ownership of unused or unoccupied lands.[562] Johnson argued FitzRoy was 'very aware of the restrictions and challenges' facing the colony, including its substantial debts. Under pressure, and under-resourced, FitzRoy feared that Heke and Kawiti posed a military threat, and that the Crown might lose its colony on his watch.[563] In this heightened state of anxiety, he did not consider other options before determining that a military response was needed.[564] But he must have realised that Heke would regard the new fortified flagstaff as merely a further challenge.

5.4.2.3.2 Missionaries attempt to ease tensions

By this time, most of Ngāpuhi were also convinced that war was inevitable. Heke determined to stand his ground, leaving other rangatira to decide whether they

555. Crown closing submissions (#3.3.403), pp 90–91.
556. FitzRoy to Beckham, 25 January 1845 (cited in Johnson, 'The Northern War' (doc A5), p 169).
557. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 349.
558. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 348–349.
559. Grant Phillipson, transcript 4.1.26, Turner Events Centre, p [210].
560. Ralph Johnson, transcript 4.1.24, Oromāhoe Marae, pp 693–694.
561. FitzRoy to Stanley, 19 October 1844, BPP, vol 4, pp 412, 413.
562. Report of the Select Committee of the House of Commons on New Zealand', *Daily Southern Cross*, 15 February 1845, p 2; Ralph Johnson, transcript 4.1.24, Oromāhoe Marae, pp 694–695.
563. Ralph Johnson, transcript 4.1.24, Oromāhoe Marae, pp 694.
564. Ralph Johnson, transcript 4.1.24, Oromāhoe Marae, p 693.

would fight and, if so, with whom they would side.[565] Settler and missionary accounts indicate that many rangatira – almost certainly a majority – accepted Heke's view that the Crown had deceived them when they signed te Tiriti.[566] The Sub-Protector of Aborigines, George Clarke junior, who had been sent to the Bay of Islands to gather intelligence, reported that almost all rangatira displayed 'a strong and . . . general feeling of dislike and contempt for the authority of Her Majesty's Government'.[567] These attitudes had hardened after the Governor's 15 January proclamation calling for Heke's arrest,[568] and for a time in late January it still appeared that most of Ngāpuhi would line up with Heke.[569]

Even Nene had become distrustful of Crown intentions and angry at being drawn into a conflict that was not of his making. Most notably, he shared in the belief that the 'evils' now facing Ngāpuhi 'arose from their having signed the Treaty of Waitangi'.[570] Nonetheless, he had made a commitment to oppose Heke and he continued to honour it, even as the Governor's soldiers returned, which was in breach of the Waimate agreement.[571] At the end of January, Nene called a hui at Pāroa Bay with the apparent aim of dissuading other Ngāpuhi hapū from joining in the war; a quick victory for the Crown over an isolated Heke was preferable to a drawn-out conflict involving all of Ngāpuhi and endangering settlement.[572]

Henry Williams attended and gave a clause-by-clause explanation of te Tiriti, which was intended to reassure rangatira about the Crown's protective intentions. As in previous hui, Williams relied on the Māori text and by this means continued to conceal the true nature of the Crown's claim of sovereignty.[573] Williams described the Governor as 'a Chief', which implied equality with rangatira; and as 'a regulator of affairs with the natives of New Zealand',[574] which implied that the Governor would negotiate and work with rangatira, not govern over them. Williams also described te Tiriti as protecting rangatira 'in their rights as chiefs', and as guaranteeing 'to the chiefs and tribes, and to each individual native, their full rights as chiefs, their rights of possession of their lands, and all their other property of every other kind and degree'.[575] These guarantees of full chiefly au-

565. Buick, *New Zealand's First War*, p 56.
566. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 349–350.
567. Clarke junior to Clarke senior, 18 February 1845 (Crown document bank (doc W48), p 280). Tāwhai later opposed Heke during the northern war: Johnson, 'The Northern War' (doc A5), p 218.
568. Johnson, 'The Northern War' (doc A5), p 170.
569. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 349–350; see also William Williams, *Plain Facts Relative to the Late War in the Northern District of New Zealand* (Auckland: Philip Kunst, 1847), p 14; Carleton, *The Life of Henry Williams*, pp 88–89, 141–142, 157.
570. Henry Williams (W Williams, *Plain Facts*, p 13); Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 349–350.
571. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 349–350; Johnson, 'The Northern War' (doc A5), pp 167–168.
572. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 349–350.
573. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 349–350.
574. H Williams to Bishop Selwyn, 12 July 1847 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 350–351).
575. H Williams to Bishop Selwyn, 12 July 1847 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 350–351).

thority had been clearly conveyed in the Māori text of te Tiriti, but not the English text.[576]

Williams later claimed this explanation had converted most of Heke's supporters, who no longer feared that the Crown intended to seize their country and therefore pledged to remain neutral in the forthcoming war.[577] In a letter to FitzRoy, Williams pointedly observed that the treaty had been 'the only weapon' that could be used to calm Ngāpuhi fears.[578] According to other sources, many rangatira remained sympathetic to Heke but chose neutrality because they did not want to embroil their people in a messy conflict. Ngāpuhi peacemakers were at the hui and very likely contributed to this outcome.[579] After the hui, Williams and Ururoa both attempted to dissuade Heke from any further attack against the flagstaff.[580] In response, Heke told Williams that the treaty was 'all soap . . . very smooth and oily, but treachery is hidden under it'.[581] In early February, Heke and Nene met in an apparent attempt to resolve their differences, but this was also unsuccessful.[582]

5.4.2.3.3 The flagstaff is rebuilt

During February, Heke travelled or sent envoys throughout the north – from Whāngārei to Mangonui – seeking support.[583] Many of the younger Waimate rangatira and warriors joined him, as did some sections of Whangaroa who were closely related to his wife, Hariata. According to George Clarke junior, Heke told his opponents 'that they are all slaves of British tyranny', and that 'his object is to restore their former freedom, and remove every mark of British authority'. Whereas Heke was setting himself up in open opposition to the Crown, he nonetheless wanted settlers to remain. George Clarke junior was satisfied that Heke had not personally committed any acts of aggression against settlers, though he had not restrained his followers. Heke had told other rangatira 'that he would not molest the white settlers, except in retaliation for any hostile measures the Government might adopt towards himself or his friends'.[584]

576. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 508–509, 512–515.

577. H Williams to FitzRoy, 20 February 1845 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 350); W Williams, *Plain Facts* (Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 349–350).

578. H Williams to FitzRoy, 20 February 1845 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 350).

579. Buick, *New Zealand's First War*, p 56; Johnson, 'The Northern War' (doc A5), pp 168–169; see also Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 305, 320, 351, 357–359, 363.

580. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 351.

581. Buick, *New Zealand's First War*, p 57; W Williams, *Plain Facts*, pp xxvi–xxvii (Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 351).

582. Johnson, 'The Northern War' (doc A5), pp 168–169.

583. Johnson, 'The Northern War' (doc A5), pp 177–179, 182; Burrows, *Extracts*, pp 8–9 (doc W48(a)).

584. Clarke junior to Clarke senior, 18 February 1845 (Crown document bank (doc W48), p 280); see also Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 351.

By this time, FitzRoy was tempering his earlier decision to initiate military action against Heke. In the meantime, the Pāroa Bay hui had been held, and fear of a general Ngāpuhi uprising had therefore eased. Williams had also informed the Governor about the depth of Ngāpuhi frustration with the Crown and the risk that any aggressive action against Heke might prove counter-productive by causing neutral hapū to join him. On 18 February, FitzRoy thanked Williams for his efforts at calming the situation and advised that while he remained determined to uphold the Crown's authority and influence, he would not 'irritate a wounded place'. He had therefore decided to act defensively 'for the present', in the hope that military action might not be needed.[585]

Nonetheless, he would not compromise on the flagstaff and was prepared to defend it with force. The HMS *Hazard* arrived in the Bay of Islands on 15 February carrying the blockhouse that was to be erected adjacent to it.[586] FitzRoy sent instructions that, at least for the time being, his Bay of Islands soldiers should be used only in a defensive role to avoid any acts that would cause alarm or suspicion among 'friendly' Ngāpuhi.[587] The New South Wales Executive Council had by this time agreed to send up to 200 soldiers to New Zealand 'to keep in check the natives, and to preserve peace between the two races'.[588] Whereas the council had initially resolved to send troops from Port Jackson, it then decided to await the arrival of the 58th Regiment, due soon from England, and instead send it to New Zealand, which it reached in late April. As we will see in the next section, FitzRoy waited for the regiment's arrival before taking military action against Heke and Kawiti.[589]

In making their decision to send troops, the New South Wales authorities had been particularly concerned about the likely inflammatory effects of the findings of the select committee of the House of Commons (which FitzRoy had probably learned of in December 1844). As noted earlier, the report included resolutions that the treaty was a policy 'mistake', and that Māori could only lawfully claim ownership over the lands they occupied or cultivated (we discuss the select committee's report further in chapter 4, section 4.3.4, and chapter 8, section 8.3.2.5).[590] On 15 February 1845, the *Daily Southern Cross* published details of the report, after receiving copies of London newspapers (they had been taken to Wellington on the *Caledonia*, then on to Auckland on the HMS *Hazard*).[591] FitzRoy clearly expected a response from Heke and other Bay of Islands Māori, and on 18 February he sent

585. FitzRoy to Williams, 18 February 1845 (cited in Carleton, *The Life of Henry Williams*, pp 87–88).

586. Johnson, 'The Northern War' (doc A5), p 178.

587. FitzRoy to Robertson, 11 February 1845 (cited in Crown closing submissions (#3.3.403), p 28).

588. 'Proceedings of the Executive Council Relative to an Application for the Governor of New Zealand for Military Assistance', 12 February 1845 (Crown document bank (doc W48), p 278); Johnson, 'The Northern War' (doc A5), pp 165–166.

589. Johnson, 'The Northern War' (doc A5), p 165.

590. Report from the Select Committee on New Zealand, 1844, BPP, vol 2, p 6.

591. Johnson, 'The Northern War' (doc A5), p 175.

word to Williams in the apparent hope that the missionary would again smooth things over.[592] In the view of Chief Protector Clarke senior, the report justified all Heke's fears about British intentions and contradicted every assurance given by Crown officials and missionaries, and in the treaty itself. Clarke told FitzRoy of these concerns on 24 February, warning that once the content of the report became widely known among Māori, they would tend to 'disturb the peace of the country, and . . . destroy confidence in the government'.[593]

Both Dr Phillipson and Mr Johnson believed that Ngāpuhi rangatira learned of the House of Commons report at some point in late February or early March, and that this inflamed Heke's opposition to the Crown and triggered his fourth attack on the flagstaff on 11 March.[594] 'The effect at the Bay of Islands cannot be exaggerated', Phillipson wrote: 'I am quite certain that it convinced Heke he now knew for certain how the Crown understood Te Tiriti and what its intentions were towards Māori and their lands.'[595] In reaching this view, Phillipson relied on an account from Henry Williams, who maintainedthat opposition to the Crown had increased markedly after the report was published, undoing the work he himself had done in explaining the treaty to rangatira.[596] From this point, Phillipson concluded, 'there was a marked change in the intensity of the crisis'. Whereas the Governor had 'determined to employ military sanctions' in January, Heke remained open to a settlement 'until late February/early March, after the publication of the House of Commons' select committee report'.[597]

The other cause of rising tensions was the arrival of the *Hazard* in the Bay of Islands, with the blockhouse and instructions for the fortification of the flagstaff.[598] A week after its arrival, on 22 February, Beckham wrote to the Governor informing him that '[t]he lower mast of the flag-staff was erected this morning.' In accordance with instructions, the flagstaff was sheathed in iron and protected by the blockhouse and palisades, which were in place before carrying out this task.[599] As noted earlier, FitzRoy had ignored missionary warnings that Heke and Ngāpuhi would regard this as a provocative act. Heke understood it as a signal that the Crown would persist in its claim of exclusive authority in the district and would use force to support that claim. His message to the missionaries had been clear: if the Governor wanted peace, he should leave the flagstaff down; if he

592. Carleton, *The Life of Henry Williams*, pp 87–88.

593. Clarke senior to FitzRoy, 24 February 1845 (cited in Johnson, 'The Northern War' (doc A5), pp 173–174).

594. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 351; Phillipson, answers to questions of clarification (doc A1(e)), p 8; Johnson, 'The Northern War' (doc A5), pp 175, 184; Johnson, answers to post-hearing questions (doc A5(g)), p 8.

595. Grant Phillipson, abbreviated summary (doc A1(f)), p 13.

596. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 318.

597. Phillipson, abbreviated summary (doc A1(f)), pp 8–9.

598. Johnson, 'The Northern War' (doc A5), pp 169, 178.

599. Beckham to FitzRoy, 22 February 1845 (Crown document bank (doc W48), p 217). Mr Johnson recorded that the flagstaff was rebuilt in late January immediately after FitzRoy gave the order; however, he gave no primary source: Johnson, 'The Northern War' (doc A5), p 169.

wanted war, he should raise it again.[600] Heke and his supporters would then 'die upon our Land, which was delivered to us by God'.[601]

From this time, there was a steady heightening of tensions around the Bay of Islands, and the Crown regarded conflict as imminent. Heke moved his supporters from Kaikohe to Te Wahapū. Beckham considered an attempt to arrest him there but was warned off by Henry Williams on the grounds that the Crown would then be the aggressor, likely provoking most of Ngāpuhi to unite against it. Beckham therefore reported that he would wait until Heke landed at Kororāreka and arrest him then.[602] In response, FitzRoy instructed Beckham to warn settlers that Heke might attack, and that lives would be lost. The Government would defend the flagstaff and blockhouse and would offer protection for settlers in Kororāreka but not elsewhere. FitzRoy was also contemplating a naval blockade as a precursor to aggressive measures against Heke but said he would not act without warning settlers.[603]

Some settlers responded by burying their valuables and leaving their homes.[604] The missionaries Henry Williams and Richard Davis both wrote to the Governor urging him to travel to the Bay of Islands in a late attempt to resolve the conflict.[605] Beckham reported Williams' view that the Governor's presence 'would be extremely beneficial' and might prevent the 'collision' that otherwise seemed imminent.[606] FitzRoy declined without giving reasons.[607] We agree with Dr Phillipson that this was another significant missed opportunity to enter dialogue with Heke and ease tensions.[608] Soon afterwards, FitzRoy wrote to Gipps in Sydney, making it clear that he was holding back from military action against Heke because he feared a general uprising. Advising him that the situation was 'more critical' than he had previously stated, FitzRoy emphasised his urgent need for troops. He was reliant on reinforcements arriving soon, and 'meanwhile, am acting only on the defensive' in order to avoid provoking Ngāpuhi.[609] This was another signal that he intended to take action against Heke once reinforcements arrived.

600. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 349.
601. Heke to FitzRoy, 21 May 1845 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 316).
602. Crown document bank (doc W48), p 217; see also Johnson, 'The Northern War' (doc A5), pp 179–180.
603. Johnson, 'The Northern War' (doc A5), pp 178–179.
604. Johnson, 'The Northern War' (doc A5), p 179.
605. Williams' letter was sent on 20 February 1845: Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 351–352.
606. Beckham to FitzRoy, 22 February 1845 (Crown document bank (doc W48), p 217).
607. Johnson, 'The Northern War' (doc A5), p 179.
608. Grant Phillipson, transcript 4.1.26, Turner Events Centre, pp [209]–[210].
609. FitzRoy to Gipps, 25 February 1845 (Crown document bank (doc W48), p 217).

5.4.2.3.4 Heke forms an alliance with Kawiti

In the last week of February,[610] Heke was joined by a party of 200 from Mangamuka.[611] He then travelled with his supporters to Te Wahapū where he met Kawiti, presenting the Ngāti Hine leader with a ngākau – a symbolic request for assistance.[612] This particular ngākau was a mere smeared with human excrement. Kawiti's great-grandson Tawai Kawiti later wrote that 'the meaning was obvious. Someone had defiled the mana of Ngapuhi and such a challenge must be met!'[613] According to claimant David Rankin, the mere possessed enormous mana, having been used by Hongi Hika before it was passed down to Heke.[614] The alliance was, on the face of it, not a natural one, since it brought together senior leaders from the northern and southern alliances, which for decades had competed for Bay of Islands influence.[615] Yet Kawiti's people regarded Heke's cause as just and had themselves been dragged into the conflict by the Kohu incident and the Crown's insensitive response. Tohunga therefore spent all night tracing tātai (lines of descent) that could bind Heke's Ngāti Rāhiri, Ngāti Tautahi, Ngāi Tāwake, and Te Uri o Hua hapū with Ngāti Hine and other southern Bay of Islands hapū including Ngāti Manu, Te Kapotai, and Te Waiariki. In the event, those tātai reached back

610. The exact timing is not known. Kawiti's great-grandson, Tawai Kawiti, wrote in *Te Ao Hou* in 1956 that the meeting took place at Te Wahapū. Beckham's despatch on Saturday 22 February indicated that Heke was travelling to Te Wahapū early the following week, which would suggest a meeting date of 24 or 25 February: Phillipson, answers to questions of clarification (doc A1(e)), p 12; Tawai Kawiti, 'Heke's War in the North', *Te Ao Hou: The New World*, no 16, October 1956, p 38 (Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 352); Beckham to FitzRoy, 22 February 1845 (Crown document bank (doc W48), p 217). In that despatch, Beckham made no mention of Heke meeting Kawiti. On 27 February, Beckham mentioned a meeting that was due to take place between Heke and Kawiti, from which Beckham expected that Heke 'will venture an attack' on the flagstaff: Beckham to FitzRoy, 27 February 1845 (Crown document bank (doc W48), p 218). Marianne Williams recorded in her diary that the alliance was not concluded until 7 March, although Dr Phillipson found that implausible: Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 353; Phillipson, answers to questions of clarification (doc A1(e)), p 12.

611. Johnson, 'The Northern War' (doc A5), p 179.

612. Kawiti, 'Heke's War in the North', p 38; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 352.

613. Kawiti, 'Heke's War in the North', pp 38–39.

614. David Rankin, personal communication to Mr Johnson, 23 May 2006: Johnson, 'The Northern War' (doc A5), p 176. Hori Parata of Ngāti Wai told us of a mere pounamu named Muramura which Hongi acquired as part of a peace agreement between Ngāpuhi and Ngāti Wai, brokered at Moturahurahu: Hori Parata (doc C22), p 9.

615. As discussed in chapter 3, the northern alliance principally comprised descendants of Māhia who had emerged from Tautoro and Kaikohe during the late 1700s, achieving dominance over the northern Bay of Islands coastline. Principal hapū included Ngāti Tautoro, Ngāi Tāwake, Te Uri o Hua, Te Patukeha, and Ngāti Rēhia. The southern alliance comprised descendants of Maikuku and occupied territories along the southern Bay of Islands coast and Taiāmai. Principal hapū included Ngāti Hine, Ngāti Rangi, Ngāre Hauata, Ngāti Manu, Te Kapotai, and others: see Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 370–371.

several generations to Hineāmaru and Torongare, and even further to the time of Rāhiri.[616]

The alliance between Heke and Kawiti was a momentous one. Kawiti was one of the senior leaders of the so-called southern alliance, a coalition comprising Ngāti Hine, Ngāti Manu, Te Kapotai, and others, which had controlled Kororāreka and other southern Bay of Islands ports during the 1820s and 1830s. Heke's whakapapa included Ngāti Tautahi and Ngāi Tāwake, founding hapū of the 'northern alliance', which had expanded from Kaikohe in the late 1700s and early 1800s to seize control of much of the northern Bay of Islands coast. The northern and southern alliances had clashed during the 1830s as each vied for control over Kororāreka and other trading centres. Heke was also of Ngāti Rāhiri and Ngāti Kawa, which occupied territories from Waitangi to Kaikohe and had remained neutral during the 1830s conflicts. (See chapter 3 for detail on the relevant hapū alignments and conflicts.)

Kawiti's decision to join Heke caused considerable alarm among settlers and Crown officials. Beckham informed Governor FitzRoy that he had armed his settler militia and established civil and military patrols in Kororāreka. Samuel Polack's home and store at the north end of Kororāreka beach was chosen as a refuge for women and children in the event of hostilities, and a 'strong fence' was built around it to protect anyone inside from gunfire. The house was picked because it was out of range of the *Hazard*'s heavy artillery.[617] Beckham had to calm fears from Ngāti Rēhia and others that the Crown would target Ngāpuhi indiscriminately if open conflict did break out.[618]

Emboldened by their new alliance with Heke, Kawiti's people began a series of taua muru against settlers in and around Kororāreka, burning down houses and taking horses. The main victims were Wright, Hingston, Benjamin Turner, and others against whom Kawiti's people had prior grievances. Although there was significant property damage, no violence occurred. Heke took no part in these raids.[619] On 3 March, Beckham attempted to intervene in one of these muru and pursued the raiding party up the Taumārere River, where Ngāti Hine opened fire. From this, Beckham concluded 'that the natives are determined to have war'.[620]

Certainly, Heke and Kawiti were determined that the flagstaff should come down and lost no opportunity to make their intentions known to settlers, missionaries, and Crown officials.[621] Both made it clear that settlers would not be

616. Kawiti, 'Heke's War in the North', p 39 (Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 352); Johnson, 'The Northern War' (doc A5), pp 176, 353; Te Kapotai claimants, 'Te Kapotai Hapu Korero: Mana, Rangatiratanga' (doc F25), p 40.

617. Beckham to FitzRoy, 28 February (Crown document bank (doc W48), p 218); Johnson, 'The Northern War' (doc A5), p 180.

618. Crown document bank (doc W48), pp 217–218.

619. Johnson, 'The Northern War' (doc A5), pp 180–181; Crown document bank (doc W48), pp 218–220.

620. Beckham to FitzRoy, 4 March 1845 (Crown document bank (doc W48), p 220); Johnson, 'The Northern War' (doc A5), p 181.

621. Johnson, 'The Northern War' (doc A5), pp 180–182; Burrows, *Extracts*, pp 8–10 (doc W48(a)); Buick, *New Zealand's First War*, p 63.

harmed and that they did not wish to have any conflict with the Crown – but they would use force if their mission was resisted.[622] With a party of 150, Heke visited the Waimate mission on 3 March. There, Te Kekeao and Ruhe warned Heke not to go to Kororāreka; if he did, they said, they would join Tāmati Waka Nene and prevent Heke from returning to his home at Kaikohe. Heke is said to have responded that 'the snake whose head has thrice been cut off is come to life again [and] he has grown to a taniwha and has many mouths'; that is, the flagstaff had been rebuilt three times and was now accompanied by a blockhouse with many defences. Heke was 'desirous to go and see this strange sight'.[623]

On 4 March, Heke told Burrows and Henry Williams that he had 'no wish to injure either sailor, soldier, or any of the settlers', but the flagstaff had been rebuilt without any reference to him, and the Governor had offered £100 for him to be taken dead or alive. As he had on other occasions, he said that Māori had been deceived into agreeing to the treaty and therefore 'signing away their lands'. This referred to the Crown claiming territorial sovereign authority, not mere possession of land.[624] As was his habit, Williams defended the treaty's protective intent without addressing Heke's fundamental concern about Crown and Māori authority.[625] At about this time, Kawiti told Catholic bishop Jean-Baptiste François Pompallier that he did not wish to harm anyone; that 'they wanted only to cut down the flagpole; and . . . if no-one fired on them, they would do no further injury and would return home'. He said that Kawiti then elaborated, 'If the flag were only for the whites . . . we would not take up arms; we would not attack it; we would say nothing; but this flag takes away the authority of our chiefs and all our lands.'[626] According to another source, Kawiti also complained of having been 'deceived' by the Crown, which persisted with its claim of sovereignty despite Māori intentions being 'well known': 'Let the flagstaff be cut down and all will be at peace. We have no intention of giving up our authority and our lands to any nation whatsoever.'[627]

Between 6 and 9 March, there were several skirmishes between Kawiti's forces and colonial troops. On one occasion, the *Hazard*'s gunboat fired on some of Kawiti's men as they crossed the bay in a waka;[628] on another, shots were exchanged when Beckham took an armed party to intervene in taua muru at Uruti and Matauwhī. Three Māori were wounded.[629] By 8 March, Kororāreka residents were 'in a great state of alarm' and believed an attack was imminent.[630] In addition to the two cannons and blockhouse atop Maiki Hill (which we describe as

622. Johnson, 'The Northern War' (doc A5), pp 180–182; Burrows, *Extracts*, pp 8–10 (doc W48(a)).
623. Burrows, 'The War in the North' (Johnson, 'The Northern War' (doc A5), p 182); see also Burrows, *Extracts*, pp 8–9 (doc W48(a)).
624. Burrows, *Extracts*, p 9 (doc W48(a)); Johnson, 'The Northern War' (doc A5), p 182.
625. Burrows, *Extracts*, pp 9–10 (doc W48(a)).
626. Pompallier, diary, 1 January–31 August 1845 (cited in Johnson, 'The Northern War' (doc A5), p 182).
627. Kawiti (Paul Moon, *Hone Heke: Nga Puhi Warrior* (Auckland: David Ling Publishing, 2001), p 95 (Phillipson, answers to questions of clarification (doc A1(e)), p 9)).
628. Burrows, *Extracts*, p 10 (doc W48(a)).
629. Johnson, 'The Northern War' (doc A5), p 186.
630. Burrows, *Extracts*, p 10 (doc W48(a)).

the upper blockhouse), the town was by this time heavily fortified and defended. Another blockhouse (which we call the lower blockhouse) had been built further down the hill, with three cannons; it faced in the direction of Matauwhī and was intended to protect Polack's house, which was now surrounded by a stockade for the protection of the townspeople. The stockade also contained the troops' gunpowder magazine. A single cannon was placed at the south end of the beach. The colonial troops were housed in the township and numbered about 140 (50 soldiers and 90 sailors and marines). About 200 townspeople and volunteers from merchant vessels in the bay had been formed into a settler militia (although Henry Williams thought few of them would know how to load a gun, let alone aim and fire).[631] The *Hazard*, anchored in the bay, carried another 18 cannons.[632]

On Sunday 9 March, Heke's supporters attended a church service at Uruti, responding to each part of the service except the prayer for the Queen.[633] Beckham reported to the Governor that Kororāreka was 'completely besieged, being surrounded by armed parties of natives', their total numbers between 600 and 700. Kawiti and Heke had been joined by most of Pōmare II's Ngāti Manu people (though not Pōmare himself) and by Pōmare's ally Te Mauparāoa (Ngāti Kahungunu), who had lived at Ōtuihu since the 1830s.[634] Beckham also sent two of the *Hazard*'s crew to spy on Kawiti's people at Uruti. They were captured and disarmed, but to their amazement were then allowed to return to the *Hazard* unharmed.[635] According to one account, the *Hazard* fired a shell at a party of Ngāpuhi who were seen on a ridge above Kororāreka.[636]

On the same day, Wai (Ngāi Tāwake) and Rewa (Te Patukeha and Ngāi Tāwake) visited Beckham offering to protect Kororāreka from any attack. Beckham declined and asked them to leave the town, as he was uncertain they could be trusted and also feared that British soldiers might become confused and fire on them.[637] Beckham may have been partially correct about Rewa's motives. According to vis-

631. Crown document bank (doc A5(a)), vol 3, p 565; Belich, *The New Zealand Wars*, p 36.

632. Johnson, 'The Northern War' (doc A5), pp 180–181, 202–203; Beckham to FitzRoy, 4 March 1845 (Crown document bank (doc W48), pp 219–220); Burrows, *Extracts*, p 11 (doc W48(a)); see also Crown closing submissions (#3.3.403), p 95.

633. Johnson, 'The Northern War' (doc A5), p 187.

634. Beckham to FitzRoy, 9 March 1845 (Johnson, 'The Northern War' (doc A5), pp 186–187); see also Crown closing submissions (#3.3.403), p 31. An alliance had formed between Ngāti Manu and Ngāti Kahungunu during the 1830s. This arose from a battle on the east coast, during which Te Mauparāoa's father saved the life of Pōmare I's nephew. In return, Te Mauparāoa was sent to live at Ōtuihu, where he would gain access to guns for his people: Arapeta Hamilton, transcript 4.1.24, Oromāhoe Marae, pp 318–322, 329–330.

635. Crown document bank (doc W48), p 229; Johnson, 'The Northern War' (doc A5), p 182. The Crown's view, based on Burrows' account, was that these men were taking an innocent walk along the beach when they were 'suddenly pounced upon by some of Kawiti's people, who were lying in ambush': Burrows, *Extracts*, p 10 (Crown closing submissions (#3.3.403), p 31). However, Philpotts' own account to Governor FitzRoy makes it clear that he was spying at Beckham's request: Crown document bank (doc W48), pp 228–229.

636. Henry Williams, *The Fall of Kororareka in 1845* (Auckland: Creighton and Scales, 1863), pp 5–6.

637. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 354.

iting French navy captain André Bérard, Rewa wanted to protect the town and its settlers, regarding them as being under his mana, but he 'would have nothing whatever to do with the matter of the flagpole'.[638] His offer rejected, Rewa took his people away from the town and in so doing, removed its most powerful source of protection.[639]

5.4.2.3.5 The fourth attack on the flagstaff: 11 March 1845

Settlers were expecting an attack on Kororāreka on Monday 10 March, but the day passed quietly.[640] During that evening, the missionary Henry Williams and the trader Gilbert Mair informed Beckham that it would happen the following morning. Williams sent Beckham a handwritten note: 'I understand that the natives intend to make their attack on the morrow in four divisions'; Mair's account was similar.[641]

Beckham was dismissive of these warnings,[642] and it does not appear that the military officers stationed in the Bay of Islands were informed. Certainly, when Heke, Kawiti, and their supporters (numbering between 450 and 600)[643] launched their action sometime between 4 am and 5 am on the morning of Tuesday 11 March, the soldiers, sailors, and marines were far from prepared. Kawiti and his party landed at Matauwhī Bay alongside another party led by the influential Te Roroa rangatira Pūmuka, who had lived for many years in the Bay of Islands. Together, they moved inland in parallel columns on either side of what is now Matauwhi Road, until they reached the single gun battery on the outskirts of Kororāreka. There, they surprised a party of sailors and marines who were digging a defensive trench.[644] A British sentry fired on the party,[645] and the sailors and marines charged at Kawiti's men.[646] In the brief, close-quarter fighting that ensued, there were many casualties on both sides. According to Ngāpuhi traditions, as his forces claimed the single gun battery on the Matauwhī side of town, Pūmuka was the first to kill an enemy soldier, and Pūmuka himself was also the first to be killed on the Ngāpuhi side. Captain Robertson of the *Hazard* was severely wounded.[647]

638. Be´rard to Minister of Naval Affairs, no date (cited in Johnson, 'The Northern War' (doc A5), p 205).

639. Johnson, 'The Northern War' (doc A5), pp 204–205; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 354.

640. Burrows, *Extracts*, pp 11–12 (doc W48(a)); see also Johnson, doc A5, pp 188, 190.

641. Williams, *The Fall of Kororareka in 1845*, p 4. This reproduces a draft letter Williams wrote to the editor of the *New Zealander* newspaper on 23 June 1845. Bishop Selwyn did not allow Williams to send it.

642. Belich, *The New Zealand Wars*, p 37.

643. Johnson, 'The Northern War' (doc A5), p 182.

644. Johnson, 'The Northern War' (doc A5), pp 188, 190; Burrows, *Extracts*, pp 11–12 (doc W48(a)); Williams, *The Fall of Kororareka in 1845*, p 5; Te Rūnanga o Ngāti Hine, 'Ngati Hine Evidence for Crown Breaches of Te Tiriti o Waitangi', 2014 (doc M24), p 91.

645. Crown document bank (doc W48), pp 226–227.

646. Williams, The Fall of Kororareka in 1845, p 5.

647. Johnson, 'The Northern War' (doc A5), pp 188, 190; Burrows, *Extracts*, pp 11–12 (doc W48(a)); Te Rūnanga o Ngāti Hine, 'Ngati Hine Evidence' (doc M24), pp 91–92; Crown document bank (doc W48), p 227.

This battle drew the attention of a smaller party of soldiers who were digging trenches on Maiki Hill. As the soldiers moved off to investigate, Heke and his party – who had been hiding since midnight in scrub on the Tāpeka side of the hill – rushed in and seized control of the upper blockhouse and flagstaff, shutting most of the soldiers out of their own defensive position. Once inside the blockhouse, Heke's supporters shot and killed the four soldiers who had remained behind. The signalman Tapper was shot and injured, and a Māori girl shot and killed, both having been mistaken for soldiers (like the soldiers, they were wrapped in blankets as they slept). Tapper's wife and daughter were left unharmed. Some of Heke's followers then dug underneath the iron sheathing on the flagstaff and began slowly to cut through the thickest part of the timber beneath, while others remained in the blockhouse firing on British soldiers outside and forcing them down the hill.[648]

Meanwhile, the remaining soldiers formed up at their barracks at Kororāreka, ready to join the battle against Kawiti. To prevent them from doing so, Te Kapotai (under Hikitene) and Ngāti Manu (under Hori Kingi and Mauparāoa) began to fire on them from the hills surrounding the town.[649] According to accounts from British officers, these covering parties made no attempt to move into the township and took no part except to provide covering fire for Heke and Kawiti. This tactic appears to have been intended to support destruction of the flagstaff while minimising direct engagement, and caused considerable confusion among British officers who had trained only for open combat.[650] After their brief battle at Matauwhī, Kawiti's troops withdrew into the surrounding bush where they, too, provided covering fire for Heke.[651]

According to Henry Williams, who was in the town at the time, the entire military engagement (the battle at Matauwhī, the capture of the upper blockhouse, and the withdrawal of Kawiti's men into the hills) was over within a very short time. The 'commencement and termination of the fighting of that day on the part of the natives' occurred within 'a space of a few minutes, say ten'.[652] Officers' accounts suggest it took longer – beginning about 4.45 am and ending at 6 am when Heke took the blockhouse, and Kawiti withdrew.[653] By the end of that very brief period, Heke's men were in the upper blockhouse, the other Ngāpuhi forces had withdrawn into the hills, and the British military forces had all returned to the stockade at Polack's house, 'with the exception of a few, in the lower [gun] battery, who received no injury'.[654]

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648. Johnson, 'The Northern War' (doc A5), pp 188, 190–191; Burrows, *Extracts*, pp 11–13 (doc W48(a)). Mr Johnson identified the girl as the daughter of a Captain Wing. The *Victoria*'s log book and the missionary Robert Burrows both referred to these casualties as accidental. Tapper's wife was identified and saved because she cried out: Johnson, 'The Northern War' (doc A5), p 190.

649. Johnson, 'The Northern War' (doc A5), pp 188, 189–191; Arapeta Hamilton (doc W7), p 7.

650. Crown document bank (doc W48), pp 226–227, 228–229.

651. Belich, *The New Zealand Wars*, p 39.

652. Williams, *The Fall of Kororareka in 1845*, p 5.

653. The *Hazard*'s log book recorded the first shots at 4.45 am, which is consistent with officers' accounts: Johnson, supporting papers (doc A5(a)), vol 4, p 613; see also Crown document bank (doc W48), pp 226–227, 228–229, 231–233.

654. Williams, *The Fall of Kororareka in 1845*, p 5.

Lieutenant Edward Barclay of the 96th Regiment described exchanges of fire between the soldiers in the lower blockhouse and Māori who were occupying the valley between there and Heke's party.[655] At about 11 am, a group of civilians left Polack's stockade to engage with a group of retreating Ngāpuhi nearby, though the encounter was brief and no one was hurt.[656] While all of these exchanges were occurring, the officers on the *Hazard* were turning the sloop broadside to the town. As the hand-to-hand exchanges came to an end, the *Hazard*'s cannons were fired at the flagstaff and blockhouse, and at the hills where the warriors were waiting and firing from under cover. The *Hazard* maintained this bombardment at regular intervals throughout the morning, as warriors fired back from the hills.[657] Soldiers in the lower blockhouse also used ships' guns against Māori in the hills above them.[658]

Heke and his party captured the flagstaff at 6 am. According to the log book of the government brig *Victoria*, it took until 10 am for the flagstaff to come down, at which point 'the firing ceased'.[659] Beckham confirmed this, reporting that 'a tremendous fire was kept up . . . until about ten o'clock, when the natives retreated and the firing ceased'.[660] Lieutenant Barclay reported that exchanges of gunfire (and cannon fire) continued 'all the morning', without providing a specific time;[661] and FitzRoy would report to Gipps that the firing from the hills was general until 'towards noon'.[662] After leaving the upper blockhouse, Heke raised his own flagstaff on a neighbouring peak and – according to one witness – 'put a soldier's jacket on one arm of the new flagstaff and a hat on the other and rahui'd the place'.[663] It is clear from the available evidence that Heke and his allies remained in the hills for most of the morning, and ceased firing soon after they had cut down the British flagstaff and erected their own. Hostilities ended probably around 10 am, but by noon at the latest.[664]

655. Beckham to FitzRoy, 15 March 1845 (Crown document bank (doc w48), p 232.

656. Crown document bank (doc w48), pp 226–227; Johnson, 'The Northern War' (doc A5), pp 192–193.

657. Johnson, 'The Northern War' (doc A5), p 191; Crown document bank (doc w48), pp 226–227.

658. Beckham to FitzRoy, 15 March 1845 (Crown document bank (doc w48), p 232.

659. *Victoria*, log book, 11 March 1845 (Johnson, supporting papers (doc A5(a)), vol 3, p 550); Johnson, 'The Northern War' (doc A5), pp 191–192.

660. Beckham to FitzRoy, 17 March 1845 (Crown document bank (doc w48), p 227). An earlier account from Beckham also had Māori retreating into the hills mid-morning: Crown document bank (doc w48), p 226.

661. Barclay to Hulme, 15 March 1845 (Crown document bank (doc w48), p 232.

662. FitzRoy to Gipps, 20 March 1845 (Crown document bank (doc w48), p 225).

663. George Clarke junior to George Clarke senior, 21 March 1845 (Johnson, 'The Northern War' (doc A5), p 192).

664. Beckham to FitzRoy, 17 March 1845 (Crown document bank (doc w48), p 227); *Victoria*, log book, 11 March 1845 (Johnson, supporting papers (doc A5(a)), vol 3, p 550); Barclay to Hulme, 15 March 1845 (Crown document bank (doc w48), p 232; FitzRoy to Gipps, 20 March 1845 (Johnson, supporting papers, doc w48, p 225); Burrows, *Extracts*, p 13 (doc w48(a)).

5.4.2.3.6 The destruction of Kororāreka: 11 and 12 March 1845

At noon, the Ngāpuhi forces raised white flags on Maiki Hill and at the south end of Kororāreka Beach, signalling the end of hostilities. Heke had Tapper and his wife escorted down Maiki Hill under cover of a white flag, to join other settlers at Polack's house.[665] Soldiers and Māori alike began to gather their dead and tend to their wounded.[666] But during the next hour, several events occurred that together contributed to the destruction of Kororāreka township. These included the evacuation of the town; an explosion in the ammunition store of the colonial forces; the sabotage of the remaining British cannon; the shelling of the town by the *Hazard*; and plunder and burning by Ngāpuhi forces.[667]

There are several accounts of these events, almost all from military officers, Crown officials, and missionaries.[668] While these are contradictory, the general sequence of events is clear. Soon after the Ngāpuhi parties raised white flags at noon, British officers decided to remove the women and children from Polack's stockade onto the ships in the bay. It appears this decision was made out of fear that Ngāpuhi forces might attack the town, even though all Ngāpuhi forces had by then withdrawn. The evacuation was completed before 1 pm.[669]

At that time, two other events occurred that contributed to a decision to abandon the town altogether: first, the powder magazine of the colonial troops blew up, injuring several people and destroying Polack's house, along with property that had been taken there for safekeeping;[670] and secondly, someone sabotaged the cannon in the lower blockhouse – the one defensive placement that remained in British hands.[671] Even though British officers were in the stockade at the time of the explosion, none could provide a convincing account of what transpired; the commanding officer could not say who, if anyone, had given the order. They told their superiors that they did not know whether the explosion was caused by an accident or an act of sabotage, though they believed an accident to be more likely. One officer's report indicated that panic within the stockade was a factor but did not give details.[672]

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665. Johnson, 'The Northern War' (doc A5), pp 192–193.
666. Johnson, 'The Northern War' (doc A5), pp 191–193.
667. Johnson, 'The Northern War' (doc A5), pp 193–196, 198–200; Crown document bank (doc W48), pp 231–233.
668. Johnson, 'The Northern War' (doc A5), pp 194–195.
669. Johnson, 'The Northern War' (doc A5), pp 194–195.
670. Johnson, 'The Northern War' (doc A5), pp 194–195; Burrows, *Extracts*, p 11 (doc W48(a)). The police magistrate Thomas Beckham reported on 11 March that the explosion left 'several persons . . . severely hurt and confused': (Crown document bank (doc W48), p 226; Johnson, 'The Northern War' (doc A5), p 195).] On 15 March, Philpotts wrote that '[m]any casualties occurred' and two died: (Crown document bank (doc W48), p 229). Lieutenant Barclay reported on 15 March that none of the soldiers or sailors was injured, though one received a small cut. Barclay did not comment on civilian casualties: Beckham to Governor, 11 March 1845 (Johnson, 'The Northern War' (doc A5), p 195); Philpotts to Governor, 11 March 1845 (Johnson, 'The Northern War' (doc A5), p 195); Philpotts to FitzRoy, 15 March 1845 (Crown document bank (doc W48), pp 228–229); Barclay to Hulme, 15 March 1845 (Crown document bank (doc W48), pp 231–233).
671. Johnson, 'The Northern War' (doc A5), p 196.
672. Crown document bank (doc W48), pp 196, 228–229, 231–233.

These events only added to the panic. The British forces had now lost the upper blockhouse and flagstaff, the stockade, and all their ammunition and cannon. Under these circumstances, the commanding officer, Lieutenant George Philpotts of the *Hazard*, ordered a full evacuation of the town.[673] 'Why the town was evacuated, is not for me to explain', Henry Williams wrote soon afterwards. 'I merely state that the inhabitants were not driven out of the town by the natives; they withdrew to the ships, by order of the authorities in command.'[674]

Having already withdrawn from the town, Heke and his allies remained in the hills 'without making any movement',[675] while the wounded, other townspeople, and finally the soldiers and sailors were loaded onto boats and taken to the ships anchored in the bay.[676] Lieutenant Barclay reported that 'occasionally a random shot was fired' during the evacuation, but none directly at townspeople or troops.[677] Bishop Selwyn, who helped the wounded and others onto boats, said that no shots were fired at all. One soldier was left behind on the beach, and Māori let him be while a boat returned for him.[678]

The accounts indicate that Heke and his allies were highly surprised to find Kororāreka suddenly vacated. After the evacuation was complete, Ngāpuhi warriors began to move slowly into the town, at first quietly and in small numbers, with others following as it became clear that the town was genuinely empty.[679] Heke forbade his own men from harming or plundering settlers,[680] though some Ngāpuhi warriors did begin to loot shops and homes, taking supplies of sweets and a cask of liquor (according to Burrows).[681] During the afternoon and evening, some of the townspeople began to return to Kororāreka to reclaim their remaining possessions. Māori offered no resistance, willingly handing property back to its owners

673. Johnson, 'The Northern War' (doc A5), pp 194–196; see also Beckham to FitzRoy, 11 March 1845 (Crown document bank (doc W48), p 226); Philpotts to FitzRoy, 11 March 1845 (Crown document bank (doc W48), pp 227–228); Philpotts to FitzRoy 15 March (Crown document bank (doc W48), pp 228–229); Beckham to FitzRoy, 17 March 1845 (Crown document bank (doc W48), p 227). Contemporary accounts often attributed the loss of the blockhouse and stockade to officers' incompetence. Historian James Belich observed that settlers and officials resorted to this 'palliative' explanation because they could not stomach the alternative: that Heke and Kawiti had achieved their objective though superior military superior strategy: Belich, The New Zealand Wars, pp 40–41.

674. Williams, *The Fall of Kororareka in 1845*, p 6.

675. Barclay to Hulme, 15 March 1845 (Crown document bank (doc W48), p 232).

676. Many of the townspeople were taken to the United States Navy frigate *St Louis*, which happened to be visiting New Zealand. Others were taken to the English whaler *Matilda*, the trading schooner *Dolphin*, and the Royal Navy ships *Hazard* and *Victoria*: Barclay to Hulme, 15 March 1845, Crown document bank (doc W48), pp 231–233; FitzRoy to Gipps, 20 March 1845, Crown document bank (doc W48), p 221; Philpotts to FitzRoy, 15 March 1845, Crown document bank (doc W48), p 229.

677. Barclay to Hulme, 15 March 1845 (Crown document bank (doc W48), p 232).

678. Johnson, 'The Northern War' (doc A5), pp 196–197, 258–259.

679. Crown document bank (doc W48), p 221; Johnson, 'The Northern War' (doc A5), p 197.

680. Johnson, 'The Northern War' (doc A5), p 200; Heke to FitzRoy, 21 May 1845 (doc A5(a), vol 1, p 227.

681. Burrows, *Extracts*, p 13 (doc W48(a)); Williams, *The Fall of Kororareka in 1845*, p 7; see also Johnson, 'The Northern War' (doc A5), p 197; Crown document bank (doc W48), pp 221, 227; Johnson, supporting papers (doc A5(a)), vol 3, p 566.

and on numerous occasions helping them to transport possessions to the boats.[682] While this was occurring, Lieutenant Philpotts made the decision to bombard the town, and thus broke the ceasefire and renewed hostilities.[683]

Andrew Bliss, the master of the whaler *Matilda*, gave a first-hand account of these events. At about 3 pm, he was helping settlers onto boats. He wrote that Māori 'were not hostile to the settlers, but only warred with the Government', adding that Heke and his allies were willing to allow settlers to return to their homes and promised not to harm them. One of the settlers, named Clayton, visited the *Hazard* and asked Philpotts to maintain a ceasefire while settlers were in the town. Philpotts agreed. Bliss reported that the settlers then returned to shore, where they were met 'with every demonstration of respect and good will'; Māori were 'desirous the settlers should return to their homes unmolested'. The settlers sent a message to Heke to confirm the ceasefire,[684] and missionaries also negotiated with him.[685] According to Bliss:

> Scarcely had the messenger left us, when two [cannon] shot were fired from the *Hazard*, which wounded one of the Natives slightly with a splinter: this immediately broke up all further intercourse. They sprang to their feet, and pointing their muskets at us, ordered us down to the beach, saying we came on shore to deceive them, and saying that we had broken faith with them: surrounding us on all sides, they would not hear a word we had to say, but vociferated, our Government was very bad . . . they then followed us down to the boat directing us to be off, and I thought myself very fortunate, in being allowed to effect my escape unmolested after such a breach of faith on our side.[686]

The *Hazard* continued to shell the town at frequent intervals throughout the evening and the following day, while Ngāpuhi, missionaries, and some settlers remained in the town.[687] Henry Williams wrote that this action caused 'imminent risk' to the Europeans gathering their property,[688] and George Clarke junior later described the firing as 'somewhat wild, but heavy'.[689]

682. Crown document bank (doc w48), pp 221, 231–233; Williams, *The Fall of Kororareka in 1845*, p 6; Johnson, 'The Northern War' (doc a5), p 197.

683. Johnson, 'The Northern War' (doc a5), p 198.

684. Andrew Bliss, 'Remarks on board the Matilda, 11 March 1845' (cited in Johnson, 'The Northern War' (doc a5), pp 197–198).

685. Williams, *The Fall of Kororareka in 1845*, p 6.

686. Bliss, 'Remarks on board the Matilda, 11 March 1845' (cited in Johnson, 'The Northern War' (doc a5), p 198).

687. Johnson, supporting papers (doc a5(a)), vol 3, p 566; Williams, *The Fall of Kororareka in 1845*, p 6; Crown document bank (doc w48), pp 228–230. Williams and his sons had three boats ferrying settlers and their possessions to the *Hazard* throughout the afternoon of 11 March and all of 12 March.

688. Williams, *The Fall of Kororareka in 1845*, p 6.

689. George Clarke junior, *Notes on Early Life in New Zealand* (Hobart: J Walch & Sons, 1903), p 72.

On 13 March, two days after the flagstaff was felled, the *Hazard* and other British ships departed for Auckland.[690] Philpotts wrote to the Governor on 15 March, giving a long account of the attack on the flagstaff and the evacuation of the town, but no explanation for his decision to open fire, except to say that the *Hazard* 'was constantly employed in shelling the town when deemed requisite'.[691] Two days later, he explained that he fired 'whenever the natives made their appearance', though he left a window of 'more than four hours' for townspeople to save their possessions.[692]

It appears from these comments that Philpotts regarded the mere presence of Māori in the town as sufficient justification for shelling it, even though white flags were flying, hostilities had otherwise ceased, colonial officers had voluntarily abandoned the town, Māori were assisting settlers to recover their property, and shelling posed considerable risk to the lives of settlers and Māori alike. Bishop Pompallier later wrote that colonial officers had decided in advance to shell the town if it fell into Māori hands.[693]

FitzRoy was incensed at the behaviour of his military officers (with the exception of the injured Captain Robertson) throughout the conflict. 'The shameful conduct of those officers whose uselessness caused the loss and destruction of Kororareka is now the subject of an enquiry.'[694] Two officers faced courts martial, one of whom (Ensign Campbell, who had been responsible for defending the upper blockhouse) was found guilty. Philpotts, who made the decision to shell Kororāreka, faced no charges.[695]

5.4.2.3.6.1 *Who was responsible for the destruction of Kororāreka?*

The decision to bombard Kororāreka during a ceasefire was a critical turning point. It threatened the lives of everyone still in the town: settlers, missionaries (who were assisting settlers and burying the dead), and Māori. Before the bombardment, the town stood intact; once it began, Māori retaliated by setting buildings alight; within a few days, the town was destroyed.[696]

The various accounts differ over when the fires were started. The *Hazard* began to shell the town on the afternoon of 11 March 1845, and Lieutenant Philpotts and Mr Bliss both recorded in their logs that the town was on fire that evening.[697] Beckham reported that the fires were started the next morning.[698] Lieutenant Barclay noted that 'the natives burnt the town, with the exception of the churches

690. Crown document bank (doc w48), p 232.
691. Philpotts to FitzRoy, 15 March 1845 (Crown document bank (doc w48), p 229).
692. Philpotts to FitzRoy, 17 March 1845 (Crown document bank (doc w48), pp 229–230).
693. Bishop Pompallier later wrote that the *Hazard*'s officers had formed a predetermined strategy to shell the town before allowing it to fall into Māori hands: Fr J A M Chouvet, A Marist Missionary in New Zealand 1843–1846, ed Jinty Rorke, trans Patrick Barry (Whakatane: Whakatane & District Historical Society, 1985), p 78 Johnson, 'The Northern War' (doc A5), p 203).
694. FitzRoy to Stanley, 9 April 1845 (Belich, *The New Zealand Wars*, p 39).
695. 'Narrative of Events at the Bay of Islands', *New Zealander*, 19 November 1845, p 1.
696. Johnson, 'The Northern War' (doc A5), pp 198–199, 208–209.
697. Johnson, 'The Northern War' (doc A5), p 199.
698. Crown document bank (doc w48), p 227.

and the houses of the missionaries' on the afternoon of 12 March.[699] Philpotts informed FizRoy that he decided to leave the Bay of Islands that evening: the *Hazard* was running out of water, the ship's surgeon had warned that there was a risk of disease among the wounded on the crowded ship, and with 'the flag-staff down, and the town sacked and burnt, what use would there have been in remaining? We had nothing left to protect.'[700]

Philpotts also reported that, by the time he left, the town was 'burnt nearly level with the ground'.[701] Yet according to the missionary Robert Burrows, when he arrived in Kororāreka on the afternoon of 14 March, 'the houses were still being plundered and burnt'.[702] Some claimants argued that the town was destroyed by cannon fire,[703] but there is little evidence to support this. The only report of damage from shell fire was a complaint by Henry Williams that the Church of England parsonage and school had been 'cut up . . . by the shot of the Hazard'.[704] In contrast, Heke later acknowledged that the town had been burned, though not by his men.[705]

Non-military observers at the time appeared to regard the burning as inevitable and reasonable retaliation for the decision to shell Kororāreka and endanger lives during a ceasefire. According to Bliss: 'It is my decided opinion, that had those shots not been fired, the Town might have been saved from plunder and destruction: for shortly after our arrival [back] on board, they commenced plundering in every direction, and fired the town.'[706]

Williams shared this view:

> The greater part of the property might have been saved, but the Commanding Officer gave the orders to fire upon the Town from time to time during the remainder of the same day [11 March] and following day [12 March] – though many of the Settlers had landed for the purpose of securing what they might be able – the natives behaved very well considering the circumstances under which they were.[707]

Williams added that the 'conduct of the soldiers and men of the sloop of war is very distressing – they would gladly cut the natives up right and left'. As a result, he feared a general uprising among Māori, not only in the Bay of Islands

699. Barclay to Hulme, 15 March 1845 (Crown document bank (doc w48), p 232).
700. Philpotts to FitzRoy, 17 March 1845 (Crown document bank (doc w48), p 230).
701. Philpotts to FitzRoy, 15 March 1845 (Crown document bank (doc w48), p 229).
702. Burrows, *Extracts*, p 13 (doc w48(a)).
703. See, for example, Claimant closing submissions (#3.3.219), p 98.
704. Williams to Church Missionary Society, 17 March 1845 (Johnson, supporting papers (doc A5(a)), vol 3, p 567).
705. Johnson, supporting papers (doc A5(a)), vol 1, pp 237–238, 240–242; see also Johnson, 'The Northern War' (doc A5), pp 258–259.
706. Andrew Bliss, 'Remarks on board the Matilda, 11 March 1845' (cited in Johnson, 'The Northern War' (doc A5), pp 198–199).
707. Williams to Church Missionary Society, 17 March 1845 (Johnson, supporting papers (doc A5(a)), vol 3, p 566).

but potentially also in Auckland and further south.[708] Auckland settlers feared this as well, and soon afterwards the Executive Council resolved to strengthen Auckland's defences.[709] It appears that there was some truth in these rumours: two Tangiterōria missionaries recorded that Kawiti sent a messenger to his relative Te Tirarau carrying a pouch with a handful of bullets and a letter asking Te Parawhau to join in the attack. Te Tirarau consulted two other senior rangatira, Parore Te Āwhā and Paikea. Anxious to maintain peace and attract more settlers and traders to their territories, they wrote back to Kawiti declining; Te Tirarau is said to have thrown the bullets in a river. Later, government sources amended this story, recording that Heke had sent the bullets.[710]

Governor FitzRoy blamed Heke and Kawiti for the fires that destroyed Kororāreka and would later use this as a justification for war. But the evidence on this is less conclusive. None of the officers or missionaries who were at Kororāreka on 11 and 12 March specifically identified which Māori were involved in burning or plundering the town. Indeed, as the Governor soon acknowledged, the officers found it impossible 'to distinguish friend from foe', let alone distinguish between the various hapū engaged in Kororāreka.[711] Burrows later said that Heke's men were responsible but he was not in Kororāreka when the fires were lit, so his account was based on hearsay.[712] Though Williams did not identify those responsible, he did say they were intoxicated.[713]

Heke denied any involvement in the town's looting or destruction. Writing to FitzRoy in May 1845, he said there was some skirmishing between Māori and Europeans after the *Hazard*'s 'great guns' were fired. He had intervened to calm the situation, he explained, and had saved the lives of missionaries and settlers, including Williams. His people then left for Mawhe, having spent only one day in Kororāreka. 'Ko te rakau anake ano taku hara,' he wrote. 'Ka hore ahau me aku tangata i taku i nga ware.'[714] The missionary Thomas Forsaith translated this as, 'The flagstaff is my only crime. Neither I nor my men burnt the houses.'[715] Heke did not deny that houses were burned but attributed that to others; in fact, he asserted that the town was burned by just one person, whom he named as Te Aho, one of

708. Williams to Church Missionary Society, 17 March 1845 (Johnson, supporting papers (doc A5(a)), vol 3, pp 567–568).

709. 'Legislative Council', *Daily Southern Cross*, 22 March 1845, p 3.

710. The missionary sources were Thomas Buddle and James Buller: Eva Blight, 'The Work of the Reverend James Buller in the Methodist Church in New Zealand', MA thesis, University of New Zealand, 1950, p 44; Tony Wall, 'Mana Whenua Report' (doc E34), p 275. Also see Rose Daamen, Paul Hamer, and Barry Rigby, 'Rangahaua Whanui District 1: Auckland', Waitangi Tribunal Rangahaua Whanui Series, Wellington, 1996, pp 173–174.

711. 'Legislative Council', *Daily Southern Cross*, 22 March 1845, p 3.

712. Burrows, *Extracts*, p 13 (doc W48(a)); Barclay to Hulme, 15 March 1845 (Crown document bank (doc W48), pp 231–233).

713. Williams, *The Fall of Kororareka in 1845*, p 7.

714. Heke to FitzRoy, 21 May 1845 (Johnson, supporting papers (doc A5(a)), vol 1, p [228]).

715. Heke to FitzRoy, 21 May 1845 (Johnson, supporting papers (doc A5(a)), vol 1, pp [237]–[238]). Kemp translated this as: 'The flagstaff alone is my only annoyance. Neither myself or my people nor my men assisted in burning the town': Johnson, supporting papers (doc A5(a)), vol 1, p [247]; see also Johnson, 'The Northern War' (doc A5), pp 258–259.

Kawiti's lieutenants.[716] Whether Heke's account is accurate or not, the evidence is clear that he showed considerable restraint towards Kororāreka settlers, and that buildings were burned only after the Crown had broken the ceasefire.[717]

Heke also blamed others for the plunder of Kororāreka, saying that his men took only a very small share. He said that 100 of his followers had supported his attack on the flagstaff but as many as 500 Māori had poured into the town to plunder. In particular, he blamed Māori from Te Rāwhiti and Te Puna, and supporters of Nene, Taonui, and Paratene Te Kekeao.[718] Again, the evidence is inconclusive. As noted earlier, Burrows said he came across some of Heke's men with plunder from the town,[719] whereas George Clarke junior said that Heke had forbidden his men from looting settlers' property.[720]

There is evidence that crew from American whaling ships took part in the plunder of the town and carried off a large quantity of copper wire, among other items.[721] It is also unclear how much of real value had been left in the town by the time it was destroyed. Some of the townspeople had buried their precious possessions in anticipation of an attack.[722] Most had taken their possessions to the stockade, where they were destroyed in the explosion.[723] Other than liquor, sweets, and a cloak that Pōmare II was accused of receiving, it is not clear what was plundered.[724]

5.4.2.3.6.2 *Did Heke and Kawiti intend to destroy Kororāreka?*

Although Kororāreka was destroyed, there is clear evidence that Heke and Kawiti did not intend this and that the flagstaff was their sole target. Both rangatira had made their plans known well in advance, to missionaries and government officials alike: they would take down the flagstaff and intended no violence against anyone, but would use force if opposed. They informed Henry Williams and Gilbert Mair of their intention to approach from several directions and had even attempted a trial landing at Matauwhī a few days beforehand. In the event, the gun battery at Matauwhī appears to have been more heavily defended than they had anticipated, and this led to brief but intense fighting between Kawiti's party and the *Hazard*'s men. Otherwise, the plan was carried out almost to perfection.[725]

Henry Williams, who spent time with Heke before and immediately after the conflict, reported to the Governor that Heke and Kawiti 'had not sought to attack

716. Johnson, supporting papers (doc A5(a)), vol 1, pp [241], [249].
717. Johnson, supporting papers (doc A5(a)), vol 4, p 814; Johnson, 'The Northern War' (doc A5), pp 198–199.
718. Johnson, supporting papers (doc A5(a)), vol 1, pp 229–231.
719. Burrows, *Extracts*, p 13 (doc W48(a)). Clarke junior to father, 19 March 1845 (cited in Johnson (doc A5(a)), vol 4, p 814).
720. Clarke junior to father, 19 March 1845 (Johnson, supporting papers (doc A5(a)), vol 4, p 814).
721. Te Kapotai claimants, 'Te Kapotai Hapu Korero: Mana, Rangatiratanga' (doc F25), p 53.
722. Johnson, 'The Northern War' (doc A5), p 179.
723. Johnson, 'The Northern War' (doc A5), pp 179, 197; Burrows, *Extracts*, pp 11–12 (doc W48(a)).
724. Burrows, *Extracts*, p 13 (doc W48(a)); Johnson, 'The Northern War' (doc A5), pp 236–238, 264, 268–270.
725. For an analysis of this point, see Belich, The New Zealand Wars, pp 38–39.

the town.'[726] Governor FitzRoy acknowledged that this was the case; he informed a meeting of the Executive Council on 15 March that Heke's objective was 'simply against the flag-staff and the soldiers', and the rangatira's intention throughout had been to leave Kororāreka and its people untouched. FitzRoy believed that Kawiti's party had attempted to attack the town, but this reflected his misunderstanding of the strategy adopted by Heke, Kawiti, and their allies.[727] Clarke junior, struck by the care that Heke showed towards Kororāreka settlers, wrote that the rangatira 'behaved throughout the business with unexampled magnanimity worthy [of] a better cause'.[728]

Dr Phillipson and Mr Johnson accepted Heke's assertion that he intended doing no more than remove the flagstaff. Both were of the same view that Heke and Kawiti had carried out a carefully planned strategy to distract the Crown's forces while they claimed the flagstaff, sustaining their attack only until that objective had been achieved and then withdrawing into the surrounding hills. Each also argued that Heke and Kawiti had deviated from their initial plans only after the Crown evacuated the town. Finally, both scholars argued it was scarcely in Heke's or Kawiti's interests to upset Kororāreka trade or to anger Rewa, both of which would have been inevitable outcomes of any attack on the town itself.[729] On this point, it is notable that Rewa did not mount any retaliatory attack against either Heke or Kawiti; indeed, in some subsequent skirmishes Rewa fought alongside Heke's people.[730]

This fourth (11 March 1845) attack on the flagstaff, and the destruction of Kororāreka that followed, was a major escalation in an already simmering conflict between sections of Ngāpuhi and the Crown. Heke, Kawiti, Pūmuka, Hikitene, Hori Kingi, and Mauparāoa had acted knowing that loss of life was likely, given the heavy military presence in the town. Nonetheless, their action followed a series of signals from the Governor that he would not compromise the Crown's claim of sovereignty over Te Raki and was preparing to use force to defend this position. Since the beginning of the year, the Governor had threatened military action against any Māori who committed taua muru, labelling them hunga tutu (rebels) for enforcing customary law. He had offered a bounty for Heke's arrest, sent troops, and fortified Kororāreka. He had made repeated requests for military reinforcements. More significantly, he had told other officials that he intended to use these reinforcements against Heke as soon as they landed. As Dr Phillipson

726. Williams to FitzRoy, 20 March 1845 (cited in Johnson, 'The Northern War' (doc A5), p 209).

727. 'Executive Council', *Daily Southern Cross*, 22 March 1845, p 3; see also Belich, *The New Zealand Wars*, pp 38–39.

728. Clarke junior to Clarke senior, 19 March 1845 (Johnson, supporting papers (doc A5(a)), vol 4, p 814).

729. Johnson, 'The Northern War' (doc A5), pp 189, 191, 192, 202–204, 208, 259; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 354–355; see also Belich, *The New Zealand Wars*, p 38 (Johnson, 'The Northern War' (doc A5), p 201). Mr Johnson acknowledged that some historians have concluded that Heke intended to attack Kororāreka township; in his view, this conclusion was coloured by later events and did not reflect the evidence of what occurred up to noon on 11 March 1845: Johnson, 'The Northern War' (doc A5), pp 200–201.

730. Johnson, 'The Northern War' (doc A5), pp 227–230; Belich, *The New Zealand Wars*, p 35.

observed, Heke and Kawiti decided to resort to violent conflict months *after* the Governor had made that decision,[731] and then only after the flagstaff was rebuilt – which, to Heke, signalled that the Governor wanted war.[732] Under these circumstances, Heke and Kawiti appear to have believed they had two options: to renew their challenge, even at considerable cost, or to wait until FitzRoy attacked. They chose the former.

5.4.3 Conclusions and treaty findngs

As discussed in previous chapters, and in our stage 1 report, Te Raki Māori who signed te Tiriti did not consent to Britain exercising sovereignty over them. Rather, they consented to Britain exercising a lesser power, kāwanatanga, that allowed it to control settlers and thereby keep peace and protect the interests of Māori and settlers alike. Rangatira understood that the Governor would be their equal and would negotiate with them on questions of relative authority as the colony developed.[733] The Crown, on the other hand, understood the treaty as granting it sovereignty over Māori people and territories. From the time of the treaty onwards, tensions arose as the Crown sought to turn its legal sovereignty into effective power over Te Raki people and territories.

We agree with the claimants that Hōne Heke and his supporters felled the flagstaff for the first time on 8 July 1844 to signal their opposition to the Crown's encroachment on Ngāpuhi tino rangatiratanga and to challenge the Crown to meet and resolve issues of their respective authority under the treaty agreement.[734] The Crown had made only limited attempts to govern Ngāpuhi up to that time, but those attempts had done significant damage to Ngāpuhi interests. More broadly, the Crown assumed that it had sovereignty, and the steps it was taking signalled to Ngāpuhi that it intended to expand its effective authority into the north. Heke had been told that the Crown's understanding of the treaty did not match that of Māori. He resorted to direct action after previous Ngāpuhi attempts at engaging with the Crown over the effect of the treaty had proved fruitless, as discussed in chapter 4.[735] By felling the flagstaff, Heke challenged the Crown to clarify its understanding of and intentions for the treaty relationship.

At this point, the Crown essentially had three courses open to it: it could persist with its claim of authority over Te Raki territories and people, irrespective of their protests; it could seek dialogue to understand and negotiate over their concerns; or it could desist altogether from its claim of authority over Te Raki and its people. In treaty terms, the Crown was obliged. at the very least, to seek dialogue and take reasonable steps to recognise and provide for Ngāpuhi tino rangatiratanga, even where that imposed limits on the Crown's authority. Yet, in the months that

731. Grant Phillipson, transcript 4.1.26, Turner Events Centre, p [211].
732. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 349.
733. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 524–525, 528.
734. Claimant closing submissions (#3.3.219), pp 50–51; specific closing submissions for Wai 1477 (#3.3.338), pp 6–7; submissions in reply for Wai 120, Wai 966, Wai 1837, and Wai 2217 (#3.3.521), para 34.
735. Johnson, 'The Northern War' (doc A5), pp 95–96.

followed Heke's first attack on 8 July 1844, the Crown consistently chose to ignore opportunities for negotiation. It persisted with its attempts to assert sovereign authority without regard for treaty-guaranteed rights of Ngāpuhi independence and self-government. We agree with the claimants that the Crown failed to consider the underlying causes of Heke's concerns and failed to take adequate steps to resolve its differences peacefully with him.[736] We also agree that the Crown's determination to assert its authority without adequate regard for the tino rangatiratanga of Te Raki Māori was the underlying cause of all the subsequent conflict with Heke.[737]

Governor FitzRoy asserted the Crown's authority over Te Raki Māori in several ways. After the first attack, he ordered that the flagstaff be rebuilt, sent for military reinforcements, and determined that Heke must atone for his action or face military reprisal. The Governor alone would determine the terms on which peace could be secured; there was to be no negotiation with Heke, nor even any attempt to understand his motivation. Initially, troops were instructed to operate only in a defensive manner, to protect Kororāreka and the flagstaff. However, when troops arrived from New South Wales, FitzRoy put his plan into action, bringing the district to the brink of war. These actions compounded the earlier challenges to Ngāpuhi tino rangatiratanga which we discussed in chapter 4. The Crown acknowledged that its threat of military invasion had been made because 'without an outward display of military force, FitzRoy lacked authority'. It further submitted that the demonstration of military force was 'not unreasonable in the circumstances' and while it 'upped the ante and created a risk some conflict might ensue, FitzRoy managed the risk appropriately'.[738]

As discussed in section 5.2.1, the Tribunal has found in other inquiries that the Crown is entitled to use force against its treaty partner only when necessary to protect citizens from harm.[739] According to Crown officials in Kororāreka, in their first (8 July 1844) action against the flagstaff, Heke's allies had felled it without serious violence and had then left for Kaikohe, so there was no clear or immediate threat that required a forceful response. Even if there had been imminent danger, the Crown was obliged to exhaust all non-violent means of securing peace. The Crown cannot be said to have done that if it has not recognised and given effect to the tino rangatiratanga of its treaty partners. It cannot use force to assert its authority over Māori or force submission to its authority.[740]

The partnership principle imposes an obligation on treaty partners to act honourably, fairly, and with the utmost good faith in their relationships with

736. Claimant closing submissions: Northern War (#3.3.219), pp 27, 33–35, 86, 89, 91–94; specific closing submissions for Wai 1477 (#3.3.338), pp 11–12, 43; submissions in reply for Wai 1477 (#3.3.547), pp 31–32; joint submissions in reply for Wai 1522 and Wai 1716 (#3.3.548), pp 31–32; draft closing submissions for Wai 1514 (#3.3.357), pp 52, 54; closing submissions for Wai 2059 (#3.3.296), p [27].

737. Specific closing submissions for Wai 1477 (#3.3.338), p 12.

738. Crown closing submissions (#3.3.403), p 74.

739. Waitangi Tribunal, *Te Urewera*, Wai 894, vol 1, pp 315–317, 498–499.

740. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pp 444–446. For an example of the application of this principle, see Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, Wai 201, pp 216–217.

each other, and to negotiate any questions of relative authority as they arise. The Tūranga Tribunal described the good-faith obligation as a high standard, which requires the Crown to behave 'impeccably' in its dealings with Māori, avoiding 'any appearance whatever of manipulation' while seeking to protect the Māori interest at all times.[741]

In its response to Heke's 8 July 1844 attack on the flagstaff, the Crown fell well short of these standards and assumed a power to control Māori it did not have under the treaty. This was not an immediate and urgent question of protecting settler and Maori lives. We accordingly find that:

- By threatening to use force against Heke in August 1844, when he had signed te Tiriti and had consented to the Crown's kāwanatanga but not the imposition and exercise of its sovereignty, the Crown did not adequately recognise, and respect, the tino rangatiratanga of Ngāpuhi hapū. This was in breach of te mātāpono o te tino rangatiratanga. It was also in breach of te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect.
- By failing to seek dialogue with Heke before making this threat, the Crown acted inconsistently with its obligation to act honourably, fairly, and in good faith, and therefore breached te mātāpono o te houruatanga/the principle of partnership.

The Governor, having refused to respond to Heke's overtures did invite him to the important hui at Waimate in September 1844. Heke refused to attend, hosting a rival and, it must be acknowledged, somewhat provocative event nearby. However, in the absence of Heke and a number of other senior rangatira (Kawiti, Pōmare, Te Kēmara, Rewa) FitzRoy negotiated with the rangatira who were there, seeking to pressure Heke into submitting to the Crown's terms. In so doing, he was prepared to make some major concessions reversing decisions that had been of concern to both Ngāpuhi leaders and himself; notably the matter of Crown retention of surplus lands, the imposition of customs duties that were depressing trade in the region and loss of anchorage fees. He also gave rangatira to understand that it was they who would be the 'guardians' of New Zealand.

Ngāpuhi leaders could not understand why Heke's actions had led the Crown to threaten war, and saw the Governor's threat as disproportionate. Nonetheless, a number of their key concerns seemed to have been addressed, they had been assured of the importance of their standing and they were desperate to keep British soldiers out of Ngāpuhi territories. Any Crown invasion would oblige them to defend Heke, drawing them into violence they preferred to avoid and upsetting vital economic relationships. Accordingly, Tāmati Waka Nene and other rangatira proposed a deal in which they would pay the required compensation, protect the flagstaff, and ensure that Heke did not again challenge the Crown's authority.

We reject the Crown's submission that Nene and his allies made this offer freely as an expression of their tino rangatiratanga.[742] The Hokianga and Waimate ranga-

741. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 1, p 120.
742. Crown closing submissions (#3.3.403), pp 69–70, 79.

tira had won some important concessions but they were also negotiating while under threat of Crown invasion, and they negotiated knowing that the Governor would not compromise over the payment of utu or over the requirement to control Heke's future actions. We find that:

- By negotiating with Waka Nene and other Ngāpuhi rangatira in September 1844 while also threatening military invasion should its demands not be met, the Crown acted inconsistently with its obligations of fairness and good faith, and therefore breached te mātāpono o te houruatanga/the principle of partnership.
- By negotiating in a manner that pressured Ngāpuhi to take sides, the Crown breached te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect. This was also inconsistent with its obligations to recognise, and respect the tino rangatiratanga of Ngāpuhi hapū, and thus breached te mātāpono o te tino rangatiratanga.

As previously discussed, te kawa o Rāhiri was based on principles of hapū autonomy even in times of common threat. Te Tiriti o Waitangi also provided a guarantee of hapū autonomy. The result of the September 1844 negotiations was an agreement that Nene and his allies would oppose Heke and protect the flagstaff were it attacked again. In effect, Nene and the rangatira aligned with him agreed to support the Crown in its attempt to contain Heke and preserve the treaty relationship. However, FitzRoy's underlying assumption that the Crown held sovereign power had not shifted and ultimately the rangatira at Waimate were misled. This agreement was a clear attack on Heke's independence and mana engineered by the Crown. Hence, we find that:

- By entering an agreement in September 1844 with the rangatira assembled at Waimate that they would be responsible for protecting the flagstaff and opposing Heke if he attacked it again, the Crown acted inconsistently with its obligations to recognise, and respect tino rangatiratanga in accordance with tikanga, in breach of te mātāpono o te tino rangatiratanga. It was also in breach of te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect.

The Crown's response to Heke's July 1844 attack set the tone for all subsequent events through to the outbreak of armed conflict on 11 March 1845. Having ignored Heke's letter of July 1844, the Governor responded to further requests for dialogue with delaying tactics while also ignoring the substance of the concerns raised by Heke and Te Hira Pure. These were missed opportunities to engage in good-faith negotiation, in a manner that might have improved mutual understanding and paved the way for a potential resolution. Heke and Te Hira Pure had warned the Governor that tensions would continue to grow if he did not enter into dialogue, and that is indeed what occurred.

Tensions were further heightened – and other hapū drawn into the conflict – by the arrogant and insensitive handling of local officials in the offence to Kohu. As the number of taua muru increased in response, the Governor ignored advice that Crown officials should respect tikanga and exacerbated tensions by advising settlers to leave the district and by making preparations for military action. In

December 1844, he advised rangatira that he would not return while taua muru were occurring and when he did, it might be with troops. In January, FitzRoy issued proclamations against taua muru without first seeking to understand the causes, demanded confiscation of land as a condition of peace for Kawau and Matakana muru, and ordered that Heke and others be arrested and tried under the colony's law. This marked a significant step away from the Crown's previous policy of tolerating Māori customary law and incorporating rangatira into the colony's legal framework, and it significantly heightened tensions and the potential for conflict.

Crown counsel argued that the Crown was entitled to prosecute 'crimes' in accordance with English law.[743] We do not agree. Te Raki rangatira who signed te Tiriti did not consent to colonial law applying to them. Nor had they offered any such agreement in the years since. As discussed in chapter 4, their consent for Maketū's trial was not a general precedent,[744] but a one-off decision reflecting settlers' right to utu. The Governor and other Crown officials knew that the relationship between tikanga and colonial law was far from settled in the north and required further negotiation, yet FitzRoy did not attempt to do this, nor even consult:

- By issuing warrants for the arrest of Heke and other rangatira in January 1845, and by condemning taua muru as lawless and rebellious despite the fact that the Governor had been instructed to provide legal recognition for Māori custom, and that the operation of taua muru had previously been tolerated, the Governor acted inconsistently with the Crown's duty to recognise and respect the tino rangatiratanga of Te Raki hapū, in breach of te mātāpono o te tino rangatiratanga. The Governor also breached te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect.
- By taking these actions without entering into dialogue with the rangatira concerned, the Crown acted inconsistently with its obligation of good faith conduct, and thus breached te mātāpono o te houruatanga/the principle of partnership.
- By requiring Te Parawhau to forfeit 1,000 acres of the Whāngārei headlands (known as Te Poupouwhenua) as payment for the January 1845 taua muru against the settlers Millon and Patten, the Governor acted inconsistently with the Crown's duty to recognise and respect tino rangatiratanga, in breach of te mātāpono o te tino rangatiratanga. He also breached te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect.
- By taking these actions when it was foreseeable that they would heighten tensions between the Crown and Te Raki Māori, and without first pursuing negotiation, the Crown breached te mātāpono o te houruatanga me te

743. Crown closing submissions (#3.3.403), pp72, 90.

744. The Crown submitted that Maketū's arrest was a precedent for general application of the colony's laws to Te Raki Māori: Crown closing submissions (#3.3.403), p72.

mātāpono o te matapopore moroki/the principles of partnership and active protection.

During January and February 1845, missionaries worked tirelessly (but with less than complete candour) on the Crown's behalf to resolve Ngāpuhi concerns about the treaty relationship. Henry Williams and others assured Māori that they retained their tino rangatiratanga, notwithstanding the Crown's unwillingness to engage on that point. Other than relying on the missionaries, the Governor made no attempt to de-escalate tensions, let alone engage with Heke and others. On the contrary, he made matters worse by rebuilding the flagstaff each time it came down (thereby signalling that the Crown would persist in its claim to have authority over Te Raki and its people), by repeatedly calling for troop reinforcements, by militarising Kororāreka and fortifying the flagstaff, and by threatening military action against Heke and his allies. We agree with the claimants that the Governor could have avoided conflict by desisting from any of these actions. Heke also escalated tensions by felling the flagstaff, but he did so to defend his treaty rights and challenge Crown encroachments against his mana, whereas the Crown escalated tensions in order to defend a sovereignty for which it had never won consent. Thus, we find that:

- By raising the flagstaff in January and February 1845, by fortifying the flagstaff and militarising Kororāreka when it knew these actions increased the risk of conflict, and by taking these actions without seeking opportunities for dialogue to resolve tensions, the Crown acted inconsistently with its obligation to act with the utmost good faith, in breach of te mātāpono o te houruatanga/the principle of partnership.

The Crown's approach sent a clear signal that the Crown did not share Heke's understanding of the treaty as a power-sharing arrangement, would persist in claiming sovereignty over Ngāpuhi hapū, and would use military force to defend that claim. We do not agree with the contention of some claimants that the Crown deliberately sought to start a war with Heke and Kawiti.[745] However, we consider that it did provoke them to a degree that made military conflict hard to avoid. Ultimately, Heke and Kawiti faced a difficult choice. Persisting in their symbolic defence of their treaty rights after the militarisation of Kororāreka would likely require force. But the other option was to desist from their defence of those rights, leaving the Crown to assert a sovereignty that it had not acquired by consent. The approach they took reflected the relevant tikanga. When the Crown kept rebuilding its pou, it signalled that it wanted to fight.

Heke and Kawiti planned their 11 March 1845 action meticulously, explaining in advance that their sole objective was the flagstaff, that they did not want to use force but would do so if resisted, and that they would not harm settlers.

745. Claimant closing submissions (#3.3.219), pp 34–35, 49–50; claimant closing submissions (#3.3.220), p 31; closing submissions for Wai 1477 (#3.3.338), pp 11–13, 43; submissions in reply for Wai 1477 (#3.3.547), pp 31–32; joint submissions in reply for Wai 1522 and Wai 1716 (#3.3.548), pp 31–32; draft closing submissions for Wai 1514 (#3.3.357), pp 52, 54; closing submissions for Wai 2059 (#3.3.296), p [27].

They even shared the exact timing of their action and the military strategy they would use. Violence erupted when the Crown's forces resisted their action but lasted only a short time before Ngāpuhi forces disengaged and withdrew into the hills. They remained there until Kororāreka was abandoned. During the afternoon of 11 March 1845, while Ngāpuhi were flying white flags and assisting settlers to recover their property, the HMS *Hazard* began to bombard the town. This action needlessly renewed hostilities after a period of ceasefire and endangered the lives of Māori, missionaries, and settlers alike. The destruction of Kororāreka by fire, though also needless, was seen by contemporary observers as an understandable response to the Crown's reckless act. We find therefore that:

- By shelling Kororāreka on 11 and 12 March 1845 in breach of a ceasefire and while Māori were in the town, the Crown committed a flagrant breach of its duty to actively protect the lives, interests, and tino rangatiratanga of Te Raki Māori. This action thus breached te mātāpono o te matapopore moroki/the principle of active protection, and te mātāpono o te tino rangatiratanga.

5.5 The Crown's Military Campaign: April 1845 to January 1846

5.5.1 Introduction

Heke's final attack on the flagstaff was the first in a series of violent encounters between Ngāpuhi and colonial troops. The Crown responded first with the bombardment of Kororāreka, which we have covered in the preceding sections. It then went ahead with a military invasion of the Bay of Islands, which we consider in the sections that follow.

In April 1845, the Governor ordered a naval blockade to be established in the Bay of Islands and proclaimed martial law.[746] When troop reinforcements arrived towards the end of the month, most were sent to the Bay of Islands under orders to attack all Ngāpuhi who had opposed the Crown's authority.[747] The Crown's military campaign then gathered pace, with a series of violent encounters between Ngāpuhi and colonial troops. We have identified the key events already in section 5.3.2, beginning with the destruction of Pōmare II's pā at Ōtuihu on 29 April 1845.[748] Attacks then followed against Heke, Kawiti, and their allies at Pukututū, Waikare, Ōhaeawai, Pākaraka, and Ruapekapeka over an eight-month period.[749] Each battle was punctuated by extended periods in which attempts were made, principally by Heke, to negotiate peace.[750] By the time the war had ended, Ngāpuhi

746. Johnson, 'The Northern War' (doc A5), pp 221–227.
747. Johnson, 'The Northern War' (doc A5), pp 220, 231.
748. Johnson, 'The Northern War' (doc A5), pp 232, 237–238.
749. Johnson, 'The Northern War' (doc A5), pp 252–253 (Pukututū), 267–270 (Waikare), 301–306 (Ōhaeawai), 311–312 (Pākaraka), 363–364, 367–371 (Ruapekapeka).
750. Ralph Johnson described Heke's efforts to secure peace: Johnson, 'The Northern War' (doc A5), pp 257–260, 271–273, 319–320, 323–325, 392–394.

casualties totalled at least 74 deaths and 90 or more wounded.[751] British casualties totalled 72 to 74 dead and at least 136 wounded.[752]

Claimants said the Crown initiated the war; was the aggressor in all of the major engagements;[753] ignored or rejected opportunities to secure peace;[754] used force in an inappropriate, indiscriminate, and punitive manner;[755] sought to divide Ngāpuhi;[756] and used war as a means of asserting sovereignty over Te Raki and other Māori.[757] The Crown conceded that it breached the treaty and its principles by making cession of land a condition of peace from July 1845, and by confiscating Pōmare II's land interests at Te Wahapū.[758] Otherwise, the Crown submitted that it had taken necessary military action to respond to Māori hostilities and suppress a rebellion,[759] and had acted reasonably throughout the war.[760]

In this section, we consider the following issue questions:

- Was the Crown justified in pursuing military action against Heke, Kawiti, and their allies?
- Were some Ngāpuhi 'rebels' and others 'loyal'?
- Was the Crown justified in destroying Ōtuihu and arresting Pōmare II?
- Did the Crown take advantage of divisions within Ngāpuhi to support its military objectives?
- Was the Crown's stance on 'neutral' rangatira and hapū reasonable?
- Did the Crown use inappropriate or excessive force?
- Did the Crown take all reasonable steps to restore peace?

5.5.2 The Tribunal's analysis

In this section we consider the Crown's decision to pursue military action against Heke, Kawiti, and their allies; and the Crown's conduct during the war. We ask whether the Crown sought to create or take advantage of divisions within Ngāpuhi in order to achieve its military objectives; whether its arrest and detention of Pōmare II was justified; whether its treatment of 'neutral' hapū was appropriate; whether it used inappropriate or excessive force; and whether it took opportunities to make peace, or alternatively continued the war after Heke and Kawiti had sought peace.

751. Johnson, 'The Northern War' (doc A5), p 413.

752. Johnson, 'The Northern War' (doc A5), pp 205–207, 252–253, 307–308, 380. The numbers for individual battles were Kororāreka: 13 dead, 7–23 wounded; Pukututu: 13–14 dead, 30–40 wounded; Ōhaeawai: 34 dead, 70 wounded; and Ruapekapeka: 12–13 dead, 29 wounded.

753. Claimant closing submissions (#3.3.219), pp 36–37, 80, 95–99, 145.

754. Claimant closing submissions (#3.3.219), pp 61, 66–68, 70–71, 128–130, 137, 139.

755. Claimant closing submissions (#3.3.219), pp 30–31, 36, 61, 63–71, 80, 145–148, 164–166.

756. Claimant closing submissions (#3.3.219), pp 29–30, 124–127, 145–146.

757. Claimant closing submissions (#3.3.219), pp 72–73, 181; see also Waihoroi Shortland (doc AA81), p 13.

758. Crown statement of position and concessions (#1.3.2), p 77.

759. Crown closing submissions (#3.3.403), pp 96–100, 104–105; Crown statement of position and concessions (#1.3.2), pp 77, 80.

760. Crown closing submissions (#3.3.403), pp 8–9, 104–105, 107–115, 129.

5.5.2.1 *Was the Crown justified in pursuing military action against Heke, Kawiti, and their allies?*

As discussed in section 5.2.1, the Crown can be justified in pursuing military action against its treaty partners only in very limited circumstances. In essence, that action must be necessary to protect lives, and then only if all other options for peaceful resolution have been exhausted.

5.5.2.1.1 FitzRoy's reasons for declaring war

On 26 April 1845, Governor FitzRoy formally ordered an invasion of the Bay of Islands and took the legal and practical steps he regarded as necessary to support this act. These included proclaiming martial law for an area of 60 miles around Kororāreka, imposing a naval blockade on the Bay of Islands, and issuing instructions to his officers. These proclamations and instructions set out FitzRoy's political objectives both explicitly and implicitly. His primary objective was to secure the Crown's sovereignty over the Bay of Islands and its people. He regarded Heke and Kawiti as rebels against that sovereignty, and war as a justified action to suppress that rebellion.[761] This was made clear in FitzRoy's declaration of martial law:

> Whereas certain disaffected Natives in the Northern District of the Colony have taken up Arms, and are now in Rebellion against the Queen's Sovereign authority, and for the suppression of such Rebellion active Military operations are about to be immediately undertaken by Her Majesty's Forces.[762]

He instructed his commanding officer, Lieutenant-Colonel Hulme, to travel to Kororāreka and hoist the British ensign 'with all due formality' while Royal Navy ships fired a 'Royal Salute'. By this means, he intended to assert the Crown's authority over Kororāreka and the Bay of Islands. Hulme was then instructed to march inland and carry out 'the signal chastisement of the rebels within your reach'.[763] While Heke and other leaders of the 'insurrection' were to be captured alive if possible, the general instruction was to 'spare no rebel in arms against lawful British Authority'.[764] In other words, those who challenged the Crown's authority would either be killed or forced into submission.

FitzRoy also required Ngāpuhi non-combatants to declare their loyalty to the Crown by gathering at mission stations, flying British ensigns at their own kāinga, or otherwise acting under the direction of Nene, Patuone, and other Hokianga rangatira. He warned that those who were not known to be loyal would be regarded as rebels and treated accordingly.[765] He furthermore hoped the capture and punishment of Heke and Kawiti would send a 'signal warning' to Māori in other parts of New Zealand that they could not defy the Crown's authority or

761. Johnson, 'The Northern War' (doc A5), pp 220–221, 224–227.
762. Proclamation, 26 April 1845 (cited in Johnson, 'The Northern War' (doc A5), p 224).
763. FitzRoy to Hulme, 26 April 1845 (Crown document bank (doc W48), p 247).
764. FitzRoy to Hulme, 26 April 1845 (Crown document bank (doc W48), p 252).
765. Crown document bank (doc W48), p 250; Johnson, 'The Northern War' (doc A5), pp 226–227.

injure its subjects with impunity.[766] He and other Crown officials feared a general Māori uprising and considered the future of the Crown's colonial Government was at stake.[767]

FitzRoy later moderated his stance on Ngāpuhi non-combatants, choosing to treat as rebels only those who were armed.[768] He otherwise remained consistent in his intention to suppress what he perceived as a rebellion and punish those he regarded as its instigators. FitzRoy and other Crown officials repeatedly labelled Heke, Kawiti, and their supporters as 'rebels' and acted on the basis that the war could be ended only by their submission or death.[769]

Throughout the conflict, FitzRoy, Grey, and Crown officials aimed for an overwhelming military victory, seeing this as necessary to establish the Crown's dominance and prevent any further challenge.[770] To this end, FitzRoy instructed that 'rebels' should not be spared. If possible, however, leading rangatira (whether engaged in open insurrection or in covert support) should be captured as hostages and ultimately transported; but they were not to be humiliated by being put in chains, if it could be avoided, and assured that their lives were safe.[771] He ordered the destruction of all pā and waka belonging to communities deemed to be in rebellion.[772] In October, he told Kawiti that the war would continue until he and Heke were either 'destroyed' or 'submitted to the Government'.[773] When Grey was sent to replace FitzRoy as Governor, he was instructed to use 'all powers . . . civil and military' to enforce subjection to the Crown's authority,[774] and he vowed to 'crush the rebels'.[775]

The Crown's determination to assert its authority over Heke and Kawiti was also reflected in its approach to peace. Throughout the conflict, neither FitzRoy nor Grey was prepared to take the initiative to secure peace, which they regarded would be a sign of submission on the Crown's part.[776] Nor were they prepared to negotiate the terms of peace,[777] since doing so would require them to treat Heke and Kawiti as formal equals.[778] Heke approached the Crown on several occasions offering peace, and the Crown either rejected these offers in favour of using force

766. FitzRoy to Hulme, 26 April 1845 (Crown document bank (doc w48), p 252).
767. Johnson, 'The Northern War' (doc A5), pp 166, 174, 212, 313. Also see Waitangi Tribunal, *The Orakei Report*, Wai 9 (Wellington: GP Publications, 1987), p 23.
768. Johnson, 'The Northern War' (doc A5), p 243.
769. For examples, see Johnson, 'The Northern War' (doc A5), pp 242, 276–277, 286, 292, 312–313.
770. Johnson, 'The Northern War' (doc A5), pp 244, 313–314, 333, 343–348, 350–351.
771. FitzRoy to Hulme, 26 April 1845. Crown document bank (doc w48), p 253; Johnson, 'The Northern War' (doc A5), p 292.
772. Johnson, 'The Northern War' (doc A5), p 244.
773. FitzRoy to Kawiti, 1 October 1845 (cited in Johnson, 'The Northern War' (doc A5), p 333).
774. Stanley to Grey, 13 June 1845 (cited in Johnson, 'The Northern War' (doc A5), pp 340–341).
775. Grey to Stanley, 29 December 1845 (cited in Johnson, 'The Northern War' (doc A5), p 363); Johnson, 'The Northern War' (doc A5), p 360.
776. Johnson, 'The Northern War' (doc A5), pp 320–321, 332–333, 350–352.
777. Johnson, 'The Northern War' (doc A5), pp 320–321, 350–352.
778. Johnson, 'The Northern War' (doc A5), p 350.

to assert its dominance,[779] or required forfeit of land, submission to the Crown's authority, and acknowledgement of the British flag as conditions of peace.[780]

If suppression of a rebellion was FitzRoy's principal reason for declaring war, his second reason was to avenge the plunder and destruction of Kororāreka. The loss of the town, one of only a few large Pākehā settlements in New Zealand, had caused major embarrassment to the Governor and his armed forces. The success of the Ngāpuhi campaign shattered the Governor's complacent assumptions about British military superiority, and highlighted the chasm between the Crown's claim of legal sovereignty and its ability to exert practical authority on the ground.[781] FitzRoy blamed Heke and Kawiti for the town's plunder and destruction,[782] and regarded it as further justification for his military campaign against them.[783] The Crown's military officers also gave the presence of plunder as reasons for destroying Ōtuihu and Waikare.[784]

As discussed in section 5.4.2, Kororāreka was destroyed only after the HMS *Hazard* violated a ceasefire by shelling the town, risking the lives of everyone in it. Māori retaliated – understandably, in the view of Henry Williams and other contemporary observers – by setting fire to most of the town's buildings. Heke denied responsibility for this action, but the Governor nonetheless blamed him and sought to punish him for the town's destruction.[785]

In summary, neither of the Crown's reasons for declaring war on Heke and Kawiti concerned protection of citizens against any clear or imminent threat. The Crown's principal reason was to shore up its own authority against Heke's challenge. Its second reason was a punitive one: it sought to punish Heke and Kawiti for the loss and destruction of Kororāreka many weeks earlier, notwithstanding the Crown's own responsibility for that event.

5.5.2.1.2 Was military force necessary to protect lives?

For many months prior to the fall of Kororāreka, Governor FitzRoy had been considering using force against Heke and his supporters. Having sent troops back to Sydney in September 1844, he called for reinforcements in October,[786] and again in January[787] and February. On the latter two occasions, he indicated he would use the troops against Heke when they arrived. These decisions were made in response to the second and third attacks on the flagstaff, before Kororāreka had fallen.[788]

Immediately after the town was destroyed, FitzRoy reiterated his policy: he would take no action while the colonial Government lacked military power but,

779. Johnson, 'The Northern War' (doc A5), p 287.
780. Johnson, 'The Northern War' (doc A5), pp 328–329.
781. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 355; Johnson, 'The Northern War' (doc A5), p 221; Crown document bank (doc W48), p 237.
782. Crown document bank (doc W48), p 237.
783. Johnson, 'The Northern War' (doc A5), pp 293, 313, 319–321, 332; see also pp 209, 211, 224, 410.
784. Johnson, 'The Northern War' (doc A5), pp 234, 238, 264.
785. Johnson, 'The Northern War' (doc A5), pp 293, 313, 319–321, 332; see also pp 209, 211, 224, 410.
786. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 346–347.
787. Johnson, 'The Northern War' (doc A5), p 165.
788. Crown document bank (doc W48), p 217.

when soldiers and ships arrived, he would be 'firm and uncompromising'.[789] He was true to his word. On 22 April, when the 58th Regiment arrived from Britain, he immediately ordered a punitive attack on the Bay of Islands. By this time, six weeks had passed since Kororāreka had fallen. None of the 'rebel' leaders had since attempted to attack any Pākehā settlement; indeed, Heke was defending himself against a series of raids by Nene's forces.[790] The Governor made no attempt to communicate with Heke, Kawiti, and their allies before launching military action. Nor is there any record of his considering any alternative course.[791]

The Crown was the aggressor in all the battles of the Northern War, beginning with its attack on Ōtuihu, the pā of the neutral rangatira Pōmare II, which we consider in depth in later. The same pattern continued throughout the war: Heke, Kawiti, Hikitene, and their allies engaged with the Crown's forces only in a defensive capacity.[792] They were not prepared to surrender land or authority to the Crown, but nor did they initiate any military action against it after the fourth and final attack on the flagstaff. Before one engagement with the Crown, Heke told the missionary Robert Burrows that he would not be the aggressor at any point during the war. He would defend his people and lands, but he would never fire the first shot; a commitment he kept.[793]

Heke and Kawiti sought to minimise military engagement. They adopted an approach known as 'he riri awatea' (fighting in broad daylight) under which they made no attempts to ambush or attack colonial forces, or even to disrupt their supply lines.[794] In battle after battle, Heke, Kawiti, Te Hira Pure, and other leaders allowed the Crown's forces to march inland, set up their positions, and begin firing on their pā; only then did they return fire.[795] This approach came at significant military cost to Heke and Kawiti – colonial officers and soldiers acknowledged that any ambush during the long approaches to Te Kahika, Ōhaeawai, and Ruapekapeka would likely have inflicted significant damage on their campaign.[796] Colonial officers could scarcely believe Heke's 'chivalry', regarding it as either naive or extraordinarily honourable.[797] Even when colonial forces retreated to Waimate after their terrible defeat at Ōhaeawai in early July, Heke and Kawiti left them alone, allowing them to regroup and wait for reinforcements.[798]

789. 'Legislative Council', *Daily Southern Cross*, 22 March 1845, p 3.
790. Johnson, 'The Northern War' (doc A5), pp 211–212, 217–218, 220.
791. Johnson, 'The Northern War' (doc A5), pp 211–212, 220.
792. Johnson, 'The Northern War' (doc A5), pp 232–233, 235–240.
793. Burrows, Extracts, p 17 (doc W48(a)), p 17; Johnson, 'The Northern War' (doc A5), p 249. After the battle at Te Kahika, Heke also told Burrows that it was for the Governor to decide whether the fighting would continue or not. Heke would 'not seek for further hostilities, but wait for the soldiers to come to him if the Governor wanted more fighting': Burrows, Extracts, p 32 (doc W48(a)); Johnson, 'The Northern War' (doc A5), p 260.
794. Johnson, 'The Northern War' (doc A5), pp 295–296. James Belich also referred to Heke and Nene taking this approach during their battles: Belich, *The New Zealand Wars*, p 35.
795. Johnson, 'The Northern War' (doc A5), p 298.
796. Johnson, 'The Northern War' (doc A5), pp 247–248, 295–297, 360–361.
797. Johnson, 'The Northern War' (doc A5), pp 295–296.
798. Johnson, 'The Northern War' (doc A5), pp 317–318.

Heke and Kawiti also consistently attempted to shield non-combatants (Māori and Pākehā) from the effects of conflict. They deliberately built defensive pā away from hapū settlements and cultivations, so that non-combatants would not be directly affected by the fighting.[799] Historian James Belich, in *The New Zealand Wars*, observed that Heke and Kawiti effectively developed a new form of pā, built 'deep in the interior, approachable only by difficult bush tracks', and designed to withstand heavy bombardment but essentially 'valueless' in terms of territorial defence; this meant they could be abandoned as soon as they were breached. By constructing pā in this manner, Heke and Kawiti maximised the cost and difficulty of attack while minimising the risk of casualties.[800]

Before hostilities began, Heke wrote to his supporters with 'he ture' (a law), instructing them to fight no one but soldiers. The soldiers were 'hoa wawai' (enemies) to Ngāpuhi mana, whereas all other Pākehā were 'o tatou hoa aroha' ('our loving friends') and were therefore to be respected. In case this was not sufficiently clear, Heke added that no settlers' houses were to be burned.[801] He honoured this commitment throughout the war as well, and at times acted against his own military interests to do so. For example, he left a bridge standing over the Waitangi River, despite its strategic important to colonial troops as a transport and supply route, because its destruction would also harm the Waimate mission and other inland settlements.[802]

While acting only in a defensive manner, Heke and Kawiti also frequently sought opportunities to enter dialogue with the Governor and restore peace. After each of the main battles, one or both sent messages to the Governor to seek an end to hostilities. They imposed no conditions, except that they be left to live in peace within their own territories.[803] Successive Governors either did not respond to these overtures,[804] or demanded that Heke and Kawiti forfeit land and submit to the Crown's authority as conditions of peace.[805]

799. Johnson, 'The Northern War' (doc A5), pp 299–300.
800. Belich, *The New Zealand Wars*, pp 63–64.
801. Heke to chiefs, no date (cited in Johnson, 'The Northern War' (doc A5), pp 219–220).
802. Johnson, 'The Northern War' (doc A5), pp 295, 318; Burrows, *Extracts*, p 24 (doc W48(a)).
803. Johnson, 'The Northern War' (doc A5), pp 257–258, 271–272, 309, 319–320, 323–325, 330–331, 392–393.
804. Johnson, 'The Northern War' (doc A5), pp 260, 272–274. According to Mr Johnson, Heke also provided 'formal peace terms' alongside this letter, and the Crown later claimed to have located written peace terms in the abandoned pā at Ōhaeawai. However, historians have never located a copy of any such document, and nothing in Heke's letters suggests that he imposed any terms other than a cessation of hostilities. Burrows' account suggests that Williams proposed terms which Heke rejected, and Williams then took it upon himself to convey those terms to the Governor. Other than peace terms later proposed by the Governor, the only other document setting out peace terms was the trader James Clendon's journal. Those terms closely resemble the terms later proposed by FitzRoy, including proposals for land forfeiture which would have been unpalatable to Heke. They are more likely to have come from missionaries or officials than from Heke: Johnson, 'The Northern War' (doc A5), pp 271–277; Burrows, *Extracts*, p 32 (doc W48(a)).
805. Johnson, 'The Northern War' (doc A5), pp 293–294, 320–322, 332–333.

On two occasions, the Crown renewed hostilities after periods of peace. There was a five-week break between the attacks on Waikare and Ōhaeawai.[806] During that time, the Crown's troops spent time in Auckland recuperating, leaving Nene and Taonui to invade Heke's territories. It is not clear what threat Heke or Kawiti could have posed to the Crown or settlers during this period.[807] Heke presented a peace offer, but the Government ignored it and resolved to attack again,[808] seeking the 'capture or destruction' of Heke, Kawiti, and other 'rebel' leaders.[809]

A five-month hiatus followed the Crown's defeat at Ōhaeawai. During this time, the Government sought reinforcements,[810] and also responded to Heke's renewed offers of peace by again representing the flag as fully guaranteeing the freedom and privileges of all men who lived under it. The treaty, he assured Heke bound the Crown 'equally with yourself'. However, he continued to insist that Heke atone for his actions.[811] The colonial troops remained at Waimate from July to mid-September, during which period neither Heke nor Kawiti had shown any sign of aggression.[812] They instead spent their time preparing cultivations to replace the food they had lost during the conflict. Governor Grey claimed that Heke and Kawiti intended to attack the colonial forces as soon as their potatoes were harvested, and therefore ordered a renewal of hostilities in early December. He did not explain to the Colonial Office why Heke and Kawiti should attack at that point, when they had not initiated any previous battle other than the 11 March attack on the flagstaff.[813]

We have seen no persuasive evidence that Heke, Kawiti, or their allies presented any threat to civilian lives at any time after 11 March 1845. On the contrary, the Crown was the aggressor throughout the war; it initiated all the major battles, and sometimes renewed hostilities after lengthy periods of peace. Heke and Kawiti fought only in a defensive manner, went to considerable lengths to protect civilians (Māori and Pākehā) from harm, and repeatedly sought peace.

5.5.2.2 *Were some Ngāpuhi 'rebels' and others 'loyal'?*

The Crown governed from 1840 in accordance with the assumption that it possessed legal sovereignty over all New Zealand lands and people. Acknowledging its inability to exercise practical authority over all territories, it initially adopted a general policy of tolerance over the continued exercise of Māori political authority and customary law, seeing this as a first step towards gradual assimilation of Māori into the colony's political and legal systems. As we have seen, tensions arose whenever the Crown attempted to convert its notional sovereignty into on-the-ground authority, this being contrary to Māori understanding of te Tiriti. Thus, at the

806. Johnson, 'The Northern War' (doc A5), pp 267, 304.
807. Johnson, 'The Northern War' (doc A5), pp 271–272, 283–284.
808. Johnson, 'The Northern War' (doc A5), pp 271–273, 286–288.
809. FitzRoy to Despard, 6 June 1845 (cited in Johnson, 'The Northern War' (doc A5), p 292).
810. Johnson, 'The Northern War' (doc A5), p 313.
811. Johnson, 'The Northern War' (doc A5), pp 319–320.
812. Johnson, 'The Northern War' (doc A5), pp 317–318.
813. Johnson, 'The Northern War' (doc A5), p 349.

beginning of 1845, the dominant civil authority in Te Raki continued to be the tino rangatiratanga of hapū, despite some encroachments by the Crown. Even in Kororāreka and in respect of Bay of Islands trade, the Crown exercised authority only to the extent that rangatira acquiesced for the purpose of sustaining the treaty relationship, as events in the build-up to the war demonstrated.

Notwithstanding these limitations on the Crown's power (both in treaty and practical terms), when conflict erupted, the Governor viewed it through the lens of colonial law. He regarded Nene and his allies as 'loyal' to the Crown's authority, and Heke, Kawiti, and their allies as 'rebels' against that authority.[814] Claimants told us that both labels were unfair and had created stigma that had been handed down through generations. In their view, both sides fought in defence of their mana, and in defence of their understanding of the treaty relationship.[815] In this section, we consider what the various parties were in fact fighting for, and the extent to which these engagements amounted to defence or rebellion against established authority.

5.5.2.2.1 Why Heke, Kawiti, and their allies fought

As discussed throughout this chapter, Heke felled the Maiki Hill flagstaff on four occasions so as to challenge the Crown's understanding of the treaty. He saw te Tiriti as part of a continuum in the Crown–Ngāpuhi relationship, in which King George IV and his successors had demonstrated their respect for Māori independent authority, and had taken steps to affirm and support that authority by sending Māori a flag and sending officials to mediate in Māori–settler disputes.[816] As discussed in our stage 1 report, during the treaty debate in 1840, though Heke had expressed doubt about whether the Governor would 'raise up' or 'bring down' the Māori people, he nonetheless wanted protection from 'French people' and 'rum-sellers', and made it clear that he was signing te Tiriti for that reason.[817] Heke, like other signatories, signed te Tiriti in the expectation that the Governor would control settlers and protect Māori from foreign threat.[818] In Heke's view, the Crown had misled rangatira into signing te Tiriti by concealing its intention to assert sovereignty over Māori people and territories, and in particular to assert authority over land. In symbolic terms, this deception was reflected in Hobson's failure to explain that the British ensign would replace the flag of the United Tribes.[819] Heke therefore saw the ensign as a symbol of the Crown's illegitimate claims. By cutting down the flagstaff, he sought to highlight Crown actions that impinged on Māori

814. Johnson, 'The Northern War' (doc A5), p 224.
815. Claimant closing submissions (#3.3.219), pp 123, 147, 152; closing submissions for Wai 2059 (#3.3.296), p 28.
816. Shortland, *Traditions and Superstitions*, pp 264–265; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 315; see also Crown document bank (doc W48), pp 346–347.
817. William Colenso, *The Authentic and Genuine History of the Signing of the Treaty of Waitangi, New Zealand, 5 and 6 February 1840* (Wellington: Government Printer, 1890), p 25; Waitangi Tribunal, *He Whakaputanga me te Tiriti*, pp 363–364.
818. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 363, 524–525; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 292.
819. Crown document bank (doc W48), pp 346–347.

authority, and to challenge the Crown to acknowledge the mana and tino rangatiratanga of Māori.[820]

Heke's views remained consistent throughout the war and in the years that followed. he told the Governor in May 1845 that he had felled the flag because it was a symbol of the Crown's claim to possession or conquest of Te Raki territories.[821] In August 1845, he told the missionary Robert Burrows that the treaty was 'in itself good', but there was 'something intended . . . which it did not express'.[822] On more than one occasion he referred to the treaty as 'soap'.[823] In December 1845, under threat of renewed hostilities, he clearly asserted his right to independence and the Crown's obligation to support that independence, telling Governor Grey that God had made New Zealand for Māori, 'and not for any stranger or foreign nation to touch.'[824]

Heke wrote to Queen Victoria in 1849 explaining that rangatira had signed te Tiriti without understanding the authority that Governors would exercise, and had therefore consented 'in our folly'. He considered the Crown 'very bad' for concealing its true intentions and likened it to a house with so many rooms that it could never be searched to completion – it contained a room of peace as well as others that symbolised death and judgment.[825]

Hobson's deception 'was the cause of my error, for I was the person that consented that both [the British Resident] Mr Busby and the first governor should live on shore, thinking that they would act rightly'. Heke said that, after rangatira had signed te Tiriti, a succession of governors had arrived, each with their own policy. Heke had sought dialogue with FitzRoy 'in order that we might talk on the subject of the flag-staff' (and, by extension, the relationship between Crown and Māori authority). But the Governor did not come, and instead re-erected the flagstaff with iron bars around it, asserting the Crown's claim. FitzRoy's 'obstinacy' was the cause of war, in Heke's view.[826]

Heke referred to Hongi Hika's conversation of 1820 with King George IV, during which the King had promised never to take possession of New Zealand. Having deceived Māori over its intentions, the Crown had then sent FitzRoy and Grey ('a fighting Governor') to assert the Crown's authority. The Queen had sent these men, and it was therefore the Queen's responsibility to remedy their errors:

> Don't suppose that the fault was mine, for it was not, which is my reason for saying that it rests with you to restore the flag of my island of New Zealand, and the authority of the land of the people. Should you do this, I will then for the first time perceive that you have some love for New Zealand and for what King George said, for although he

820. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 349; Johnson, 'The Northern War' (doc A5), p 182; doc W48(a), pp 8–9.
821. Johnson, supporting papers (doc A5(a)), vol 1, pp 235–236.
822. Burrows, diary, p 7 (cited in Johnson, 'The Northern War' (doc A5), pp 321–322).
823. Burrows, diary, p 7 (cited in Johnson, 'The Northern War' (doc A5), pp 321–322).
824. Heke to Grey, 2 December 1845 (citred in Johnson, 'The Northern War' (doc A5), pp 402–403).
825. Heke to Queen Victoria, 10 July 1849 (cited in Crown document bank (doc W48), pp 346–347).
826. Heke to Queen Victoria, 10 July 1849 (Crown document bank (doc W48), pp 346–347).

and Hongi are dead, still the conversation lives; and it is for you to favour and make much of it, for the sake of peace, love, and quietness.[827]

Heke argued that it was also for the Queen to prevent 'troublesome' people from migrating to New Zealand, including French, Americans, and Governors who attempted to rule over Māori. Heke wanted only '[t]he missionaries, the gentlemen, and the common people' who would live in peace with Māori:

> But I say to you, that although they are living on this island and I also, still the management of my island remains with me, and although they have obtained possession of part of it, still the adjustment of the pieces which they have acquired remains with me; also, for God apportioned the land to this nation and to that, for the power of God is very good for New Zealand.[828]

Among those who fought against the Crown, Heke was by far the most prolific at committing his thoughts to paper – but he was not the only one. As already discussed, Te Hira Pure also wrote to the Governor on two occasions to demand that he restore the flag of the United Tribes or approve a replacement, and to seek dialogue about the treaty relationship. Like Heke, Pure saw the British ensign as a symbol of the Crown's claim to mana over Te Raki territories.[829]

Kawiti understood himself as defending Māori lands and authority from Crown encroachment, and as responding to the Crown's deception at Waitangi.[830] As the war was coming to an end, Kawiti famously advised his people 'kia kakati te namu i te wharangi o te pukapuka, hei kona ka tahuri atu ai' ('wait until the sandfly nips the pages of the book, [o]nly then will you stand to challenge what has happened'). The 'pukapuka' was te Tiriti. Kawiti's statement meant that a long time would pass, but his people would one day stand up once more for te Tiriti's true meaning. He no longer wished to fight, but nonetheless his commitment to tino rangatiratanga endured in the face of the Crown's forceful challenge.[831]

Others who fought alongside Heke and Kawiti did not leave written statements about their reasons for challenging the Crown though we note the words printed onto the ensign that Busby had gifted to Pūmuka: 'Tiriti Waitangi.'[832] Kōrero about their motivations have been handed down through the generations. In 1882, the Kaikohe rangatira Hirini Taiwhanga and several other leading rangatira petitioned Queen Victoria seeking recognition of Māori rights under the treaty. In that petition, the rangatira said that Ngāpuhi had chosen England over other countries to

827. Heke to Queen Victoria, 10 July 1849 (Crown document bank (doc w48), pp 346–347).
828. Heke to Queen Victoria, 10 July 1849 (Crown document bank (doc w48), pp 346–347).
829. Johnson, 'The Northern War' (doc a5), pp 108, 132.
830. Phillipson, answers to questions of clarification (doc a1(e)), p 9; Johnson, 'The Northern War' (doc a5), p 182.
831. Raumoa Kawiti provided this saying to Mr Johnson: Johnson, 'The Northern War' (doc a5), p 391. The Kawiti whānau and Rima Edwards provided the translation (alternative translations were provided for the third line).
832. Phillip Bristow (doc m16), pp 14, 30.

be their protector. Heke had then cut down the flagstaff in protest against 'land sales and the withholding of the anchorage money at Bay of Islands . . . contrary to the second article of the Treaty of Waitangi'.[833] Heke's action was partly due to misunderstanding, because he 'imagined that the flag was a symbol of land confiscation'. Nonetheless, 'there was no blood in the flagstaff' that would justify the Governor raising an army to fight Heke. If the Governor had entered dialogue with Heke, there would have been no war; but instead, 'the Europeans flew as birds to make war against Heke, which brought about the blood-shedding of both Europeans and Maoris'.[834]

In 1897, Heke's great-nephew Hōne Heke Ngāpua told Parliament that the war had occurred not because Māori wanted to fight Europeans but because of the Crown's departure from the treaty (see also chapter 11):

> The fact is that the feeling of disloyalty amongst the Natives who opposed Her Majesty's troops in the early days was on account of the departure from a contract made between Her Majesty's representative and the Native Chiefs of New Zealand, in 1840. The contract of which I speak was the Treaty of Waitangi, by which the minds of the Natives of that time and of to-day were impressed with the feeling that that contract must be held sacred. It was broken, and that was the cause of the wars.

Heke and his allies

> recognised that some of the articles of the treaty had been broken by the rulers in New Zealand representing the British Crown. They recognised that they had the right to protest that; and it was through that treaty being broken, and through the misunderstanding by the Europeans of the Native mind in the early days of the colony, that all these troubles Her Majesty's subjects in New Zealand, were brought about. The expense was about six millions, I believe. The whole cause of these wars, then, as I say, was that the English authorities misunderstood the Native mind.[835]

In this inquiry, Te Kapotai hapū told us that their tūpuna joined with Heke and Kawiti 'to ensure that their rangatiratanga over Te Kapotai remained, and that te mana o te Tiriti was respected';[836] and that they 'had no option but to fight against the Crown in the Northern War because the Crown was taking our lands and our rangatiratanga'.[837] Emma Gibbs-Smith said that Te Haratua, Marupō, and their kin fought to defend themselves against the 'attack on our mana' represented by the Crown's assertion of authority in Te Raki. In accordance with te Tiriti, they sought

833. 'Petition from Maoris to the Queen', AJHR, 1883, A-6, p 3. As noted in chapter 4, a marginal note in the petition said that Captain Hobson, at Waitangi, had promised that Heke would continue to receive the anchorage money after 1840. According to the note, the Crown honoured this promise for two years, and then insisted that ships instead pay fees to the customs house.
834. 'Petition from Maoris to the Queen', AJHR, 1883, A-6, p 1.
835. Hone Heke, NZPD, 1897, vol 97, pp 55–56.
836. Te Kapotai claimants, 'Te Kapotai Hapu Korero: Mana, Rangatiratanga' (doc F25), p 41.
837. Te Kapotai claimants, 'Te Kapotai Hapu Korero: Mana, Rangatiratanga' (doc F25), p 58.

a partnership of equals with the Crown.[838] Hone Pikari of Te Uri o Hua told us that Heke fought 'because the Crown refused to accept that our people were its equals'. Pure had tried to resolve his issues with the Crown through diplomacy, 'but faced with a kawanatanga that refused to meet to discuss the issues man to man – a kawanatanga that continued to act as if it had extinguished our sovereignty – Te Hira Pure had no other choice but to fight to assert his sovereignty'.[839] For Phillip Charles Bristow of Ngāti Manu and Te Roroa, Pūmuka's flag was a reminder to 'perservere for te Tiriti o Waitangi and the sovereignty of our people'.[840]

Historians in recent times have typically expressed similar views. James Belich, in *The New Zealand Wars*, wrote that Heke fought not to overturn the treaty but 'to ensure the application of the Maori version'.[841] Ralph Johnson, in his evidence about the Northern War, observed that Heke and Kawiti were declared rebels 'for the fact that they sought to oppose the sovereign authority of the Queen', even though they had never consented to that authority being exercised over them. This, in Mr Johnson's view, reflected the 'awful logic' of the Crown's assumption of sovereignty.[842] Dr Phillipson told us that the concept of rebellion 'was a hard one to make stick in 1840s New Zealand' where the Crown's authority was 'so new and untried, and Maori consent to the cession of kawanatanga so limited and conditional'.[843]

Heke, Kawiti, and others who fought against the Crown were not rebels against the Crown's sovereignty, for the simple reason that they had never consented to that sovereignty applying to them or their communities. Nor was the Crown's authority established in practical terms. On the contrary, the mana and tino rangatiratanga of Te Raki hapū was the established authority within their territories. So far as Te Raki rangatira were concerned, the Crown had affirmed that mana and tino rangatiratanga in its various dealings with Te Raki leaders between 1820 and 1840, and again in the discussions at Waitangi in 1840 and in the text of te Tiriti. To them, the concept of rebellion would have made no sense. As they saw it, the Crown had been challenging that agreement and asserting its authority far beyond what had been agreed in 1840. To borrow from *The Taranaki Report: Kaupapa Tuatahi* (1996), 'The Governor was in rebellion against the authority of the Treaty and the Queen's word that it contained.'[844] Far from rebelling, Heke and his allies were reminding the Governor of the limits of his power.

838. Emma Gibbs-Smith (doc w32), pp 24–25.
839. Hone Pikari (doc w11), pp 10, 11–12.
840. Phillip Bristow (doc m16), p 16.
841. Belich, The New Zealand Wars, p 34.
842. Johnson, 'The Northern War' (doc a5), pp 225–226. Mr Johnson acknowledged that historians in the nineteenth and early twentieth centuries had regarded Heke as being in rebellion, a reflection of their 'underlying assumption that there was a single form of government in operation at the time' against which Heke could rebel, and of their lack of understanding of the treaty, with its provision for dual Māori and Crown authority: Johnson, 'The Northern War' (doc a5), pp 25–26.
843. Phillipson, 'Bay of Islands Maori and the Crown' (doc a1), p 360.
844. Waitangi Tribunal, *The Taranaki Report*, Wai 143, p 9.

5.5.2.2.2 Why Patuone, Nene, and their allies fought

Before the Crown's attack on Pōmare II's pā at Ōtuihu, Heke had already clashed with Tāmati Waka Nene and a Hokianga coalition in a series of skirmishes near Ōmāpere. Settler witnesses described these as 'staged fights' between close kin in which warriors from both sides fired off large numbers of rounds while causing very few casualties. During these early clashes, Rewa of Kororāreka fought on the side of Heke. Alongside Nene's Ngāti Hao people were Te Pōpoto under Makoare Te Taonui, and Te Māhurehure under Mohi Tāwhai and Arama Karaka Pī.[845] These were closely related hapū who all occupied contiguous inner Hokianga territories to the west of Heke's Kaikohe homelands (see chapter 3). When the Crown's troops arrived in the Bay of Islands, this coalition did not fight alongside them;[846] rather, they continued to wage a parallel campaign to keep pressure on Heke while colonial troops went after Kawiti and others. Nene then advised colonial officers of the best time to attack Heke and offered valuable military advice and logistical support, such as guiding, feeding, and lodging the troops.[847]

In early June 1845, Nene, Taonui, Tāwhai, and Pī began a strategic advance towards Taiāmai and Ōmāpere.[848] When Taonui captured Heke's unguarded pā at Te Ahuahu, a fierce battle ensued with many hundreds of warriors involved. Heke and Te Haratua both received serious wounds. In all, 12 were killed – seven of Heke's men and five from Hokianga.[849] Nene then encouraged colonial officers to conduct an immediate attack on the wounded Heke and his people at Ōhaeawai.[850] Nene offered to fight alongside colonial troops but was refused.[851] Thereafter, his warriors guided colonial troops to Ōhaeawai,[852] but they remained aloof from fighting there aside from two minor skirmishes with Heke's people.[853] Later, during the battle of Ruapekapeka in January 1846, Nene's warriors clashed with those of Kawiti and were the first to enter the pā before it was captured, though they did not stay to fight alongside the Crown's troops.[854]

Throughout the war, this Hokianga coalition of Ngāti Hao, Te Pōpoto, and Te Māhurehure were Heke's main Ngāpuhi antagonists,[855] though other hapū sometimes joined the conflict. When British forces attacked Te Kapotai at Waikare in May 1845, Rewa's Te Patukeha and Ngāi Tāwake hapū joined in the attack, as did Te Hikutū under Hauraki and Te Māhurehure under Mohi Tāwhai and Repa. Nene seems to have been absent on this occasion.[856] After colonial troops had

845. Johnson, 'The Northern War' (doc A5), pp 227–230; Belich, *The New Zealand Wars*, p 35.
846. Johnson, 'The Northern War' (doc A5), pp 248–252, 262.
847. Johnson, 'The Northern War' (doc A5), pp 230–231, 244, 247–248, 262.
848. Johnson, 'The Northern War' (doc A5), pp 287–289.
849. Johnson, 'The Northern War' (doc A5), pp 289–291.
850. Johnson, 'The Northern War' (doc A5), pp 290, 294–295.
851. Johnson, 'The Northern War' (doc A5), pp 297–298.
852. Johnson, 'The Northern War' (doc A5), p 301.
853. Johnson, 'The Northern War' (doc A5), pp 298, 310.
854. Johnson, 'The Northern War' (doc A5), pp 366, 374.
855. Johnson, 'The Northern War' (doc A5), p 213; for accounts of their involvement in the main battles, see pp 248–252, 265–266, 301–302, 311–314, 363, 366–368, 370–371.
856. Johnson, 'The Northern War' (doc A5), pp 265–266.

departed, Repa and Rewa attacked Te Kapotai again, on 26 May.[857] Other rangatira to oppose Heke and Kawiti included Tamati Pukututu of Te Uri o Ngongo and Te Uri o Hawato, Rangatira of Ngāti Korokoro, Paratene Te Kekeao of Ngāti Matakire, and Wiremu Hau of Ngāti Te Whiu.[858] Panakareao of Te Rarawa joined the January 1846 battle against Kawiti and his allies at Ruapekapeka.[859]

Several reasons have been advanced for Tāmati Waka Nene and his allies fighting against Heke, some concerning Ngāpuhi relationships with the Crown and settlers, and others pertaining to more traditional objectives. The most direct cause of Nene's involvement in the war arises from the promises he made in September 1844 to keep Heke under control. As discussed earlier, Nene made this commitment in response to FitzRoy's planned invasion, which threatened to embroil all of Ngāpuhi in war against the Crown. He was determined to keep British soldiers out of Ngāpuhi territories and in pursuit of that goal, gambled on his ability to keep his younger relative in line. Having made this commitment, Nene was bound as a matter of mana to keep it.[860]

During the last few months of 1844, Nene made efforts to dissuade Heke from openly challenging the Crown's authority; and in early March 1845, he and others threatened to use force if Heke attacked the flagstaff again. According to Phillipson, Nene had considered initiating forceful action to prevent Heke's final attack on the flagstaff but was reluctant to fight his own kin on the Crown's behalf, and was also dissuaded by Hokianga missionaries (and possibly by FitzRoy himself), who feared that any action might begin a long and difficult inter-hapū conflict.[861] Following the destruction of Kororāreka, Nene changed his mind. Heke's actions meant the Crown would soon return with a larger force, potentially jeopardising trading relationships and (ultimately) chiefly authority, should Ngāpuhi forces lose any subsequent war. Nene therefore told Māori and Crown officials that he would fight against Heke in a limited manner, sufficient to occupy him until colonial troops arrived. When they did, Nene would leave Heke to the British.[862] Subsequently, during the war, Nene, Tāwhai, Taonui, and Pī provided the Crown with logistical support, and very occasional and limited military assistance alongside (but never under the command of) British forces.[863]

The Crown regarded them as 'friendly' or 'loyal' to the Crown,[864] but these labels masked the sometimes-complex motivations of Nene and his allies. As we

857. Johnson, 'The Northern War' (doc A5), p 271.

858. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 358; Henare, Petrie, and Puckey, 'Oral and Traditional History Report on Te Waimate Taiamai Alliance' (doc E67), pp 232, 265.

859. Johnson, 'The Northern War' (doc A5), pp 355–357.

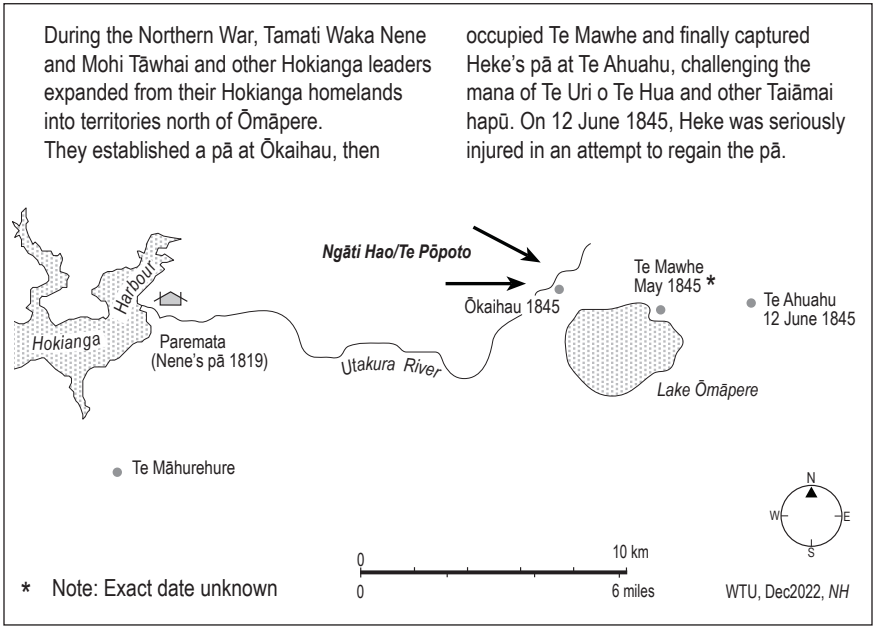
860. Murray Painting (doc V12), pp 25–26.

861. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 347; see also Belich, *The New Zealand Wars*, pp 34–35.

862. Johnson, supporting papers (doc A5(a)), vol 4, pp 833–834; Johnson, 'The Northern War' (doc A5), p 230.

863. For accounts of their roles in the main battles, see Johnson, 'The Northern War' (doc A5), pp 248–252, 265–266, 301–302, 311–314, 363, 366–368, 370–371.

864. Johnson, 'The Northern War' (doc A5), pp 224, 353–354. The Crown continued to use this terminology in its closing submissions: Crown closing submissions (#3.3.403), pp 37, 103, 121.



Map 5.8: Nene's expansion into Taiamai.

have mentioned previously, Nene shared many of Heke's concerns about Crown encroachments on Ngāpuhi authority. In chapter 4 we discussed his resistance to Crown interference in the kauri trade (see section 4.4.2).[865] On several occasions in 1844, he expressed his displeasure at Crown actions that impinged on Māori authority, including Britain's replacement of the flag of the United Tribes with its ensign.[866] In late January 1844, Nene and his allies were scarcely less angry than Heke about the Crown's pretensions of authority over Ngāpuhi.[867]

Historians appearing before our inquiry agreed that Nene, Taonui, Tāwhai, Pī, and their allies were not fighting for the Crown's sovereignty. Mr Johnson argued that 'it is incorrect to refer to them as "loyalists" to the Crown, as some government officials labelled them at the time'.[868] Mr Johnson told us that Nene was as concerned as Heke about safeguarding Ngāpuhi authority and 'the sanctity of Te Tiriti'.[869] According to Dr Phillipson, 'Those who ended up supporting or opposing the Government, and those who remained neutral, all wanted to ensure the continued independent authority of rangatira over their communities.'[870] Doctors

865. Johnson, 'The Northern War' (doc A5), p 64.
866. Johnson, 'The Northern War' (doc A5), pp 103, 107–108; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 331.
867. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 349.
868. Johnson, 'The Northern War' (doc A5), p 213.
869. Johnson, 'The Northern War' (doc A5), pp 408–409.
870. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 325.

Manuka Henare, Hazel Petrie, and Adrienne Puckey in their traditional history of Ngāpuhi, wrote that '[b]oth Māori factions . . . resented state interference'.[871] Dr O'Malley concluded that Heke and Nene both fought to uphold their mana:

> [W]hereas Nene and the other so-called 'friendly' chiefs were reassured by Crown promises that their mana would be recognised and their ability to govern the internal affairs of their people left untouched, Heke and his followers remained unconvinced.[872]

James Belich argued similarly, that Heke and Nene shared objectives but differed over tactics. Both sought to maximise the benefits of contact with settlers while minimising any threat to Māori authority, and both had seen the treaty as a means to those ends. But, whereas Heke vigorously and directly defended Māori law and authority, Nene and his allies believed that peaceful alliance with Britain was a more effective means of protecting chiefly authority and advancing trade.[873] Historians in this inquiry expressed similar views.[874] Mr Johnson referred to a famous utterance by Taonui to Heke during the conflict:

> E whakaae ana ahau i takahia to tatou tapu e te Pakeha, Engari kaua e patua te pakeha. Me korero e tatou, kia puta.
>
> I agree that the Pakeha has trampled on the treaty however do not kill the Pakeha. Let us dialogue as a way out.[875]

The Whangaroa claimant and kaumātua Nuki Aldridge told us that Nene's stance in the war had been misunderstood. He said that Nene was a staunch protector of Ngāpuhi independence who had participated in Te Whakaminenga (a formal assembly of rangatira from autonomous hapū that gathered to deliberate and act in concert[876]) from early in the nineteenth century and was later instrumental in extending Te Whakaminenga into Auckland to oversee the settler Parliament.[877] Mr Aldridge noted:

> We're told now though that Waka Nene and other Hokianga rangatira were supporters of the British and the Crown. I question that historical finding. Participation

871. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 468.
872. O'Malley, 'Northland Crown Purchases' (doc A6), p 82.
873. Belich, *The New Zealand Wars*, pp 30, 33–34.
874. O'Malley, 'Northland Crown Purchases' (doc A6), p 82; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 466–468; Johnson, 'The Northern War' (doc A5), pp 213–214, 467–468.
875. The tohunga Rima Edwards provided the whakataukī and translation to Mr Johnson: Edwards to Johnson, personal correspondence, 9 June 2006 (Johnson, 'The Northern War' (doc A5), p 214); see also pp 408–409.
876. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 179.
877. Nuki Aldridge (doc AA167), p 40.

was lacking, he only looked on. . . . [Nene] was acting for the survival of his people, his own hapū.[878]

According to Ben Pittman of Ngāti Hao, Ngāpuhi internal politics played a role in the dispute between Nene and Heke. Nene regarded himself as the region's pre-eminent rangatira, and Heke as 'an impudent upstart'. Nene was deeply suspicious of the colonial Government, but equally suspicious of Heke 'who he saw as a threat to his *mana* and *rangatiratanga*'. This influenced Nene's initial decision to 'keep an eye' on the flagstaff, even though he shared Heke's contempt for the British flag, referring to the flagstaff as 'He iti rakau'. According to Mr Pittman, 'Nene and Patuone had their own agendas and one was to keep the British from bringing in ever larger forces while they attempted to sort out their own affairs within and as a Ngāpuhi collective.'

Thereafter, each time Heke felled the flagstaff, this was an insult to Nene's mana, which eventually required him to act. Britain was no more than an 'appendage' to Nene's desire to preserve his mana and tino rangatiratanga;[879] privately, Nene and his allies 'had serious misgivings.'[880] The descendants of Nene, Patuone, Tāwhai, and others had faced ongoing resentment for the roles their tūpuna played.[881]

There is some evidence that Nene and his Hokianga allies were also motivated by territorial expansion. During the war, they occupied territories abandoned by Heke and his allies to the north and north-east of Lake Ōmāpere. Initially, they occupied and cultivated lands at Te Mawhe, then occupied Heke's pā at Te Ahuahu. These were valuable agricultural areas that had traditionally been contested among Ngāpuhi hapū. It is not clear that Nene and Taonui began the war with territorial expansion in mind, but it does appear that they responded opportunistically to the power imbalances that arose in the wake of the Crown invasion.[882] The Government encouraged these ambitions by offering to confiscate land from Heke and other 'rebels' and grant that land to 'loyal' Ngāpuhi.[883]

Patu Hohepa provided evidence that Nene, Taonui, and Tāwhai fought to seek utu for previous conflicts, particularly for attacks by Hongi Hika against Whiria and other Hokianga pā. As Hongi's nephew and heir, Heke bore the brunt of the Hokianga response.[884] In an August 1845 letter to the Governor, Heke argued that Nene fought to avenge the death of Hao, eponymous ancestor of Nene's hapū. However, none of the claimants or historians provided any evidence about Hao's death.[885] Heke wrote that traditional grievances were 'the real causes' of the war.

878. Nuki Aldridge (doc AA167), p 39.
879. Benjamin Pittman (doc W12), pp 13–14.
880. Benjamin Pittman (doc W12), p 19.
881. Benjamin Pittman (doc W12), pp 19–20.
882. Johnson, 'The Northern War' (doc A5), pp 288, 295, 332; Murray Painting (doc V12), pp 25–27.
883. FitzRoy to Despard, 6 June 1845 (cited in Johnson, 'The Northern War' (doc A5), p 293); Johnson, 'The Northern War' (doc A5), pp 287–291.
884. Manuka Henare, Hazel Petrie, and Adrienne Puckey, supporting papers to 'Northern Tribal Landscape Overview' (doc A37(b)), p 46.
885. Johnson, 'The Northern War' (doc A5), pp 323–324.

Nene wanted the Governor to believe he was fighting for Europeans so that 'the multitude may be deceived as well as you; and that they may obtain powder . . . that thus they may obtain satisfaction for their dead'.[886]

Aside from Patuone, Nene, and their Hokianga and Waimate allies, other rangatira played limited parts in the war. Panakareao and a section of Te Rarawa arrived in September 1845 and joined in the battle of Ruapekapeka. According to Mr Johnson, Panakareao had genealogical connections to Nene and sought utu for Heke's role in a Ngāpuhi conflict against Te Rarawa at Ōruru in 1843, and for earlier actions by Hongi against Te Rarawa. Panakareao also sought to demonstrate his commitment to Te Rarawa's relationship with Britain. Another section of Te Rarawa, under Papahia, sided with Kawiti, while a third section remained neutral.[887]

In May 1845, Repa of Te Māhurehure and Rewa of Te Patukeha fought against Te Kapotai at Waikare, alongside Mohi Tāwhai and a force from Te Hikutū. According to the claimant Arapeta Hamilton of Ngāti Manu, they joined in the battle to seek utu for the deaths of Tāwhai and Pī (fathers of Mohi Tāwhai and Arama Karaka Pī respectively) at the hands of Ngāti Hine and Ngāti Manu during a battle at Ōpua a generation earlier.[888]

Tamati Pukututu also took a very limited role in the war in support of Nene. Pukututu was related to Kawiti and lived near him at Kawakawa (Kawiti had kāinga at Ōtuihu, Taumārere, and Waiōmio among other locations). Pukututu seems to have been motivated by a land dispute with Kawiti, and perhaps also by a desire to secure an alliance with the Government. Late in 1845, Pukututu constructed a pā at the mouth of the Kawakawa River to protect British supply lines and to cover the retreat of the British troops from their attack on Ruapekapeka.[889]

Based on the evidence outlined in this section, we conclude that Nene, Taonui, Tāwhai, and other rangatira did not fight to defend the Crown's claim of sovereignty but for a range of other reasons. Principally, these Hokianga rangatira entered the war to defend their mana and tino rangatiratanga. They had made an agreement at Waimate in September 1844 to keep Heke under control. They had not freely consented to this arrangement but had given the Governor their word while under threat of invasion and in return for a number of concessions and assurances. They promised to control Heke so the Governor would send his soldiers home and their territories would not be threatened. Having made that commitment, they were obliged as a matter of mana to honour their commitment; having been pressured into taking sides, they then had little option but to fight. More broadly, they sought to maintain peaceful relations with the Crown and with traders, seeing that as the most effective means by which they could secure their authority and advance their people's material well-being. Once drawn into war,

886. Heke to FitzRoy, 29 August 1845 (cited in Johnson, 'The Northern War' (doc A5), p 324).

887. Johnson, 'The Northern War' (doc A5), pp 356–357, 362.

888. Arapeta Hamilton (doc W7), pp 4–5; Arapeta Hamilton (doc F12(a)), p 10; see also Te Kapotai claimants, 'Te Kapotai Hapu Korero: Mana, Rangatiratanga' (doc F25), pp 46–47; Johnson, 'The Northern War' (doc A5), pp 265–266, 269–270.

889. Johnson, 'The Northern War' (doc A5), pp 357–358.

they might also have chosen to take advantage of the circumstances to achieve territorial expansion and utu for past causes.

Others who fought at Waikare and Ruapekapeka did so to seek utu for traditional causes and to advance their relationship with Britain. We agree with Dr O'Malley that, for all Ngāpuhi combatants, 'maintaining and upholding their mana was the primary consideration beyond all others'.[890]

5.5.2.2.3 What the Crown knew of Heke's concerns about the treaty relationship

FitzRoy and other colonial officials understood the treaty principally through its English text, which granted sovereignty to the Crown in return for the Crown's protection and a land guarantee for Māori.[891] It was on this basis that FitzRoy declared Heke and Kawiti to be in rebellion and he initiated his military campaign against them.[892] Throughout the conflict, FitzRoy and other Crown officials insisted that they were honouring the treaty's terms,[893] and demanded that Heke and Kawiti also honour those terms by submitting to the Crown's sovereignty.[894]

Nonetheless, FitzRoy and other officials were aware that Māori had a different understanding of the treaty, shaped by the Māori text and by the verbal assurances Hobson had given during the treaty debates.[895] As discussed in chapter 4, almost immediately after the treaty was signed, Te Raki leaders had begun to protest and seek assurance that the Crown did not intend to claim their lands or assert authority over them. Heke and other Ngāpuhi leaders had drawn their attention to conflicting interpretations of the treaty by sending letters, by attacking the flagstaff, and by seeking recognition of shared or dual authority. They had also raised their concerns with missionaries, traders, and other Pākehā in the Bay of Islands and Hokianga (see chapter 4). Between 1842 and 1845, Chief Protector Clarke senior reported to his superiors that Māori did not see themselves as subject to colonial law and authority.[896] During 1844 and early 1845, Clarke, Governors FitzRoy and Grey, and missionaries all sought to reassure Ngāpuhi about the treaty's protective intent, while blurring the true meaning of the sovereignty that Britain claimed.[897]

In 1845 and 1846, Clarke and the Colonial Under-Secretary James Stephen both acknowledged that Māori had not understood the treaty as granting Britain authority over them.[898] On 1 July 1845, the former British Resident, James Busby, wrote to Lord Stanley attributing the entire war to Māori 'indignation at what they consider a violation of faith [in the treaty], and their determination to resist

890. O'Malley, 'Northland Crown Purchases' (doc A6), p 82.
891. Johnson, 'The Northern War' (doc A5), pp 225–226.
892. Johnson, 'The Northern War' (doc A5), p 224.
893. Johnson, 'The Northern War' (doc A5), pp 320, 341, 345.
894. Johnson, 'The Northern War' (doc A5), pp 327–328, 333–334.
895. We described Te Raki Māori understandings of the treaty in our stage 1 report: Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 524–525.
896. Johnson, 'The Northern War' (doc A5), pp 61, 281–282.
897. Johnson, 'The Northern War' (doc A5), pp 120, 140, 149–150; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 349–350; Orange, *The Treaty of Waitangi*, p 122.
898. Johnson, 'The Northern War' (doc A5), pp 61, 281–282.

further encroachment [on their rights]'.[899] In his memoirs, Governor FitzRoy acknowledged that Māori had been frustrated with the Crown's attempts to exert its authority, 'which they had consented to acknowledge, however reluctant to obey'.[900]

In sum, both before and during the war, Crown officials were made aware that Māori did not interpret the treaty as the Crown did, and did not regard questions of relative authority as settled. Yet the Crown nonetheless determined that Heke and others who challenged the Crown's interpretation were committing acts of rebellion against what officials saw as its established and legitimate authority.

5.5.2.3 *Did the Crown take advantage of divisions within Ngāpuhi to support its military campaign?*

The threatened invasion of Ngāpuhi territories in August 1844 led Tāmati Waka Nene, Patuone, Mohi Tāwhai, Makoare Te Taonui, and others to align themselves with the Crown against Heke.[901] During the war, they conducted a parallel campaign against Heke,[902] while also providing the Crown's forces with advice, logistical assistance, and occasional military support.[903] As noted earlier, Dr Phillipson described the conflict as 'a "civil war" in two senses: it was a war within Ngāpuhi, and it was a war between certain Ngāpuhi leaders (and hapū) and the Crown'.[904] He said:

> It's a civil war within Ngā Puhi because it is a war in which alignments are affected by whakapapa and relationships, but the choice of which side to fight for and in fact the fact of fighting at all is as a result of the Crown and the existence of new civil polity in New Zealand.[905]

Specifically, in April 1845, Nene and his allies conducted a series of attacks north of Ōmāpere, keeping Heke's forces occupied until the Crown's forces could arrive.[906] Prior to the attack on Te Kahika, Nene, Patuone, Te Tainui, Mohi Tāwhai, and Pī provided guides for the Crown's troops as they advanced inland, then lodged the troops at Ōkaihau.[907] Te Māhurehure and Te Hikutū advised the Crown's officers prior to the attack on Waikare, and (acting under their own com-

899. Busby to Stanley, 1 July 1845 (cited in Johnson, 'The Northern War' (doc A5), p 343).
900. FitzRoy, Remarks on New Zealand, p 14 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 82).
901. Johnson, answers to post-hearing questions (doc A5(g)), pp 1–2; see also Johnson, 'The Northern War' (doc A5), pp 115–116; Phillipson, answers to questions of clarification (doc A1(e)), pp 11–12.
902. Johnson, 'The Northern War' (doc A5), pp 248–252, 262.
903. Johnson, 'The Northern War' (doc A5), pp 230–231, 244, 247–248, 262.
904. Phillipson, answers to questions of clarification (doc A1(e)), p 13.
905. Grant Phillipson, transcript 4.1.26, Turner Events Centre, p [243].
906. Johnson, 'The Northern War' (doc A5), pp 227–231.
907. Johnson, 'The Northern War' (doc A5), pp 247–248.

mand) led its first wave.[908] After Te Kahika, Nene, Taonui, and Tāwhai invaded Heke's territories, occupying Te Kahika and other pā in northern Ōmāpere. They then moved into Taiāmai where they claimed Heke's pā at Te Ahuahu, seriously injuring Heke as he tried to regain it.[909] Before the attack on Ōhaeawai, Nene offered Colonel Despard, FitzRoy's new commanding officer, the service of his warriors, which Despard refused. Nene's forces then conducted a brief attack in advance of the Crown's forces.[910] Nene, Tāwhai, and Panakareao joined the attack on Ruapekapeka, advised the Crown's officers on tactics, and led the first advance after the pā had been breached. Te Taonui meanwhile sent warriors to Heke's pā at Hikurangi.[911]

The Crown regarded the support of 'loyal' Māori as important to its campaign and sought to reward them in three ways. The first was by offering material support. From April 1845 and for the remainder of the conflict, it supplied Nene and his allies with ammunition, and also made gifts of flour, tobacco, and blankets.[912] Crown officials ensured that all Ngāpuhi understood this policy and therefore had material incentive to fight against Heke. In May, shortly before the battle of Ōhaeawai, the Colonial Secretary reported that Nene had been given 100 blankets, 3,000 percussion caps, and a bag of flints.[913] Between July and September, the Crown gave out goods valued at £380, most of that in tobacco and blankets. Other items included flour, flags for 'loyal' chiefs, and calico for badges so the Crown's forces could distinguish between friend and foe.[914] The scale of gift-giving was such that George Clarke junior warned against excess generosity, saying that 'if they know they can obtain it so easily, they do not value it'.[915] Nonetheless, payments continued until the end of the war and afterwards: Crown accounts for the six months to June 1846 recorded 'special payments' of £80 to Hokianga leaders, £12 to build a house for Patuone, and £15 for presents to Nene and his closest supporters.[916]

Gifts took on considerable importance because of the economic blockade, which prevented Te Raki Māori from acquiring munitions and other goods by trade. When the blockade was extended on 19 May 1845 to cover Whangaroa and Whāngārei, the Governor accompanied it with an assurance that the Crown would

908. Johnson, 'The Northern War' (doc A5), pp 265–269.
909. Johnson, 'The Northern War' (doc A5), pp 290–291.
910. Johnson, 'The Northern War' (doc A5), pp 297–299.
911. Johnson, 'The Northern War' (doc A5), pp 362–363, 369–370.
912. Johnson, 'The Northern War' (doc A5), pp 215–216, 358–359. In December 1845, Governor Grey also made the decision to establish a Māori unit within the colonial forces, who would be paid for their services as well as receiving ammunition and food rations. The war ended before this plan was carried to fruition: Johnson, 'The Northern War' (doc A5), pp 359–360.
913. Johnson, 'The Northern War' (doc A5), p 216.
914. Johnson, 'The Northern War' (doc A5), pp 358–359.
915. Clarke junior to father, 28 July-21 August 1845 (cited in Johnson, 'The Northern War' (doc A5), p 358).
916. Johnson, 'The Northern War' (doc A5), p 396.

'make Presents to all the Loyal Chiefs who have taken part or may be taking part in putting down disturbances'. The blockade would furthermore be lifted as soon as the 'rebellion' was crushed.[917] The blockade was extended because the Governor learned that munitions were being landed at Whangaroa.[918] Nevertheless, we agree with Mr Johnson that the Governor took the opportunity to increase economic pressure on neutral hapū, giving them incentive to 'attack their fellow kin'.[919] These measures angered Heke and neutral leaders alike.[920] 'Waka [Nene] is fighting for what he can obtain from you', Heke told the Governor in May 1845. 'There is nothing sincere in him.'[921] As described earlier, he later accused Nene of having duped the Governor into arming him so he could obtain utu for traditional causes.[922]

The Crown's second method for rewarding 'loyal' Ngāpuhi was to offer them land taken from Heke and his allies. FitzRoy's view was that Māori who transgressed against the Crown's authority or breached its laws should forfeit land as atonement. According to the historian Ian Wards, this doctrine reflected a view that the Crown's protection and land guarantee applied only to those who were loyal.[923] FitzRoy had applied this doctrine in January 1845 by taking land at Whāngārei,[924] and again in May when he took Pōmare II's land at Ōtuihu.[925]

Throughout the war, FitzRoy acted on the basis that land confiscation would form part of any peace terms, and this appears to have been common knowledge in the Bay of Islands from at least May 1845. When Heke wrote to the Governor on 21 May offering peace, he asked, '[B]ut still you insist on my giving up the land? Then where are we to go? Are we to go to Port Jackson or to England?' Heke then sarcastically inquired if the Governor would provide him with a ship.[926] By that time, Police Magistrate James Clendon possessed draft terms of peace that specified the lands to be taken.[927] In June, as the Crown's troops returned to Te Raki prior to the battle of Ōhaeawai, FitzRoy instructed Despard to 'assure the Natives generally that land forfeited by the rebellious will be divided among the loyal Natives, and that no land will be taken by the government'.[928] In August, the Governor responded to Heke's overtures for peace by demanding that Heke 'offer an atonement to the utmost of your ability' for the destruction of Kororāreka,[929] a

917. Colonial Secretary to Clendon, 19 May 1845 (cited in Johnson, 'The Northern War' (doc A5), p 216); Johnson, 'The Northern War' (doc A5), p 283.
918. Johnson, 'The Northern War' (doc A5), pp 283–284; Nuki Aldridge (doc AA167), p 43.
919. Johnson, 'The Northern War' (doc A5), p 284.
920. Johnson, 'The Northern War' (doc A5), pp 215–216.
921. Heke to FitzRoy, 21 May 1845 (Johnson, supporting papers (doc A5(a)), vol 1, p [249]).
922. Heke to FitzRoy, 29 August 1845 (cited in Johnson, 'The Northern War' (doc A5), p 324).
923. Johnson, 'The Northern War' (doc A5), pp 293, 294.
924. O'Malley, 'Northland Crown Purchases' (doc A6), pp 71, 75; see also Johnson, 'The Northern War' (doc A5), p 156. During February, the goods were returned, and the land transferred. In March, FitzRoy cancelled his 8 January proclamation: O'Malley, 'Northland Crown Purchases' (doc A6), p 77.
925. Johnson, 'The Northern War' (doc A5), pp 241–243.
926. Heke to FitzRoy, 21 May 1845 (Johnson, supporting papers (doc A5(a)), vol 1, p [248]).
927. Johnson, 'The Northern War' (doc A5), pp 275–276.
928. FitzRoy to Despard, 6 June 1845 (cited in Johnson, 'The Northern War' (doc A5), p 293).
929. FitzRoy to Heke, 6 August 1845 (cited in Johnson, 'The Northern War' (doc A5), p 321).

demand that Heke rightly understood as requiring forfeit of land.[930] In September, FitzRoy drew up formal terms of peace specifying the lands he intended to take,[931] and communicated those terms to Heke and Kawiti.[932] FitzRoy's stance confirmed in Heke's mind that the Crown had no intention of honouring its treaty guarantees, and therefore hardened his determination to hold out.[933] Yet the promise to transfer land to 'loyal' Māori emboldened Nene and Taonui, leading them to commit to territorial expansion from Hokianga into Taiāmai.[934]

In November, Governor Grey initiated a third method for rewarding 'loyal' Ngāpuhi. From 5 December, those who fought alongside the Crown were granted a daily ration of flour and sugar from the Crown's stores. Grey hoped that this would encourage Nene and others to bring in more warriors, and that those warriors would become more responsive to British officers' commands. Grey also authorised the establishment of a permanent company of Ngāpuhi soldiers, who would be paid professionals under the command of British officers. However, we have seen no evidence that this company was established before the war ended in January 1846.[935] After the war, the Crown continued to reward Nene and other 'loyal' rangatira by paying annual salaries.[936]

We agree with Mr Johnson that through its gifting and land confiscation policies the Crown deliberately 'sought to strengthen the basis of [its] support' in a manner that deepened the divisions between Nene and Heke, and also caused resentment towards Nene among other Ngāpuhi.[937] In May and again in December, Heke warned that the conflict within Ngāpuhi would endure after he had made peace with the Crown, as 'the wound is too deep to be healed without more bloodshed'.[938] George Clarke junior warned in August that Ururoa and other Ngāpuhi felt 'bitter' towards Nene, and if Nene was not supported by the Government, it was likely he would be 'attacked by an overwhelming force'.[939]

5.5.2.4 *Was the Crown justified in destroying Ōtuihu and arresting Pōmare II?*

The first pā attacked in the Crown's military campaign was Ōtuihu, on 29 April 1845. British officers arrived at the pā with orders to capture Pōmare,[940] those

930. Johnson, 'The Northern War' (doc A5), pp 321–322.
931. Johnson, 'The Northern War' (doc A5), p 328.
932. Johnson, 'The Northern War' (doc A5), pp 332–333.
933. Johnson, 'The Northern War' (doc A5), pp 322–324.
934. Johnson, 'The Northern War' (doc A5), pp 287–288.
935. Johnson, 'The Northern War' (doc A5), pp 359–360.
936. Ralph Johnson, presentation summary and response to statement of issues (doc A5(d)), p 15.
937. Johnson, 'The Northern War' (doc A5), p 294; see also pp 215–216, 355.
938. Burrows, journal, 1 December 1845 (cited in Johnson, 'The Northern War' (doc A5), p 355); see also Heke to FitzRoy, 21 May 1845 (Johnson, supporting papers (doc A5(a)), vol 1, p [251]).
939. Clarke junior to father, 28 August 1845 (cited in Johnson, 'The Northern War' (doc A5), p 355).
940. Johnson, 'The Northern War' (doc A5), pp 236, 240–241, 242–243. The commanding officer, Lieutenant-Colonel William Hulme, identified Pōmare as 'one of the proscribed chiefs' on a list he had been ordered to arrest: Hulme to FitzRoy, 27 May 1845 ('Official Summary of Military Operations at the Bay of Islands', *Nelson Examiner and New Zealand Chronicle*, 26 July 1845, p 83).

considered to be covertly supporting the 'insurrection'[941] and a premeditated plan – agreed by British officers – to 'knock [the pā] about [Pōmare's] ears and raze it to the ground'.[942] Ōtuihu was the first target for the simple reason that it was the most accessible of the Kawakawa River pā that the Governor had ordered destroyed.[943]

The Government had been advised that Pōmare played no part in the attack on Kororāreka and was genuinely neutral; but according to Clarke junior, he made 'no distinction between friend or foe'. Pōmare had in fact spent the duration of the Kororāreka conflict guarding the lives and property of traders at Te Wahapū.[944] Pōmare himself had written to the Governor saying he was a friend of Pākehā and wished to remain neutral in any conflict, and the Governor had written back accepting this assurance.[945] Nonetheless, some of Pōmare's people had provided covering fire for the attack on Kororāreka, and Pōmare was rumoured to have received a cloak from the plunder. These facts – together with some 'treasonous letters' FitzRoy had obtained that were apparently from Pōmare's pā at Ōtuihu (though not in his hand) and another rumour that he had secretly provided ammunition to Heke – led the Government to regard the rangatira and all his people as hostile. As had become his habit, FitzRoy gave orders based on information from settlers and British officers, making no attempt to inquire more deeply into the facts, let alone consider the perspective of the rangatira he was ordering arrested.[946]

On the morning of 29 April, a colonial force numbering about 470 landed outside Ōtuihu, supported by the warship HMS *North Star*. A white flag was flying from the pā the next morning, and the *North Star* raised its own white flag. Pōmare, with his daughter Iritana, came to the foreshore. Pōmare said he was a friend of the Governor and demanded to know why his pā was surrounded. When he and Iritana then attempted to return to the pā, they were arrested and taken onto the ship.[947] An armed standoff then ensued, in which Lieutenant-Colonel Hulme demanded that Ngāti Manu relinquish their arms; otherwise, they would be treated as rebels, and the pā and all property inside it would be destroyed. Ngāti Manu then offered the colonial force a small portion of their weapons, but most of their number – about 200 in all – fled out the back of the pā, taking what they could carry, while the *North Star* fired shells at them.[948] Hulme later reported that

941. FitzRoy to Hulme, 26 April 1845. Crown document bank (doc w48), p 253.
942. Bridge, 28 April 1845, 'Journal of Events on an Expedition to New Zealand 4 April – 25 December 1845' (cited in Johnson, 'The Northern War' (doc A5), p 232).
943. 'Official Summary of Military Operations at the Bay of Islands', *Nelson Examiner and New Zealand Chronicle*, 26 July 1845, p 83.
944. Clarke junior to father, 21 March 1845 (cited in Johnson, 'The Northern War' (doc A5), p 234); see also Clendon's comments on p 234.
945. *Wellington Independent*, 5 July 1845, p 2.
946. Johnson, 'The Northern War' (doc A5), pp 234–235.
947. Johnson, 'The Northern War' (doc A5), pp 232, 235–237.
948. Johnson, 'The Northern War' (doc A5), pp 236–240.

his orders did not allow him to recognise a flag of truce flown by 'a supposed rebel'.[949]

At about 3 pm, Hulme gave the order to burn the pā and destroy all nearby waka, later justifying the decision on the basis that plundered items had been found inside the pā. Another officer, Major Bridge, reported that the pā was burned because Ngāti Manu refused to give up their arms. Neither explanation is plausible in light of the clear evidence (discussed earlier in this section) that the decisions to arrest Pōmare and destroy the pā were premeditated.[950]

Nor, indeed, does the 'plunder' justification stand on its own terms. The Crown's officers later claimed that they found a good amount of Kororāreka plunder at the pā, yet the only items specified in their written accounts were pigs, turkeys, ducks, an old rifle, and a mere. The officers did not explain how they could distinguish Kororāreka property from that belonging to Pōmare and his people, Ōtuihu already being one of the wealthiest trading centres in the north. British soldiers were allowed to plunder all the livestock and other food inside the pā before it was torched. Major Bridge took the mere as a souvenir. Given these actions, justifying the pā's destruction because of 'plunder' was hypocritical at best.[951]

There were other, strategic reasons for destroying Ōtuihu. The pā was a potential threat to Kororāreka, where the soldiers were to be based during their time in the Bay of Islands. More importantly, where it lay at the mouth of the Kawakawa River was a vital transport route for the Crown's planned inland expeditions against Heke and Kawiti.[952] Later, during the war, colonial troops would use Ōtuihu as a base for their expeditions to Waikare and Ruapekapeka.[953]

Pōmare and his daughter were detained on the *North Star* for about two weeks and were then taken to Auckland. After intervention by Nene's brother Patuone – who was also to play a key peacemaker role on other occasions – and other Hokianga rangatira, FitzRoy conceded that Pōmare had not been responsible for or had even known of the 'treasonous' letters that had prompted his arrest. FitzRoy agreed to pardon and release Pōmare, on five conditions. First, Pōmare was required to acknowledge that he had failed actively to suppress the rebellion or prevent plunder from being taken to his pā, and the Governor therefore had just cause for being suspicious of him. Secondly, the Governor claimed that many 'very bad' letters had originated from Pōmare's pā, even if Pōmare had not been responsible for them. Thirdly, Pōmare had to promise to punish Heke and Kawiti for their transgressions and return any plunder he was able to. Fourthly, he was required to grant the Crown his interests in the trading station at Te Wahapū (that territory was occupied by the traders Gilbert Mair and Charles Waetford, who acknowledged Pōmare's ongoing rights and interest, consistent with traditional

949. Hulme to FitzRoy, 27 May 1845 (cited in 'Official Summary', *Nelson Examiner and New Zealand Chronicle*, 26 July 1845, p 83).

950. Johnson, 'The Northern War' (doc A5), pp 236–238, 243.

951. Johnson, 'The Northern War' (doc A5), pp 236–238; Bridge, journal (Johnson, supporting papers (doc A5(a)), vol 4, p 693).

952. Johnson, 'The Northern War' (doc A5), p 244.

953. Johnson, 'The Northern War' (doc A5), p 361.

rangatira-settler relationships).[954] Officials regarded Waetford, an ex-convict, as one of the 'bad and designing' settlers who had encouraged Heke to challenge the Crown's authority; the confiscation was likely aimed as much at him as at Pōmare.[955] The final condition was that after the war, the Crown would station a company of soldiers at Te Wahapū.

The conditions for Pōmare's release were extraordinary. In effect, the Governor was acknowledging that he had used force against Pōmare and his people based on flawed intelligence. Then, having acknowledged Pōmare's innocence, FitzRoy nonetheless required that Pōmare be punished – not for the transgression of which he was accused, but for his failure to control Heke when he had never promised to do so. In effect, as Johnson noted, Pōmare 'was declared guilty of remaining neutral'.[956] After Pōmare's release, FitzRoy moderated his stance on neutral Māori, ensuring that colonial troops acted only against those who were known to be in arms against the Crown.[957] Kaumatua Arapeta Hamilton told us that Ngāti Manu had never forgotten these events. Upon her eventual return to Ngāti Manu, Pōmare's eldest daughter was given the new name, 'Te Nota' (North Star)[958] – a name also given to children in subsequent generations alongside others like Te Hereheretini (tied up in chains) that serve as reminders of 'the indignity of the Crown's actions towards our Tupuna.'[959]

Pōmare's arrest, and the destruction of Ōtuihu, had significant, enduring consequences for Ngāti Manu. Ōtuihu was a site of great significance, occupied for many hundreds of years by Ngāti Tū, Ngāti Hine, and Ngāti Manu. It had once been home to Ngāti Hine founding ancestor Hineāmaru. Pōmare II had lived there with his Ngāti Manu people since his departure from Kororāreka after the Girls' War in 1830. He had established Ōtuihu as a major trading settlement, second only to Kororāreka in importance.[960] Initially, Ngāti Manu were forced to retreat to a small kāinga called Mātairiri (at Taumārere). Later, after it was rebuilt, they moved to Puketohunoa Pā at Te Karetū.[961] The destruction of Ōtuihu and the confiscation of Pōmare's interests in the trading station at Te Wahapū cut off Ngāti Manu trading relationships, and the retreat of the hapū inland cut off their access to the sea. 'Ngati Manu in the 1800s were a sea people', Arapeta Hamilton told us. 'We travelled the coast of the North Island, we fished and lived off the sea, we controlled our water ways with a huge respect as a tino taonga.' Through the destruction of

954. Johnson, 'The Northern War' (doc A5), pp 241–243.
955. Wyatt, 'Old Land Claims' (doc E15), p 247; Johnson, 'The Northern War' (doc A5), p 169.
956. Johnson, 'The Northern War' (doc A5), pp 242–243.
957. Johnson, 'The Northern War' (doc A5), p 243.
958. Johnson, 'The Northern War' (doc A5), p 240.
959. Arapeta Hamilton (doc F12(a)), p 13.
960. Johnson, 'The Northern War' (doc A5), pp 233, 237; Arapeta Hamilton (doc K7(b)), pp 5, 6; Manuka Henare, Hazel Petrie, and Adrienne Puckey, 'Oral and Traditional History Report on Te Waimate Taiamai Alliance' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2009) (doc E33), p 149.
961. Arapeta Hamilton (doc F12(a)), pp 13–14.

the pā, 'We lost the control of our resources, whether it be the sea, land or water or Ngahere [forest].'[962]

5.5.2.5 *Was the Crown's stance on 'neutral' hapū reasonable?*

5.5.2.5.1 The nature of Ngāpuhi neutrality

Most of Heke's allies occupied territories extending from the southern Bay of Islands inland to Taiāmai and Kaikohe, while their opponents from other hapū mainly occupied inland Hokianga river valleys. This left a large portion of Te Raki hapū who were not active combatants or played only very limited roles in the war. In December 1845, Governor Grey identified the principal non-combatants: Ururoa and Hongi (Te Tahawai of Whangaroa); Kupe (Ngāti Kawau of Whangaroa); Tāreha (Ngāti Rēhia of Tākou); Rewa and Moka (Ngāi Tāwake of Te Rāwhiti); Pōmare II and Waikato (Ngāti Manu of southern Bay of Islands); and Papahia (Te Rarawa).[963] Crown officials used the term 'neutral' to describe these hapū, but this masks their often complex motivations for abstaining from active combat. Dr Phillipson thought there were two 'neutral' camps: those who were actually neutral, and those who opposed the Crown in secret by providing logistical support for Heke and his allies.[964]

During January 1845, Ururoa supported Heke's cause against the Crown and attempted to recruit others to join in the fourth attack against the flagstaff, which took place on 11 March 1845. After attending the Pāroa Bay hui and receiving assurances about the meaning of the treaty, Ururoa declared that he would not fight against British forces. He then visited Heke and attempted to dissuade him from any further action against the flagstaff.[965] The Whangaroa claimant and kaumātua Nuki Aldridge told us that was only partially correct. While Ururoa decided to abstain from fighting, he nonetheless supported Heke.[966] After the fall of Kororāreka, Ururoa sent 130 warriors to protect Heke in case of attack,[967] and Ururoa's people also fought with Heke's at the battle of Te Ahuahu.[968] To put it simply, Whangaroa Māori were prepared to fight with Heke when colonial troops were not present but generally abstained from action otherwise, apart from providing small numbers of reinforcements when needed. 'Our people talk about being at the battles and participating,' Mr Aldridge said, naming Ruapekapeka as one such instance.[969] Dr Phillipson referred to a small Whangaroa contingent, under the rangatira Pona, playing a part in the war as well.[970]

962. Arapeta Hamilton (doc F12(a)), p 14.
963. Johnson, 'The Northern War' (doc A5), pp 353–354.
964. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 356.
965. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 349–350; Johnson, 'The Northern War' (doc A5), pp 168–169.
966. Nuki Aldridge (doc AA167), p 40.
967. Johnson, 'The Northern War' (doc A5), p 218; Nuki Aldridge (doc AA167), p 40.
968. Johnson, 'The Northern War' (doc A5), pp 354–355.
969. Nuki Aldridge (doc AA167), pp 41–42.
970. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 356–357.

Mr Aldridge explained to us that Whangaroa Māori also provided food and shelter for Heke and Kawiti's forces, and safe haven for warriors and whānau when it was needed. '[W]hen they had to get away and be safe somewhere until things cooled down, they would come over to Whangaroa. If the warriors needed food and shelter, they received it.'[971] Kinship was a critical factor in this arrangement – Ururoa was closely related to Heke and his wife Hariata Rongo.[972] But according to Mr Aldridge, many in Whangaroa also supported the cause for which Heke and Kawiti were fighting:

> I've been told that we looked at their efforts from that symbolic point of view, as protecting our waters, lands and other resources. To the people of Whangaroa they were doing the right thing on behalf of our people and the right thing for the future of Māoridom. I think the whole of the North were on this kaupapa.[973]

In Dr Phillipson's view, Ngāti Rēhia and Ngāti Wai also supported Heke while remaining officially neutral. He considered it was no coincidence that coastal hapū professed neutrality as they were far more vulnerable to attack than those inland, such as Kawiti's Ngāti Hine and Heke's Ngāti Tautahi hapū.[974]

The role played by Rewa's Ngāi Tāwake and Te Patukeha people was similarly complex. Identified by Governor Grey as 'neutral',[975] Rewa and his brothers Moka and Te Whareraki were described by Dr Phillipson as supporters of Nene and the Crown.[976] Neither label fully explains the brothers' actions during the war. After the destruction of Kororāreka, Rewa and his people sought refuge in Whangaroa.[977] The loss of the town naturally angered them; indeed, one Crown official claimed that Rewa responded by declaring war on Heke.[978] In fact, it is not clear whether Rewa blamed Heke or the Crown for the town's destruction, and Rewa took no direct military action against Heke at any stage during the war. On the contrary, he fought with Heke against Nene during the initial skirmishes, believing that Heke's cause was justified, and Nene's was not.[979]

Once British forces had arrived, Rewa and Moka adopted different and seemingly contradictory approaches. They largely abstained from active combat but did not remain neutral.[980] Having initially fought with Heke against Nene, the brothers then provided practical support for Nene's forces. This included catching fish, maintaining cultivations to feed Nene's warriors,[981] and joining with Mohi

971. Nuki Aldridge (doc AA167), p 41.
972. Nuki Aldridge (doc AA167), p 40.
973. Nuki Aldridge (doc AA167), p 41.
974. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 357.
975. Johnson, 'The Northern War' (doc A5), pp 353–354.
976. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 356–358.
977. Nuki Aldridge (doc AA167), p 41; see also Johnson, 'The Northern War' (doc A5), pp 207–208.
978. Johnson, 'The Northern War' (doc A5), pp 216–217.
979. Johnson, 'The Northern War' (doc A5), p 230.
980. Johnson, 'The Northern War' (doc A5), pp 214, 356–357, 362.
981. Johnson, 'The Northern War' (doc A5), p 355.

Tāwhai to burn down houses in Heke's territories.[982] This suggests that Rewa and Moka saw destruction of property as sufficient utu for Kororāreka and that they did not believe that Heke's actions warranted loss of life. Whānau relationships were also a factor. Rewa, Moka, and their older brother Wharerahi were all of Ngāi Tāwake descent and therefore close relatives of Heke.[983] But Wharerahi was also married to Nene's sister Tari, imposing obligations on both sides.[984] As previously discussed, Rewa and Moka did fight on two occasions alongside the Crown and Hokianga hapū, joining them in attacks against Te Kapotai at Waikare. These actions were partly to avenge the destruction of Kororāreka, and partly to seek utu for an older cause but as Mr Johnson observed, not aimed at supporting that of the Government.[985]

Grey also identified the Ngāti Manu leader Pōmare II as neutral.[986] Pōmare had declared himself so before the war,[987] and according to his descendant Arapeta Hamilton, he remained personally neutral throughout.[988] Yet that position masked complex motivations. Pōmare had close relatives among the Kawakawa and Hokianga antagonists; and in common with Patuone and Nene, he also wanted to sustain lucrative trading relationships with settlers and a constructive relationship with the Governor.[989] After his capture, detention, and release early in the war, Pōmare walked a fine line, aimed at maintaining positive relationships on all sides without antagonising any. At times, he made efforts to be seen as friendly to the Crown. In June 1845, his followers helped to rescue a Crown troop ship that had foundered near Onewhero Bay, and soon afterwards, Pōmare himself visited Nene and the Crown's force at Waimate in another demonstration of friendliness.[990] But Pōmare also allowed many of his supporters to fight in support of Kawiti, not only at Kororāreka but also at Ruapekapeka. Ngāti Manu provided food supplies for Ruapekapeka, and Pōmare offered Kawiti refuge afterwards. By taking these steps, Pōmare was acknowledging their close relationships with Kawiti's granddaughter Kohu.[991]

Other rangatira abstained from fighting because they did not see warfare as the most effective means of protecting their tino rangatiratanga or advancing the interests of their people. Paratene Te Kekeao (Te Uri Taniwha) and Ruhe (Ngāti Rangi, Ngāti Hineira) attempted to act as peacemakers throughout.[992] Others abstained because they feared that Europeans would leave if they took sides,[993] or

982. Johnson, 'The Northern War' (doc A5), p 323.
983. Kawharu (doc E50), pp 3–4.
984. Benjamin Pittman (doc W12), p 6.
985. Johnson, 'The Northern War' (doc A5), pp 265–266, 324.
986. Johnson, 'The Northern War' (doc A5), pp 353–354.
987. *Wellington Independent*, 5 July 1845, p 2.
988. Arapeta Hamilton (doc F12(a)), pp 9, 11, 13.
989. Johnson, 'The Northern War' (doc A5), pp 234–235.
990. Johnson, 'The Northern War' (doc A5), pp 295–296.
991. Johnson, 'The Northern War' (doc A5), pp 234–235, 353; Arapeta Hamilton (doc W7), p 8.
992. Johnson, 'The Northern War' (doc A5), p 218.
993. Johnson, 'The Northern War' (doc A5), p 219.

feared that the Crown would attack them if they supported Heke.[994] Te Tirarau and Pārore Te Āwha of Te Parawhau declined Kawiti's requests for assistance for these reasons. Te Tirarau wrote to the Governor in April 1845 with an assurance that his people had played no part in the previous month's attack on the flagstaff. He asked for a flag as a signal of neutrality.[995]

5.5.2.5.2 FitzRoy's stance on neutrality

On 26 April 1845, as he initiated the Crown's military campaign, Governor FitzRoy issued a proclamation aimed at Māori of 'Tokerau' and 'Pewairangi'. It stated that those who wished to retain 'peace, commerce, and friendship with Europeans, and the maintenance of the Queen's just authority', must separate themselves from 'te Iwi tutu' or 'ill disposed Natives'. It instructed them to gather, with their rangatira, either at mission stations or at their own kāinga under protection of a British flag.[996]

As the proclamation and accompanying instructions made clear, the Governor's main purpose was to ensure that British troops would not mistake Māori for enemies and accidentally fire on them. This was partly to save lives, and partly because any accidental shooting of neutral Māori would be likely to strengthen Heke's support. But under the circumstances, the instruction to gather under a British flag was provocative and tantamount to requiring a declaration of loyalty to the Crown. Whereas the proclamation otherwise expressed protective intent, FitzRoy's instructions to Lieutenant-Colonel Hulme struck a different and more threatening tone. Hulme was told that non-combatant Māori must gather either at missions or at places directed by Nene, Patuone, and other Hokianga leaders – an obvious insult to the mana of other rangatira. Furthermore, any who did not comply within a few days 'will be considered disaffected'. In other words, those who did not surrender their mana and fly a British flag risked being treated as rebels. Although Hulme was also warned not to take enforcement action against any non-combatants, his instructions created some risk that neutral hapū who chose not to fly an ensign or comply with instructions from Nene might be caught up in hostilities.[997] Indeed, as discussed in section 5.3, the Crown's first action after declaring war would be to destroy the pā of a neutral rangatira, Pōmare II.[998]

5.5.2.5.3 Grey's stance on neutrality

Governor Grey's arrival in November 1845 signalled a further shift in the Crown's approach to 'neutrality'. Whereas FitzRoy had sought to avoid drawing neutral

994. Johnson, 'The Northern War' (doc A5), p 230.

995. Johnson, 'The Northern War' (doc A5), pp 219, 355. Mr Johnson named Pārore and Te Tirarau as Ngāti Whātua, but they are more properly regarded as Te Parawhau and other hapū. Te Parawhau were related to Kawiti's Ngāti Hine people.

996. Wakarongo, 26 April 1845: Johnson, supporting papers (doc A5(a)), vol 1, p 286; proclamation, 26 April 1845: Johnson, supporting papers (doc A5(a)), vol 1, p 287.

997. FitzRoy to Hulme, 26 April 1845 (Crown document bank (doc W48), pp 250–251).

998. Johnson, 'The Northern War' (doc A5), pp 236, 240–241, 242–243.

hapū into the conflict,[999] Grey determined that some Ngāpuhi 'under the guise of what they term neutrality' were covertly supporting Heke with both men and supplies, while avoiding direct conflict with colonial troops. As discussed in the preceding sections, claimant evidence suggests this was true at least of Ngāti Manu and Whangaroa hapū. In Grey's view, the Crown had not been sufficiently firm with these groups. In early December, after his decision to attack Ruapekapeka, Grey sent a message around the Bay of Islands and Whangaroa saying that he 'should not recognize any neutrality on the part of any chief' and would call on all to assist the Crown actively. Those who did not would be regarded as rebels and treated as such.[1000]

5.5.2.6 *Did the Crown use inappropriate or excessive force?*

5.5.2.6.1 The Crown's instructions to its military commanders

On 26 April 1845, Governor FitzRoy instructed Lieutenant-Colonel Hulme to carry out the 'signal chastisement' of all Māori considered to be in rebellion as a 'warning that British subjects are not to be grievously injured with impunity'. No 'rebel' in arms against 'lawful British authority' should be spared though no life should be taken 'except in actual hostilities'. However, the 'principal chiefs' whether 'actually engaged in this insurrection, or who may be covertly assisting the rebels should be taken alive if possible and kept as hostages' – ultimately to be transported. FitzRoy saw this as his duty to his sovereign, country and indeed the 'well-disposed native of New Zealand'.[1001] FitzRoy was also sensitive to the possibility of defeat and of general Ngāpuhi uprising, either of which could fatally undermine the Crown's authority in the north. He therefore instructed Hulme to attack only when certain of victory, and to avoid any confrontation with or provocation towards non-combatants. Women, children, and the elderly and the 'unresisting' were not to be harmed.[1002]

FitzRoy described the need to issue such orders as 'deeply painful', but we find them extraordinary.[1003] Of course, Ngūpuhi leaders did not see themselves as in rebellion since they did not accept that they had ceded sovereignty at all. FitzRoy insisted that they had and his intention to take them 'hostage' (rather than prisoner) underlines his emphasis on putting down rebellion by enforcing the good behaviour of their hapū, while the rangatira themselves were to be removed entirely from their country and their communities. The instructions regarding those 'covertly assisting' opened the door wide to punitive and unjustified action – and incidents of opportunistic looting. This was demonstrated in the capture of

999. Crown document bank (doc w48), pp 247, 252–254; Johnson, 'The Northern War' (doc a5), pp 226–227, 231, 243. The Governor initially regarded Pōmare ii as hostile, before acknowledging his neutrality: Johnson, 'The Northern War' (doc a5), pp 231–232, 234, 241–243.

1000. Grey to Stanley, 8 December 1845 (Crown document bank (doc w48), pp 302–303); see also Crown document bank (doc w48), p 306.

1001. FitzRoy to Hulme, 26 April 1845; Crown document bank (doc w48), p 253.

1002. FitzRoy to Hulme, 26 April 1845 (Crown document bank (doc w48), pp 247, 251–254); Johnson, 'The Northern War' (doc a5), p 231.

1003. FitzRoy to Hulme, 26 April 1845; Crown document bank (doc w48), p 252.

Pomare and the sacking and destruction of Ōtuihu three days after he issued his orders to Hulme.

This essential objective of ensuring the complete capitulation of the 'rebels' remained consistent throughout the campaign. In early May, before the attack on Te Kahika, FitzRoy instructed Hulme to destroy all principal pā along the Kawakawa River, particularly those of Kawiti, Hori Kingi Tahua, Ruku, Waikare (Te Kapotai), and Marupō (Matarahurahu and Ngāti Rāhiri). Until these pā were destroyed and 'till the majority of their rebellious inhabitants are killed', there could be no peace. In addition, FitzRoy said, 'every canoe belonging to the Rebels should be destroyed', there being 'many concealed near the falls of Waitangi, belonging to Heke, and his adherents'.[1004]

In June, before the attack on Ōhaeawai, FitzRoy instructed Colonel Despard: 'The principal object . . . is the capture or destruction of the rebel Chief Heke and his principal supporters', who were identified as Kawiti, Te Hira Pure, Hori Kingi Tahua, Te Haratua, and Marupō. All of these 'notorious' rangatira were to 'share the fate which *their* destruction of the settlement of Russell (or Kororarika) has rendered inevitable' (emphasis in original). Despard was additionally instructed not to make any peace unless the terms included Heke and these other rangatira being taken prisoner.[1005]

While seeking to destroy Heke and his allies, FitzRoy was also at pains to ensure that the colonial troops did not kill indiscriminately. He repeated his earlier order that the Crown must 'spare and protect the old, the helpless, the women, the children and the unresisting'. He also warned that soldiers had attracted a reputation that they 'give no quarter'.[1006] Some claimants understood this instruction to mean that British soldiers had indiscriminately killed the vulnerable in battles prior to this date.[1007] According to Belich, FitzRoy repeated his earlier order after learning that British soldiers had killed wounded warriors at the battle of Te Kahika on 8 May, a practice he did not want repeated.[1008]

Governor Grey was on hand to supervise the battle of Ruapekapeka and does not seem to have left detailed written instructions for Despard. Nonetheless, Grey informed Lord Stanley that it would be 'absolutely requisite to crush either Heke or Kawiti' before peace could be restored.[1009]

5.5.2.6.2 Did the Crown attack non-military targets?

During the war, British forces attacked six pā: Ōtuihu, Te Kahika, Waikare, Ōhaeawai, Pākaraka, and Ruapekapeka. All had some connection with leaders who had taken part in the 11 March 1845 attack on Maiki Hill and were therefore – from the Crown's perspective – legitimate military targets.[1010] Two of those pā (Te

1004. FitzRoy to Hulme, 4 May 1845 (cited in Johnson, 'The Northern War' (doc A5), p 244).
1005. FitzRoy to Despard, 6 June 1845 (cited in Johnson, 'The Northern War' (doc A5), pp 292–293).
1006. FitzRoy to Despard, 6 June 1845 (cited in Johnson, 'The Northern War' (doc A5), p 292).
1007. Submissions in reply for Wai 1514 3.3.451, p 6; claimant closing submissions (#3.3.219), p 167.
1008. Belich, *The New Zealand Wars*, p 43.
1009. Grey to Stanley, 10 December 1845 (cited in Johnson, 'The Northern War' (doc A5), p 360).
1010. Johnson, 'The Northern War' (doc A5), pp 256–257.

Kahika and Ruapekapeka) were purpose built for fighting, and a third, Ōhaeawai, had been rebuilt with that intention. Strategically located to draw the Crown's forces away from centres of population and cultivation, they were designed to be difficult and costly to attack, simple to defend for long periods, and safe and easy to abandon without significant loss of life.[1011] The other three pā (Ōtuihu, Waikare, and Pākaraka) were all centres of hapū life, and whānau were in occupation when the Crown attacked.[1012]

As already explained, some occupants of Ōtuihu pā had supported Heke and Kawiti at Kororāreka; many others had not.[1013] At the time of the Crown's attack, at least 200 people were inside the pā and possibly many more. While some of the pā's occupants challenged the Crown's forces, most fled carrying what they could while the *North Star* shelled their path. The Crown's forces discovered large quantities of livestock and other food inside the pā; they took what they could before burning it and all its buildings and destroying all nearby waka.[1014] Ngāti Manu retreated to the kāinga Mātairiri (at Taumārere), and later moved to Puketohunoa Pā at Te Karetū.[1015]

Waikare was another long-established pā site – one held by Te Kapotai.[1016] During the 1820s and 1830s, a thriving trading settlement had grown up around it, supplying timber for ship repairs and settlers' homes, and offering an anchorage that was outmatched only by Kororāreka and Ōtuihu.[1017] The surrounding settlement included hostels and homes for European traders, and kāinga occupied by many Te Kapotai families.[1018] The colonial troops attacked on 15 May 1845, intending to surround the pā and cut off any escape, but the sound of ducks taking off from the shore alerted the pā's occupants, allowing them to begin evacuation.[1019] Women and children departed first, leaving a small party to cover the escape.[1020] As at Ōtuihu, plundering occurred; the colonial forces took large quantities of pigs, potatoes, and other food, before burning the pā and all surrounding buildings.[1021]

1011. Johnson, 'The Northern War' (doc A5), pp 248, 300, 364, 377; see also Belich, The New Zealand Wars, pp 63–64.

1012. Johnson, 'The Northern War' (doc A5), pp 235, 267–268, 311–312; Te Kapotai claimants, 'Te Kapotai Hapu Korero for Crown Breaches of Te Tiriti o Waitangi: Mana, Rangatiratanga' (doc F25(b)), p 48.

1013. Johnson, 'The Northern War' (doc A5), pp 187, 234.

1014. Johnson, 'The Northern War' (doc A5), pp 237–239.

1015. Arapeta Hamilton (doc F12(a)), p 13.

1016. Te Kapotai claimants, 'Te Kapotai Hapu Korero for Crown Breaches of Te Tiriti o Waitangi: Mana, Rangatiratanga' (doc F25(b)), p 23.

1017. Te Kapotai claimants, 'Te Kapotai Hapu Korero for Crown Breaches of Te Tiriti o Waitangi: Mana, Rangatiratanga' (doc F25(b)), pp 27, 29–32.

1018. Te Kapotai claimants, 'Te Kapotai Hapu Korero for Crown Breaches of Te Tiriti o Waitangi: Mana, Rangatiratanga' (doc F25(b)), pp 49–50.

1019. Johnson, 'The Northern War' (doc A5), pp 267–268.

1020. Johnson, 'The Northern War' (doc A5), pp 267–268; Te Kapotai claimants, 'Te Kapotai Hapu Korero for Crown Breaches of Te Tiriti o Waitangi: Mana, Rangatiratanga' (doc F25(b)), p 49.

1021. Johnson, 'The Northern War' (doc A5), pp 268–270.

Crown forces also discovered and claimed large food stores at Ōhaeawai and Pākaraka before those pā were destroyed.[1022] Pākaraka, one of Te Haratua's pā, was abandoned as the Crown's forces approached, leaving British troops to discover its large stores.[1023] At Ōhaeawai, British forces discovered six months' supply of potatoes and corn. This was shared out among Crown and 'loyal' Ngāpuhi troops and consumed within days.[1024] As well as food, the Crown's troops stole other items. At Ōtuihu, the British officer Cyprian Bridge carried away a mere as a souvenir.[1025] After Ruapekapeka he stopped off at Waiōmio where he 'went into a burying place of Kawiti's and picked up a skull which I brought away with me'.[1026] Henry Williams later described the soldiers as a 'scourge', remarking that they 'steal all they can put their hands upon, to say nothing of their dreadful destruction wherever they move'.[1027]

In early May, seamen from the *North Star* and *Hazard* destroyed several undefended settlements around the Bay of Islands coast. Clarke junior identified the destroyed settlements as Kaipatiki, Waitangi, Kaihera, and Pūmuka's settlement (known as Te Raupō) at Whangae.[1028] Clarke and James Clendon had been present at the attack on the first two and pointed out whare belonging to 'friendly' Māori. Those, along with church buildings, were the only structures saved.[1029] It is not clear where Kaihera was or who it was associated with. The other settlements appear to have been targeted because of associations with Heke or others who were resisting the Crown. Clarke identified Kaipatiki as one of Heke's settlements.[1030] The claimant Emma Gibbs-Smith told us that Te Kēmara of Waitangi orchestrated the resistance at Puketutu, Ōhaeawai, and Ruapekapeka, in which his nephews Heke, Marupō, and Te Haratua all played key roles.[1031] Pūmuka had been killed at Kororāreka on 11 March and his relatives fought against the Crown in subsequent battles. While British forces had been instructed to destroy pā associated with the Crown's opponents, there was no clear direction to destroy kāinga.[1032] FitzRoy's instruction that all waka belonging to 'rebel' Māori be destroyed[1033] was duly carried out during the attacks on Ōtuihu, Waikare, and Bay of Islands

1022. Johnson, 'The Northern War' (doc A5), pp 238, 268–270, 310–311.
1023. Johnson, 'The Northern War' (doc A5), pp 311–312.
1024. Johnson, 'The Northern War' (doc A5), p 311.
1025. Johnson, 'The Northern War' (doc A5), pp 234, 236–238; Bridge, journal, 30 April 1845 (Johnson, supporting papers (doc A5(a)), vol 4, p 693).
1026. Bridge, 13 January 1846 (cited in Johnson, 'The Northern War' (doc A5), p 385).
1027. Williams to Church Missionary Society, 7 November 1845 (cited in Johnson, 'The Northern War' (doc A5), p 318).
1028. Johnson, 'The Northern War' (doc A5), p 256.
1029. Clarke to father, 19 May 1845 (cited in Johnson, 'The Northern War' (doc A5), p 256).
1030. Johnson, 'The Northern War' (doc A5), p 256.
1031. Emma Gibbs-Smith (doc W32), pp 24–25.
1032. Johnson, 'The Northern War' (doc A5), pp 190, 378.
1033. FitzRoy to Hulme, 4 May 1845 (cited in Johnson, 'The Northern War' (doc A5), p 244).

kāinga.[1034] Waka were also destroyed at Ōtuihu.[1035] At Waikare, British officers allowed Nene's men to take away Te Kapotai waka.[1036]

Chief Protector Clarke senior later acknowledged the heavy cost to hapū arising from the destruction of their homes, waka, fishing nets, and other property, and the plunder of their food stocks which could not be replenished during winter. These events deepened the already serious economic crisis arising from the naval blockade. Despite acknowledging the severity of the repercussions, Clarke regarded them as 'unavoidable' consequences of war.[1037] Although the Crown's actions put the lives and livelihoods of non-combatants at risk, there is no evidence of the Crown forces deliberately firing on those populations. One woman and two children were killed by shellfire inside Ruapekapeka.[1038]

5.5.2.7 *Did the Crown take all opportunities to secure and restore peace?*

5.5.2.7.1 Peace negotiations: 1845

Six weeks passed between the destruction of Kororāreka and the British attack on Ōtuihu, during which the Governor made no attempt to communicate with 'rebel' leaders or consider alternatives to military action.[1039] Once the Crown's military campaign had begun, Heke and Kawiti made regular overtures to the Governor seeking peace.[1040] Governor FitzRoy ignored Heke's first approach, which was made just three weeks into the campaign.[1041] Thereafter, the Crown indicated it was willing to make peace only if Heke and Kawiti gave up land and submitted to its authority.[1042]

Heke first attempted to negotiate peace on 14 May 1845, soon after British forces had attacked Te Kahika. He approached the missionary Robert Burrows to ask what terms the Governor would require for peace, then again met him – and also Henry Williams – a week later, repeating his request for peace and offering terms (though there is no surviving record of what they were).[1043] On 21 May, he wrote to FitzRoy offering an end to hostilities. Heke made it clear that he would not surrender but would lay down arms if the Governor was willing to also.[1044]

In this letter, Heke carefully weighed the Crown's transgressions against his own. He explained why he had cut down the flagstaff, and why the Governor's insistence on rebuilding it was a provocation. He tallied the losses of his pā, kāinga, waka, cultivations, and livestock against the loss of the flagstaff, while denying

1034. Johnson, 'The Northern War' (doc A5), pp 239, 257, 271, 356.
1035. Johnson, 'The Northern War' (doc A5), pp 236–238, 243.
1036. 'Official Summary', *Nelson Examiner and New Zealand Chronicle*, 26 July 1845, p 83.
1037. Chief Protector, half yearly report, 1 July 1845 (Crown document bank (doc W48), p 267).
1038. Johnson, 'The Northern War' (doc A5), p 379.
1039. Johnson, 'The Northern War' (doc A5), pp 220–221.
1040. Johnson, 'The Northern War' (doc A5), pp 257–260, 330, 347, 392; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 315–316, 319.
1041. Johnson, 'The Northern War' (doc A5), pp 286–287.
1042. Johnson, 'The Northern War' (doc A5), pp 336–338.
1043. Johnson, 'The Northern War' (doc A5), p 257.
1044. Johnson, 'The Northern War' (doc A5), pp 257–260; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 315–316.

responsibility for the plunder or destruction of Kororāreka.[1045] Even at this early stage Heke was aware that FitzRoy would demand land as a condition of peace, as he had done in the cases of Parihoro and Koukou in January,[1046] and Pōmare earlier in May.[1047] Crown officials already possessed draft peace terms setting out the lands to be taken,[1048] leading Heke to ask where he was supposed to go if the Governor insisted on proceeding with this plan.[1049] It was the Governor who had opened the doors of 'Anger and of Death' by invading his lands, said Heke, and it was therefore for the Governor to close them: 'If you say, let war continue, I answer Yes. If you say let peace be made, I answer – Yes – make peace with your enemy. If you agree to this law, come and converse.'[1050]

FitzRoy received this letter on 29 May but made no response. The Executive Council met that day and resolved to attack Heke again. In its view, military victory was a necessary precursor to peace. As discussed earlier, the Government's concern was not only with defeating Heke, but also with warning other Māori against any challenge to the Crown's authority.[1051] After Kawiti's resounding defeat of the British force at Ōhaeawai, Heke wrote again seeking peace.[1052] Only an English translation survives:

> O Friend the Governor,
> This is my good news to you. I call upon you to make peace. Would it not be well for us to make peace? – to seek a reconciliation with God on account of our sins, as we have defiled his presence by human blood?
>
> The Scriptures tell us to pray to God, who will give us a knowledge of his laws.
>
> I felt a regard for the soldiers, although they came with their heavy things (shells etc) to destroy me. I did not burn the bridges on the Keri Keri road; this was my act of great kindness to the soldiers.
>
> If you think well of these sentences, write to me quickly, in order that I may learn your sentiments. This is my second letter to you, and I now know that there is anger within you, because you have not sent me one letter. I also know that it is Walker [Waka Nene] who kills the soldiers, for he lets the soldiers fight, but runs away into the bush himself.
>
> What are the reflections respecting this affair? I say, do you look into this affair both for yourself and me.[1053]

1045. Johnson, supporting papers (doc A5(a)), vol 1, pp 237–238.
1046. O'Malley, 'Northland Crown Purchases' (doc A6), pp 71, 75, 77.
1047. Johnson, 'The Northern War' (doc A5), p 242.
1048. Johnson, 'The Northern War' (doc A5), pp 275–276. These terms included Heke's, as well as another set of peace terms recorded by Clendon. According to Johnson, 'No further information has been located in relation to the peace terms recorded by Clendon', but they were unlikely to be from Heke or Kawiti.
1049. Johnson, supporting papers (doc A5(a)), vol 1, p 248.
1050. Heke to FitzRoy, 21 May 1845 (Johnson, supporting papers (doc A5(a)), vol 1, pp 233, 242, 244.
1051. Johnson, 'The Northern War' (doc A5), pp 286–287.
1052. Johnson, 'The Northern War' (doc A5), pp 319–320.
1053. Heke to FitzRoy, 19 July 1845 (cited in Johnson, 'The Northern War' (doc A5), p 319).

As Johnson observed, this was 'a clear and direct appeal for peace', which imposed no conditions.[1054] This time, the Governor responded. He said he had not answered Heke's first approach 'because it was not a proper letter'. Now, he was willing to make peace, but only if Heke and Kawiti offered 'an atonement to the utmost of your ability' for the destruction of Kororāreka and the lives lost. He made no comment on Heke's claim that others had destroyed the town, or that his own intransigence had contributed to the conflict.[1055] Although FitzRoy did not spell it out, 'atonement' meant forfeiting land, as Heke understood.[1056] FitzRoy also enclosed a copy of te Tiriti, telling Heke he was 'bound equally' with the Crown and lived under the protection of its flag. Heke could either submit and pay the required atonement, or face a larger Crown force: 'I bear the sword of justice, but I will use it with mercy. I am obliged to put down those who cause tumult and war. Many ships and a great many soldiers are coming, but at my word they will stop, or they will act.'[1057]

Heke responded by dismissing te Tiriti as saying one thing and meaning another. According to the missionary Robert Burrows, Heke regarded the Crown's true intention to mean 'I hereby secure to you in the name of the Queen of England big guns rockets shells and muskets, but your lands, your forests and fisheries I mean to take as soon as I can.'[1058] As proof, Heke held up the Governor's letter and said, 'We have already had the guns etc and now we have to forfeit our lands, no let them destroy us first and then they can have our lands. Kawiti will never agree to give up his. My people will never quietly give up theirs.'[1059]

Nonetheless, Heke replied to the Governor. Again, he denied responsibility for the plunder or destruction of Kororāreka and again he enumerated the losses his people had experienced from the war. He asked FitzRoy to share responsibility for the conflict: 'You have said, that my sin was the sole cause which produced so much evil in the world: that may be; but let it not be said that it was solely my fault. You raised it (flag) up; I cut it down. (So that) we are both alike.'[1060]

By making these comments, Heke was reiterating his point that utu had already been achieved and the Governor could therefore make peace without demanding anything further. To underline this, Heke explained that land was '[t]he thing I put most value upon; because it was given by God for a dwelling-place for man in this world, a resting place for the soles of his feet, a burial place for the strangers of the world'. Heke told the Governor that any peace would have to include Kawiti,

1054. Johnson, 'The Northern War' (doc A5), p 320.
1055. FitzRoy to Heke, 6 August 1845 (cited in Johnson, 'The Northern War' (doc A5), pp 320–321).
1056. Johnson, 'The Northern War' (doc A5), pp 321–322. Prior to the attack on Ōhaeawai, FitzRoy told Colonel Despard of the 99th Regiment that the war would continue until Heke and Kawiti were dead or imprisoned, and their lands forfeited and handed over to Nene and his supporters: Johnson, 'The Northern War' (doc A5), pp 293–294.
1057. FitzRoy to Heke, 6 August 1845 (cited in Johnson, 'The Northern War' (doc A5), pp 320, 321).
1058. Burrows, diary (cited in Johnson, 'The Northern War' (doc A5), p 322); Johnson, 'The Northern War' (doc A5), pp 322–324.
1059. Burrows, diary (cited in Johnson, 'The Northern War' (doc A5), p 322).
1060. Heke to FitzRoy, 29 August 1845 (cited in Johnson, 'The Northern War' (doc A5), p 324).

and he asked him to visit the rangatira and negotiate directly, because negotiating through letters was not satisfactory.[1061]

This was Heke's third letter seeking peace. It took six weeks to reach the Governor, because (for reasons he never explained) the missionary Henry Williams held it back.[1062] In early September, Kawiti also wrote a very brief letter to the Governor to say that he consented to peace being made, as too many Māori and Pākehā had died.[1063] On 25 September, FitzRoy responded to Heke and Kawiti setting out his conditions; he refused to meet until peace had been concluded. We have the English text of FitzRoy's letter to Heke but not its translation. FitzRoy specified the terms as follows:

> 1st. The treaty of Waitangi to be binding.
> 2d. The British colours to be sacred.
> 3d. All plunder now in the possession of the natives to be forthwith restored.
> 4th. The following places to be given up to the Queen, and remain unoccupied by any one until the decision of Her Majesty be signified; namely, parts of Mawe, Ohaeawae, Taiamai, Te Aute, Wangai, Waikare, Kotori, and Kaipatiki.
> 5th. Hostilities to cease entirely between all chiefs and tribes now in arms, with or against the Government.[1064]

These conditions, FitzRoy said, were 'very favourable' to Heke and Kawiti, 'who have caused so much evil and distress in this land'. He explained that he would consent to peace only on these terms and repeated his assertion that the war was entirely the fault of Kawiti and Heke. More soldiers would be brought in, he told them, and war must continue until they either submitted to the Crown's authority or were 'destroyed'.[1065]

To Heke and Kawiti, these terms were a combination of the unpalatable and impossible. Taken together, the first and second conditions make clear that rangatira were to accept the English text of the treaty, which granted Britain sovereignty over New Zealand and therefore established the Union Jack as the national flag. As already explored, Heke and Kawiti's understanding of the treaty was very different, a situation of which FitzRoy was aware but refused to countenance. Here, he was asking them to submit to the Crown and acknowledge its flag as sacred. Heke had already explained that he possessed no plunder from Kororāreka and so had none to return. As far as he was concerned, anything taken was in the hands of Hokianga or coastal Bay of Islands hapū.[1066] Nor could Heke and Kawiti accept the Governor's other conditions. Kawiti replied in early October to state he would agree to peace but could never give up his territories: 'I have been fighting for my

1061. Heke to FitzRoy, 29 August 1845 (cited in Johnson, 'The Northern War' (doc A5), pp 325–326).
1062. Johnson, 'The Northern War' (doc A5), pp 326–327.
1063. Johnson, 'The Northern War' (doc A5), p 330.
1064. FitzRoy to Heke, 29 September 1845 (Crown document bank (doc W48), pp 342–343).
1065. FitzRoy to Heke, 29 September 1845 (Crown document bank (doc W48), pp 342–343); see also Johnson, 'The Northern War' (doc A5), pp 332–333.
1066. Crown document bank (doc W48), pp 333–335.

land', he told the Governor, '. . . if you are very desirous to get my land, I shall be equally desirous to retain it for myself.'[1067] Even if Heke and Kawiti had been willing to comply, the specific lands demanded by FitzRoy were not theirs to give; they either had no interests in them or their interests were jointly held with other hapū.[1068]

Nonetheless, both FitzRoy and his successor regarded the terms as non-negotiable. FitzRoy therefore ceased communication after Kawiti's refusal, other than to warn of dire consequences if the terms were not accepted. Kawiti and Heke continued to speak to Crown officials in the Bay of Islands, making clear that they wanted peace, but not at the cost of their lands or territorial authority. In early November, Henry Williams held talks with both rangatira, at which Kawiti reiterated that they would give up 'no land whatever'. He and Heke would fight if they had to, but according to Williams, 'They all wished for peace.'[1069]

When Grey replaced FitzRoy as Governor in November, he determined that it was preferable for the Crown to achieve a decisive victory than to negotiate peace.[1070] Any negotiation would mean treating Heke and Kawiti as equals, 'somewhat in the position of sovereign princes', which was something Grey was unwilling to do.[1071] He judged that his plan to defeat Heke and Kawiti and then offer them unconditional pardons was the most effective way of humiliating them and conveying their status as subjects.[1072] Accordingly, Grey engineered an end to the peace negotiations by demanding that Heke and Kawiti comply with all demands (including the forfeit of lands belonging to other hapū)[1073] or face another round of military action.[1074] On 2 December, Heke rejected Grey's ultimatum:

> Land? Not by any means, because God made this country for us; it cannot be sliced, if it were a whale it might be sliced; but as for this, do you return to your own country, to England, which was made by God for you. God has made this land for us, and not for any stranger or foreign nation to touch (or meddle with) this sacred country.[1075]

As Heke's letter makes clear, the question of land was not merely about possession of a resource, but also about territorial authority: Heke's perception was that the Crown was interfering in his country. In early December, Heke made one final attempt to arrange peace and sought to talk with Grey directly. The Governor was willing to oblige and travelled to Ōtuihu, but a misunderstanding over the timing

1067. Kawiti to FitzRoy, 7 October 1845 (cited in Johnson, 'The Northern War' (doc A5), pp 337–338).
1068. Johnson, 'The Northern War' (doc A5), pp 349, 351–352.
1069. Captain Everard Home to Rear Admiral Cochrane, 13 November 1845 (cited in Johnson, 'The Northern War' (doc A5), pp 339–340); see also Burrows, *Extracts*, p 49 (doc W48(a)).
1070. Johnson, 'The Northern War' (doc A5), pp 343–348.
1071. Grey to Stanley, 15 December 1845 (cited in Johnson, 'The Northern War' (doc A5), p 350).
1072. Johnson, 'The Northern War' (doc A5), p 351261.
1073. Johnson, 'The Northern War' (doc A5), pp 349, 351–352.
1074. Johnson, 'The Northern War' (doc A5), pp 347–348.
1075. Heke to Grey, 2 December 1845 (cited in Johnson, 'The Northern War' (doc A5), p 347).

meant the meeting did not eventuate. On 5 December, Grey ordered his forces to attack Ruapekapeka.[1076]

5.5.2.7.2 Peace is concluded: January 1846

The Crown's troops bombarded Ruapekapeka almost constantly for 11 days before the pā was finally breached. On 11 January, Nene's forces entered through the gap in the palisade to find Kawiti's men in a state of retreat. Several hundred British soldiers followed very soon afterwards, and a battle ensued,[1077] beginning inside the pā and then moving into the dense bush outside. After some hours, those still defending the pā withdrew into the bush.[1078] As they had elsewhere, the colonial forces removed anything of value from the pā and then burned it and the surrounding camps.[1079]

Governor Grey subsequently proclaimed that taking Ruapekapeka had led to 'the complete defeat of the rebels Heke and Kawiti by Her Majesty's forces'.[1080] As he represented matters, this was the overwhelming victory that the Government had been seeking for the previous eight months.[1081] Not everyone was convinced. The missionary Henry Williams later doubted that the capture of an abandoned pā could be regarded as such a triumph, and some settler newspapers and early military historians have also dismissed Grey's claims.[1082] The casualty numbers were fairly even: for the British, 12 men were killed and 29 wounded; for the defenders of the pā (according to Belich), between nine and 12 lives were lost and 30 or so were wounded.[1083] Once again, Heke and Kawiti had survived the Crown's assault.[1084]

After the battle, Kawiti and his warriors retreated south to Pehiāweri (northern Whāngārei) where they buried their dead and tended their wounded. Te Kapotai and Heke's people returned to their homes.[1085] Very soon afterwards, Heke and Kawiti renewed their peacemaking efforts. On previous occasions they had approached missionaries and the Governor, but this time they requested Pōmare II and Te Whareumu to act as intermediaries in brokering peace with Nene and the Grey.[1086] Pōmare then sent a message to Nene: 'Kaati te whawhai, kua mate ano te tangata i aia. Me whakamutu!' (which we translate as 'The battle is over and the man is dead. Let's stop.'). Nene agreed, and Pōmare then brought Heke and Kawiti to his pā at Puketohunoa where they completed the arrangements.[1087]

1076. Johnson, 'The Northern War' (doc A5), p 348.
1077. Johnson, 'The Northern War' (doc A5), pp 366–367, 369–370.
1078. Johnson, 'The Northern War' (doc A5), pp 370–371.
1079. Johnson, 'The Northern War' (doc A5), p 385.
1080. Grey to Stanley, 13 January 1846 (cited in Belich, *The New Zealand Wars*, p 60).
1081. Belich, The New Zealand Wars, p 60.
1082. Belich, *The New Zealand Wars*, pp 60–61.
1083. Johnson, 'The Northern War' (doc A5), pp 377–378, 380.
1084. Johnson, 'The Northern War' (doc A5), p 377.
1085. Johnson, 'The Northern War' (doc A5), p 390; Shirleyanne Brown (doc P9), p 19.
1086. Johnson, 'The Northern War' (doc A5), p 392. Te Whareumu appears to have been the son of Hori Kingi Te Whareumu who was killed in 1828.
1087. Arapeta Hamilton (doc W7), p 9.

On 19 January 1846, a week after Ruapekapeka was abandoned, Kawiti wrote a brief letter to Grey. The original does not appear to have survived, but an English translation read: 'friend governor, I say let peace be made between you and I. I am filled (satisfied or have had enough) of your riches (cannon balls); therefore, I say, let you and I make peace.'[1088] Pōmare II and Te Whareumu wrote to FitzRoy (who was still in New Zealand) on the same day, confirming that the principal resistance leaders all sought an end to hostilities. They insisted that the deal be concluded in person, and offered to travel to Auckland and return with Grey to the Bay of Islands.[1089] This was the fifth occasion since September 1844 in which Ngāpuhi leaders had sought a face-to-face meeting with the Governor. No meeting had yet taken place.[1090]

On 21 January, Heke, Kawiti, Hikitene, and Nene all attended a hui at Puketohunoa and there reached agreement to make peace. Nene then travelled to Auckland aboard a Royal Navy ship, possibly with Te Whareumu and Pōmare II. Chief Protector George Clarke senior kept an account of the meeting, according to which Nene declared that Heke and Kawiti would not fight any more under any circumstances; if the Governor would not make peace, 'they must become wanderers in the bush'. Nene also claimed that Heke and Kawiti were now willing to give up land, but no other surviving statement corroborates that, and no land was ever taken.[1091] Ben Pittman of Ngāti Hao told us that Patuone and Nene 'made it very clear to Grey on no account that Kawiti or Heke suffer any consequences. This is generally not known or even acknowledged but it is part of our history.'[1092]

The day after this meeting, Grey issued a peace proclamation granting full pardons to Heke, Kawiti, and other 'rebel chiefs'. No confiscation or other punitive measure was imposed. Grey claimed that Heke, Kawiti, and their allies had been 'defeated and dispersed', and had 'made their complete submission to the Government'.[1093] Soon afterwards, Grey reported to Lord Stanley that he had avoided punitive measures because he wanted Māori throughout the country to recognise the Crown as 'generous and liberal' towards its 'native subjects'.[1094] Another explanation is that an unconditional pardon allowed the Crown to extract itself from a costly war while also claiming authority over Heke and Kawiti.[1095] By this time, Grey was dealing with another conflict in the Hutt Valley and could not risk fighting in two regions.[1096] According to the missionary Robert Burrows, Grey

1088. Kawiti to Governor, 19 January 1846 (cited in Johnson, 'The Northern War' (doc A5), p 392).
1089. Johnson, 'The Northern War' (doc A5), p 392.
1090. Johnson, 'The Northern War' (doc A5), pp 257–260, 347; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 315–316, 319.
1091. George Clarke senior, 'Memorandum for His Excellency', 22 January 1846 (Johnson, 'The Northern War' (doc A5), p 393); Johnson, 'The Northern War' (doc A5), pp 393–395; Belich, *The New Zealand Wars*, p 65.
1092. Benjamin Pittman, transcript 4.1.17, Akerama Marae, p 290.
1093. *New Zealand Gazette*, 23 January 1846, no 2, p 7 (cited in Johnson, 'The Northern War' (doc A5), p 394).
1094. Johnson, 'The Northern War' (doc A5), p 395.
1095. Johnson, 'The Northern War' (doc A5), pp 350–352.
1096. Johnson, 'The Northern War' (doc A5), p 395.

was as pleased as Heke and Kawiti to be done with fighting, especially in a war that brought 'neither honour nor glory to anyone'.[1097]

Grey's claim that Heke and Kawiti had offered their 'complete submission' does not bear scrutiny. The Crown, after insisting for months that the conflict must continue until Heke and Kawiti were crushed, had instead accepted an unconditional peace negotiated entirely within Ngāpuhi and presented to the Governor as a fait accompli.[1098] Heke and Kawiti were free to return to their homes.[1099] They accepted that they could not fight the Crown indefinitely, but otherwise continued to assert their tino rangatiratanga.[1100] O'Malley told us that the Government's claim of victory was 'a convenient fiction',[1101] and Phillipson's view was that the Crown 'fought a war to no purpose'.[1102]

5.5.2.7.3 The aftermath of war

Soon after peace was concluded, Heke wrote to Governor Grey asking that he and FitzRoy both travel north for a meeting. Nene and Rewa had raised the possibility of rebuilding the flagstaff, but Heke continued to insist that the Crown and Ngāpuhi do this jointly: '[C]ome that we may set aright your misunderstandings and mine also, and Walker's too', wrote Heke, 'then it will be right; then we two (you and I) will erect our flagstaff; then shall New Zealand be made one with England.'[1103] Nothing in this brief letter indicated that Heke was submitting to the Crown's authority or giving up any of the cause for which he had been fighting; rather, he appears to have regarded the conclusion of peace as an opportunity to negotiate.[1104]

Grey told the Colonial Office he would make the journey, and on 7 February he arrived in the Bay of Islands on a Royal Navy man-of-war. When Heke came to the shore for a meeting, Grey refused to leave the ship, and Heke would not go on board, fearing that he would be captured and imprisoned as Pōmare had been.[1105] Heke then composed a waiata to describe his mistrust of Grey: 'Haere atu ki te pai a te Kawana. He pai ranei? He kahore ranei?' ('Go off to the peace of the Governor. Is it peace? Or not?').[1106]

Grey left two Royal Navy ships in the Bay of Islands, and a garrison of soldiers at Waitangi on the land Busby claimed to have purchased (the soldiers were soon

1097. Burrows, *Extracts*, p 55 (doc w48(a), p 32).
1098. Belich, The New Zealand Wars, p 65.
1099. Burrows, *Extracts*, p 55 (doc w48(a), p 32).
1100. Johnson, 'The Northern War' (doc a5), pp 391–392.
1101. O'Malley, 'Northland Crown Purchases' (doc a6), p 91.
1102. Phillipson, 'Bay of Islands Maori and the Crown' (doc a1), p 361.
1103. Heke to Governor, no date (cited in Johnson, 'The Northern War' (doc a5), pp 397–398).
1104. Johnson, 'The Northern War' (doc a5), p 398.
1105. Johnson, 'The Northern War' (doc a5), p 398. Heke's fears were reasonable. A few months later, Grey would capture and imprison Te Rauparaha by luring him onto a Royal Navy ship.
1106. Hone Heke (Johnson, 'The Northern War' (doc a5), pp 398–399). Translation by Dr Jane McRae.

afterwards moved to Te Wahapū).[1107] He also took some limited steps to assert the Crown's civil authority, leaving two military officers (Colonel Wynyard and Major Bridge) as justices of the peace. Bridge later became the resident magistrate. On 7 February, the customs office was reopened.[1108]

However, the Governor showed little other interest in the north, preferring to focus his attentions on asserting the Crown's authority and acquiring land for larger settlements such as Port Nicholson. He made scant attempt to assert practical authority over Ngāpuhi communities. Nor did he seek land for settlement, nor ensure the return of surplus lands – despite his attack on the large missionary claims (discussed in chapter 6) – nor make any attempt to support trade or economic renewal.[1109] Whereas Dr Phillipson saw this as a policy of 'benign neglect',[1110] Dr O'Malley viewed it as a deliberate attempt to 'strangle the lifeblood' out of the district's economy, because Ngāpuhi had failed to recognise the Crown's authority.[1111]

According to Phillipson, Heke, Kawiti, and others who had resisted the Crown 'lived fairly much as before, their authority unimpaired by the war or their supposed defeat'.[1112] The war enhanced Heke's mana to such an extent 'that he appears to have been the principal rangatira at the Bay of Islands in the late 1840s'. Right up to his death in 1850, he continued to exercise independent authority within his community, and sometimes also over settlers, enforcing tikanga, punishing breaches of tapu, and conducting taua muru when he saw fit.[1113]

Crown officials did not dare rein him in. Instead, in cases of Māori–settler disputes, they sought his aid to enforce their laws – which he refused to give. In response to one approach from Major Bridge, Heke said:

> I am no magistrate for the Europeans. I am a Maori man for the Maori people. You have a law an erroneous law. I have a law likewise: it is a straight law . . . Should the lower order of Europeans misbehave in future I will not look to the Magistrate, it matters not whether they are Chiefs or whether the Governor goes to war, that will be good.[1114]

1107. Johnson, 'The Northern War' (doc A5), p 398; Lee, *I have Named it the Bay of Islands*, p 270. See chapter 6 for details of Busby's old land claim.

1108. Johnson, 'The Northern War' (doc A5), p 398.

1109. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 305.

1110. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 305.

1111. O'Malley, 'Northland Crown Purchases' (doc A6), p 110; see also pp 107–109.

1112. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 360; see also Belich, *The New Zealand Wars*, pp 68–70.

1113. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 360–361; see also O'Malley, 'Northland Crown Purchases' (doc A6), pp 11, 88–93; Ralph Johnson, transcript 4.1.24, Oromāhoe Marae, p 690.

1114. Heke to Bridge, 16 January 1849 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 361).

Later that year, he wrote his letter to the Queen, insisting that she honour the treaty by restoring Māori authority.[1115] He was far from alone in continuing to assert that the north should be governed according to Māori law – other rangatira shared this view. After a series of killings in 1847, Nene warned the Government against intervening, arguing that the deaths were legitimate under Māori law.[1116] Henry Williams, a few months earlier, had written to his brother-in-law in England: 'The flag-staff in the Bay is still prostrate, and the natives here rule. These are humiliating facts to the proud Englishman, many of whom thought they could govern by a mere name.'[1117] In O'Malley's view, Grey chose not to rebuild the flagstaff because he feared it would be toppled again and he wanted to spare the Crown the humiliation of embarking on another unwinnable war.[1118]

If the Government was unable to enforce its laws during the late 1840s, that does not signify that Māori control was complete; rather, an uneasy balance was maintained. For the most part, neither rangatira nor colonial officials were willing to risk open conflict by challenging the other. This meant not only that colonial authorities could not impose their laws over Māori but also that rangatira struggled to impose their authority on settlers. Breaches of tapu might result in enforcement action, but Māori – Heke included – struggled to enforce their understanding of pre-1840 land claims, and received no effective help from the Governor.[1119]

Nene and Heke met in October 1846 to finalise their peace, and there agreed that no Ngāpuhi rangatira should again interfere in the affairs of another.[1120] Heke and Grey met – at last – in April 1848. The Government sent gifts of blankets and cash in advance, which Heke refused to accept.[1121] He would himself present the Governor with a mere pounamu, some pigs, and the hani (wooden weapon) that he had used throughout the war.[1122] According to the *Daily Southern Cross*, the Governor went to some length to ensure that the meeting was not in public. Nonetheless, the newspaper acquired detailed accounts from some who were present.[1123] Heke told the Governor:

> Haere mai e te Kawana, haere, kia u tou puri i aku kupu, kia u taku pupuri i au.
>
> Tenei tenei kino o taua kua mutu, kua mau te rongo, e pai ana. Tenei ake pea te kino nui atu i tenei me ko wai ka kite? Kia rongo mai tatou e nga tangata o te Waimate, o te Ahuahu, o Kaikohe o hea, o hea, kia tatou katoa, tenei kupu. E mara e te Kawana, kati atu nga Taone mou i Kororarika, i Akarana, i nga kainga o nga porahu. Hei Taone

1115. Johnson, 'The Northern War' (doc A5), pp 401–403.
1116. O'Malley, 'Northland Crown Purchases' (doc A6), pp 93–95.
1117. Williams to Edward Marsh, 28 May 1846 (cited in Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 469).
1118. Vincent O'Malley, '"A Living Thing": The Whakakotahitanga Flagstaff and its Place in New Zealand History', *Journal of New Zealand Studies*, 2009, no 8, p 41.
1119. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 361.
1120. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 359.
1121. 'The Governor's Visit to the North', *Daily Southern Cross*, 6 May 1848, p 2.
1122. *New Zealander*, 3 May 1848, p 2.
1123. 'The Governor's Visit to the North', *Daily Southern Cross*, 6 May 1848, p 2.

aha hoki to Taone? Ina hoki titiro noa ana ahau, kiki tonu nga toa o te Waimate i te taonga, kahore ano, i hemo noa te hokoko ki te Maori.

Hoki atu koe ki reira noho mai ai, ka hoki ahau ki taku kainga noho ai ki te kai nani.

E nga Mihinare, kia u te noho i o koutou wahi, me tatou kia u te noho i o tatou wahi.

The newspaper translated this as:

Come, o Governor, go. Hold fast my words as I will hold fast yours.

Here has this our old quarrel been concluded. Peace has been made, it is good. Hereafter, perhaps, there will arise a still greater quarrel. Who can tell? Listen all ye men of Waimate, or Ahuahu, of Kaikohe, and of all the adjacent places, this word is to you all. Friend Governor, keep your Towns at Kororarika, and at Auckland, at the places already in confusion. What is the good of your Towns? I see the stores of the Waimate are full of goods, they are not empty, neither is the traffic with the natives suspended.

Go, return to these places, and remain. I shall return to my place and remain and eat my native food (lit. cabbage).

Ye missionaries, hold fast, and remain in your places, as we also remain in our places.[1124]

In September 1849, Ngāti Manu hosted a hui where Grey and Kawiti also finally met face to face, during which Kawiti formalised peace by placing a kōtuku feather in the Governor's cap.[1125]

Although Ngāpuhi had not been defeated, prosperity remained elusive. The combined effects of war, the departure of settlers, increased competition from other ports, and Crown neglect all combined to push the Bay of Islands economy into a steep decline.[1126] The scale of this can be seen in the value of Bay of Islands exports, which fell from £5,678 in 1844 to just £43 in 1855. By 1853, Kororāreka's population numbered about 40.[1127] This was not the prosperity that Hobson had promised in 1840,[1128] and that Grey had again promised when peace was made in 1846.[1129]

Economic neglect achieved what war had not. During the late 1840s and the 1850s, Ngāpuhi made several efforts to re-engage with the Crown, offering land

1124. 'The Governor's Visit to the North', *Daily Southern Cross*, 6 May 1848, p 2.

1125. Johnson, 'The Northern War' (doc A5), p 404; Te Kapotai claimants, 'Te Kapotai Hapu Korero: Mana, Rangatiratanga' (doc F25), p 60.

1126. Nicholas Bayley, 'Aspects of Maori Economic Development and Capability in the Te Paparahi o Te Raki Inquiry Region from 1840 to c 2000' (commissioned research report, Wellington: Waitangi Tribunal, 2013) (doc E41), pp 51–55; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 361.

1127. O'Malley, 'Northland Crown Purchases' (doc A6), pp 87–88, 134–135.

1128. Johnson, 'The Northern War' (doc A5), pp 71–73.

1129. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 360; O'Malley, 'Northland Crown Purchases' (doc A6), p 81.

– sometimes at nominal prices – for townships. Māori also appealed to the Government for more settlers, recognising the need for larger markets to create economic prosperity.[1130] Rangatira Moetara and other Hokianga leaders wrote to the Government in the mid-1850s to say they were 'impoverished and neglected', and had done no wrong that they should now be 'deserted by the Europeans'. Makoare Te Taonui also wrote to express similar sentiments: the Government's wartime allies were suffering as much as its opponents.[1131]

In 1857, the emerging Kīngitanga movement sent envoys to the north to seek expressions of support. Several Ngāpuhi communities, fearing the effects of continued isolation and neglect, responded instead by offering messages of support for the Crown. Nene, Tāwhai, Te Hira Pure, and several other rangatira held a meeting where they determined to reject the overtures from Waikato and affirmed their loyalty to the Queen. They wrote to the Governor with this assurance. As an expression of their commitment, they also determined to rebuild the flagstaff on Maiki Hill and erect another at Mangonui.[1132]

The Crown responded, offering some hope of reconciliation and economic engagement. Governor Thomas Gore Browne visited in January 1858 and met with rangatira at Kororāreka, Waitangi, Waimate, and Māngungu.[1133] One practical outcome of these hui was that the Crown brought into fruition a long-discussed plan to remove its troops from the Bay of Islands (a decision that reflected their inability to exercise any effective control over the district should there be further serious unrest);[1134] another, greatly welcomed by Ngāpuhi, was the Governor's proposal that a town be established.[1135]

Ultimately, Kerikeri was selected as the site. But, in return, Te Raki Māori would have to accept the authority of the second Land Claims Commission (see chapters 4 and 6), along with a system of Crown rule through local rangatira who would receive salaries and have influence over local bylaws in return for keeping peace.[1136] This proposal reflected the Crown's recognition that 'English law cannot be strictly carried out without the agency of the Natives.'[1137] In Dr O'Malley's view, this was a plan for 'the extension of substantive British sovereignty by means of indirect rule through favoured chiefs, and by implication, the assimilation of northern Māori into colonial society'.[1138]

At the end of January 1858, after nearly two months of preparation, the flagstaff was rebuilt on Maiki Hill. Ngāti Hine provided the spar, which was fashioned into

1130. O'Malley, 'Northland Crown Purchases' (doc A6), pp 108–110.
1131. Rangatira Moetara and others to Governor, 16 May 1855 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 108).
1132. O'Malley, 'Northland Crown Purchases' (doc A6), pp 115–116.
1133. O'Malley, 'Northland Crown Purchases' (doc A6), pp 121–127.
1134. O'Malley, 'Northland Crown Purchases' (doc A6), p 114.
1135. O'Malley, 'Northland Crown Purchases' (doc A6), pp 124–125.
1136. O'Malley, 'Northland Crown Purchases' (doc A6), pp 129–130; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 203–205, 361–362.
1137. Donald McLean to Governor Gore Browne, 20 March 1857 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 129).
1138. O'Malley, 'Northland Crown Purchases' (doc A6), p 130.

a pole by a local carpenter. More than 300 people from Ngāti Hine, Te Kapotai, and other hapū then dragged the pole up Maiki Hill and erected it. Kawiti had died a few years earlier, and his son Te Kūkupa (later Maihi Parāone) Kawiti supervised the operation and called the pou 'Te Whakakotahitanga o Ngā Iwi', a name intended to represent the unification of Te Raki Māori with the Crown and settlers. Maihi Parāone gifted the Crown an area of land about the flagstaff and promised that the pole would never again be touched (we discuss these events in greater detail in chapter 7). By its reinstatement, Ngāti Hine, Te Kapotai, and others asserted their mana while also symbolising friendship with the Crown. This was all that Heke had sought more than a decade earlier. However, if the flagstaff was intended as a sign of reconciliation, that process was not complete. Though he was then in the Bay of Islands, Governor Gore Browne declined to attend the ceremony. He feared that Ngāpuhi might cut the flag down again as quickly as they had raised it, and that the Crown would once again be drawn into conflict.[1139]

5.5.3 Conclusions and treaty findings

Te Tiriti o Waitangi/The Treaty of Waitangi founded a partnership under which hapū and the Crown were to share authority, paving the way for mutually protective and mutually beneficial Māori–settler relationships. Any armed conflict between the Crown and Māori represented a significant breakdown in that partnership. As set out in section 5.2, previous Tribunal reports have found that the Crown is entitled to use force against its treaty partners only in very limited circumstances. In essence, the force must be necessary to protect lives,[1140] and even then it can only be used if all non-violent options have been exhausted.[1141] In Te Raki, the Crown should not have used force to assert its authority over Māori or settle questions of relative authority,[1142] nor could it claim to have exhausted all possibilities for peace if it had failed to recognise, and respect tino rangatiratanga;[1143] and repeatedly rejected opportunities for negotiation.

After the destruction of Kororāreka, a period of six weeks passed during which there were no further hostilities between Crown and Māori forces, nor any evident threat to settler communities. The Crown did not launch its military campaign

1139. O'Malley, 'Northland Crown Purchases' (doc A6), pp 118–119; Johnson, 'The Northern War' (doc A5), pp 404–405; Te Kapotai claimants, 'Te Kapotai Hapu Korero: Mana, Rangatiratanga' (doc F25), p 60.

1140. Waitangi Tribunal, *Te Urewera*, Wai 894, vol 1, pp 292–293, 315–317, 319, 498–499; Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 1, p 116.

1141. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pp 444–446. For an example of the application of this principle, see Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, Wai 201, pp 216–217.

1142. Waitangi Tribunal, *The Taranaki Report*, Wai 143, pp 78–79, 103; Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pp 444–446; Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 1, p 121.

1143. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, p 446; see also Waitangi Tribunal, *The Taranaki Report*, Wai 143, p 80.

because it perceived that settler lives were under threat,[1144] but rather for two other reasons. First, it was determined to assert its dominance over Heke and Kawiti by suppressing what it regarded as a rebellion to demonstrate to other Māori that the Crown's authority could not be resisted. This was, as Governor FitzRoy's 26 April 1845 proclamation of martial law made clear, a war for 'the Queen's sovereign authority' over people who had never consented to it, and over a district where questions of respective authority had not yet been negotiated, let alone resolved.[1145] Secondly, the Crown sought atonement, in the form of surrendering land, from Heke and Kawiti for the destruction of Kororāreka.

In the absence of any imminent threat to citizens' safety, and in the absence of any attempt by the Crown to resolve its differences with Heke and Kawiti by negotiation, these were not sufficient reasons for going to war. Accordingly, we find that:

- By launching a military campaign in order to assert the Crown's sovereignty, the Crown breached te mātāpono o te tino rangatiratanga, as well as te mātāpono o te matapopore moroki/the principle of active protection. It further acted inconsistently with its obligation to act honourably, fairly, and in good faith, in breach of te mātāpono o te houruatanga/the principle of partnership. This finding applies to actions taken to support the military campaign, including the imposition of martial law and the naval blockade.
- The orders issued to Colonel Hulme on 26 April 1845 instructing him to spare no 'rebel' and 'if possible' to capture principal chiefs as hostages – both those in arms and those in 'covert' support – was a breach of te mātāpono o te tino rangatiratanga and of te mātāpono o te houruatanga/the principle of partnership.

Having declared war against Ngāti Manu, Ngāti Hine, Ngāti Rāhiri, Ngāti Kawa, Ngāti Tautahi, Te Uri o Hua, Te Roroa, and other hapū, the Crown then initiated attacks on their pā and kāinga. Throughout the war, the Crown was the aggressor while Heke, Kawiti, Hikitene, and their allies acted entirely in a defensive manner, fighting only when attacked in their pā, eschewing any acts of ambush or sabotage, and attempting to shield Māori and settler communities as much as possible from the effects of conflict. In June 1845, the Crown renewed hostilities after a five-week hiatus. In December, it renewed hostilities after a further hiatus of five months. During these periods of peace, Heke, Kawiti, Hikitene, and their allies had carried out no action against settlers or the Crown. Thus, we find that:

- By renewing hostilities in June and December 1845 after periods without conflict, the Crown breached te mātāpono o te matapopore moroki me te mātāpono o te houruatanga/the principles of active protection and partnership.

Throughout the war, Heke and his allies regarded themselves as fighting to defend their mana and territories from the Crown's attempts to establish

1144. This was the essential test used by the Tribunal in *Te Urewera*: Waitangi Tribunal, *Te Urewera*, Wai 894, vol 1, pp 292–293, 315–317, 319, 498–499.

1145. Proclamation, 26 April 1845 (cited in Johnson, 'The Northern War' (doc A5), p 224).

sovereignty over them. Yet the Crown regarded them as 'rebels' and justified its war on that basis. The claimants told us that the label was unfair and had stigmatised their tūpuna.[1146] We agree. Rebellion occurs when a party attempts armed uprising against established civil authority. As we have previously concluded, Te Raki rangatira who signed te Tiriti o Waitangi in 1840 were not consenting to the Crown's sovereignty, but to a shared power arrangement which would require negotiation as it developed. The Crown's subsequent assertion of sovereignty under English law could not change this essential fact. In practical terms, the established civil authority in Te Raki in 1844 continued to be the tino rangatiratanga of hapū. Even in Kororāreka and in respect of Bay of Islands trade, the Crown exercised authority only to the extent that rangatira acquiesced for the purpose of sustaining the treaty relationship, as events in the build-up to the war demonstrated. We find that:

- By labelling Māori leaders who took action against the flagstaff 'rebels', the Crown acted inconsistently with its obligation to act in good faith towards its treaty partner, and therefore breached te mātāpono o te houruatanga/the principle of partnership.

In conducting the war, the Crown deliberately took advantage of divisions within Ngāpuhi. The Crown had deepened existing divisions by threatening to invade Ngāpuhi territories. During the war it offered gifts to hapū who aided its war effort, promised them the lands and waka of 'rebel' hapū, and (at Ruapekapeka) gave them rations as if they were part of the British army. These actions widened the rifts within Ngāpuhi, causing lingering resentment of Nene and his allies by 'rebel' and 'neutral' hapū alike. When faced with division among Māori, the Crown is obliged to take reasonable steps to support reconciliation, not exploit the division for its own purpose, especially when that purpose is the assertion of its authority in breach of the treaty's article 2 guarantees. Nene and others who opposed Heke's course of action did so in order to preserve their people's mana and tino rangatiratanga, not to support the Crown's sovereignty. Thus, we find that:

- By taking advantage of and encouraging divisions within Ngāpuhi, the Crown breached te mātāpono o te mana taurite me te mātāpono o te houruatanga/the principles of equity and partnership, by acting inconsistently with its obligation to act with utmost good faith towards its treaty partner.

On occasions, the Crown also attempted to pressure non-combatant rangatira to declare their loyalty. Early in the war, Governor FitzRoy imposed this pressure to ensure that the Crown's forces did not inadvertently attack non-combatants causing outrage among his Te Raki allies. Later, Governor Grey pressured 'neutral' leaders to declare their loyalty under threat of military action, because he suspected them of secretly supporting Heke. We find that:

- By pressuring non-combatant rangatira to declare their loyalty to the Crown or face military action, the Crown breached te mātāpono o te houruatanga/the principle of partnership.

1146. Claimant closing submissions (#3.3.219), p 123; see also pp 147, 152.

The detention of Pōmare and Iritana was arbitrary and unjustified, the evidence against Pōmare being little more than hearsay. The Crown made no attempt to inquire into the facts or seek Pōmare's view before ordering his arrest and the destruction of his pā. The terms of Pōmare's release required him to acknowledge that he had been justifiably detained, even when not. The pardon also required him to acknowledge guilt for failing to prevent rebellion by Heke and Kawiti. This was inappropriate: first, because Heke and Kawiti were not in rebellion; and secondly, because Pōmare had no legitimate means of exercising authority over them; to do so would be a breach of their mana and tino rangatiratanga; nor had he agreed to the attempt. The Crown has acknowledged that it breached treaty principles by requiring Pōmare to forfeit land as part of this arrangement.[1147] We agree with Ngāti Manu claimants that Pōmare 'had committed no offence' and therefore 'there was nothing to pardon',[1148] and accordingly find that:

- The arbitrary capture and detention of the rangatira Pōmare II and his daughter Iritana was in breach of te mātāpono o te tino rangatiratanga, article 3 rights, and te mātāpono o te matapopore moroki/the principle of active protection.
- By requiring Pōmare, as a condition of his release, to acknowledge that he had been justifiably detained when that was not the case, and guilty for failing to control the actions of Heke and Kawiti, the Crown breached te mātāpono o te matapopore moroki me te mātāpono o te mana taurite/the principles of active protection and equity. It also acted inconsistently with its duties of honour and good faith, in breach of te mātāpono o te houruatanga/the principle of partnership.
- By requiring land at Te Wahapū as a condition of Pōmare II's release, the Crown breached its duty to recognise, and respect the tino rangatiratanga of Ngāti Manu and their rights to their lands and resources, in breach of te mātāpono o te tino rangatiratanga.

We accept the Crown's submission that it confined its campaign to military targets such as pā, or to other targets that had potential to support military action (such as kāinga that could be used as bases for campaigns, waka that could provide transport, and food stores that could be used to support military action).[1149] We also accept the Crown's submission that there was no evidence of its killing non-combatants or prisoners,[1150] though there is evidence of its forces killing the wounded in some battles.[1151] We agree with the conclusion in the *Te Urewera* report, however, that the Crown was obliged to consider the consequences of its actions, even when those actions were carried out for genuine military purposes. In particular, that report found that the Crown's forces, when attacking food sources and plundering cultivations, must consider the impacts on the wider community, not

1147. Crown closing submissions (#3.3.403), p 3.
1148. Closing submissions for Wai 354, Wai 1514, Wai 1535, and Wai 1664 (#3.3.399), p 87.
1149. Claimant closing submissions (#3.3.403), pp 107, 110–111.
1150. Claimant closing submissions (#3.3.403), p 114.
1151. See, for example, the battle at Te Kahika: Johnson (doc A5), p 253.

only on combatants.[1152] During the Northern War, the Crown plundered stock and destroyed communal food stores, destroyed waka and fishing nets that were used to gather seafood, and destroyed the homes of many hundreds (if not thousands) of Ngāpuhi. It did so during winter, and during an economic blockade that had already imposed considerable hardship. Crown officials acknowledged the hunger and misery that resulted, but regarded those impacts as inevitable costs of war. We find that:

- By failing to adequately consider and address the welfare of non-combatants affected by its military campaign, systematically destroying pā, kāinga, waka, and food stores, the Crown breached te mātāpono o te matapopore moroki me te mātāpono o te mana taurite/the principles of active protection and equity.

On several occasions during the war, Heke and Kawiti approached the Governor offering peace. Heke made approaches in May, July, and August of 1845, while Kawiti wrote in September. The Crown ignored Heke's initial approach, and thereafter imposed conditions on peace – including submitting to Crown authority, acknowledging the flag as inviolable, and forfeiting land. The Crown has acknowledged that it breached the treaty and its principles by insisting on land confiscation as a condition of peace from July 1845 until the end of the war.[1153] In fact, it seems to have been clearly understood among Māori and officials from as early as May that the Crown would insist on confiscation. Heke referred to this fact in his 21 May 1845 letter; the police magistrate possessed draft terms by then detailing the lands to be confiscated; and FitzRoy confirmed as much in his instructions to Despard on 6 June. The Crown's concession can therefore be applied to all conflicts after the attack on Waikare.

Even then, we do not consider that the concession goes far enough, since it fails to acknowledge the Crown's insistence that Heke and Kawiti submit to its authority as a condition of peace. We find that:

- By failing to respond to Heke's initial offer of peace, the Crown acted inconsistently with its obligation of good faith, breaching te mātāpono o te houruatanga/the principle of partnership.
- By initially insisting on submission and land confiscation as conditions of peace, the Crown breached te mātāpono o te tino rangatiratanga, as well as te mātāpono o te matapopore moroki me te mātāpono o te houruatanga/the principles of active protection and partnership.
- By refusing to engage and negotiate in person despite Heke's repeated requests, the Crown breached te mātāpono o te houruatanga/the principle of partnership.
- By continuing its military campaign after sincere offers of peace had been made in May, July, August, and September of 1845, the Crown acted inconsistently with its duty of good faith conduct. It breached te mātāpono o te

1152. Waitangi Tribunal, *Te Urewera*, Wai 894, vol 1, p 360.
1153. Claimant closing submissions (#3.3.403), p 3.

matapopore moroki me te mātāpono o te houruatanga/the principles of active protection and partnership.

5.6 Whakarāpopototanga o ngā Whakataunga / Summary of Findings

In respect of the Crown's actions before the war, we find that:

- By threatening to use force against Heke in August 1844, when he had signed te Tiriti and had consented to the Crown's kāwanatanga but not the imposition and exercise of its sovereignty, the Crown did not adequately recognise, and respect, the tino rangatiratanga of Ngāpuhi hapū. This was in breach of te mātāpono o te tino rangatiratanga. It was also in breach of te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect.
- By failing to seek dialogue with Heke before making this threat, the Crown acted inconsistently with its obligation to act honourably, fairly, and in good faith, and therefore breached te mātāpono o te houruatanga/the principle of partnership.
- By negotiating with Waka Nene and other Ngāpuhi rangatira in September 1844 while also threatening military invasion should its demands not be met, the Crown acted inconsistently with its obligations of fairness and good faith, and therefore breached te mātāpono o te houruatanga/the principle of partnership.
- By negotiating in a manner that pressured Ngāpuhi to take sides, the Crown breached te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect. This was also inconsistent with its obligations to recognise, and respect the tino rangatiratanga of Ngāpuhi hapū, and thus breached te mātāpono o te tino rangatiratanga.
- By entering an agreement in September 1844 with the rangatira assembled at Waimate that they would be responsible for protecting the flagstaff and opposing Heke if he attacked it again, the Crown acted inconsistently with its obligations to recognise, and respect tino rangatiratanga in accordance with tikanga, in breach of te mātāpono o te tino rangatiratanga. It was also in breach of te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect.
- By issuing warrants for the arrest of Heke and other rangatira in January 1845, and by condemning taua muru as lawless and rebellious despite the fact that the Governor had been instructed to provide legal recognition for Māori custom, and that the operation of taua muru had previously been tolerated, the Governor acted inconsistently with the Crown's duty to recognise and respect the tino rangatiratanga of Te Raki hapū, in breach of te mātāpono o te tino rangatiratanga. The Governor also breached te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect.

- By taking these actions without entering dialogue with the rangatira concerned, the Crown acted inconsistently with its obligation of good faith conduct, and thus breached te mātāpono o te houruatanga/the principle of partnership.
- By requiring Te Parawhau to forfeit 1,000 acres of the Whāngārei headlands (known as Te Poupouwhenua) as payment for the January 1845 taua muru against the settlers Millon and Patten, the Governor acted inconsistently with the Crown's duty to recognise and respect tino rangatiratanga, in breach of te mātāpono o te tino rangatiratanga. He also breached te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect.
- By taking these actions when it was foreseeable that they would heighten tensions between the Crown and Te Raki Māori, and without first pursuing negotiation, the Crown breached te mātāpono o te houruatanga me te mātāpono o te matapopore moroki/the principles of partnership and active protection.
- By raising the flagstaff in January and February 1845, by fortifying the flagstaff and militarising Kororāreka when it knew these actions increased the risk of conflict, and by taking these actions without seeking opportunities for dialogue to resolve tensions, the Crown acted inconsistently with its obligation to act with the utmost good faith, in breach of te mātāpono o te houruatanga/the principle of partnership.
- By shelling Kororāreka on 11 and 12 March 1845 in breach of a ceasefire and while Māori were in the town, the Crown committed a flagrant breach of its duty to actively protect the lives, interests, and tino rangatiratanga of Te Raki Māori. This action thus breached te mātāpono o te matapopore moroki/the principle of active protection, and te mātāpono o te tino rangatiratanga.

In respect of the Crown's conduct of war, we find that:

- By launching a military campaign in order to assert the Crown's sovereignty, the Crown breached te mātāpono o te tino rangatiratanga, as well as te mātāpono o te matapopore moroki/the principle of active protection. It further acted inconsistently with its obligation to act honourably, fairly, and in good faith, in breach of te mātāpono o te houruatanga/the principle of partnership. This finding applies to actions taken to support the military campaign, including the imposition of martial law and the naval blockade.
- The orders issued to Colonel Hulme on 26 April 1845 instructing him to spare no 'rebel' and 'if possible' to capture principal chiefs as hostages – both those in arms and those in 'covert' support – was a breach of te mātāpono o te tino rangatiratanga and of te mātāpono o te houruatanga/the principle of partnership.
- By renewing hostilities in June and December 1845 after periods without conflict, the Crown breached te mātāpono o te matapopore moroki me te mātāpono o te houruatanga/the principles of active protection and partnership.

- By labelling Māori leaders who took action against the flagstaff 'rebels', the Crown acted inconsistently with its obligation to act in good faith towards its treaty partner, and therefore breached te mātāpono o te houruatanga/the principle of partnership.
- By taking advantage of and encouraging divisions within Ngāpuhi, the Crown breached te mātāpono o te mana taurite me te mātāpono o te houruatanga/the principles of equity and partnership, by acting inconsistently with its obligation to act with utmost good faith towards its treaty partner.
- By pressuring non-combatant rangatira to declare their loyalty to the Crown or face military action, the Crown breached te mātāpono o te houruatanga/the principle of partnership.
- The arbitrary capture and detention of the rangatira Pōmare II and his daughter Iritana was in breach of te mātāpono o te tino rangatiratanga, article 3 rights, and te mātāpono o te matapopore moroki/the principle of active protection.
- By requiring Pōmare, as a condition of his release, to acknowledge that he had been justifiably detained when that was not the case, and guilty for failing to control the actions of Heke and Kawiti, the Crown breached te mātāpono o te matapopore moroki me te mātāpono o te mana taurite/the principles of active protection and equity. It also acted inconsistently with its duties of honour and good faith, in breach of te mātāpono o te houruatanga/the principle of partnership.
- By requiring land at Te Wahapū as a condition of Pōmare II's release, the Crown breached its duty to recognise, and respect the tino rangatiratanga of Ngāti Manu and their rights to their lands and resources, in breach of te mātāpono o te tino rangatiratanga.
- By failing to adequately consider and address the welfare of non-combatants affected by its military campaign, systematically destroying pā, kāinga, waka, and food stores, the Crown breached te mātāpono o te matapopore moroki me te mātāpono o te mana taurite/the principles of active protection and equity.
- By failing to respond to Heke's initial offer of peace, the Crown acted inconsistently with its obligation of good faith, breaching te mātāpono o te houruatanga/the principle of partnership.
- By initially insisting on submission and land confiscation as conditions of peace, the Crown breached te mātāpono o te tino rangatiratanga, as well as te mātāpono o te matapopore moroki me te mātāpono o te houruatanga/the principles of active protection and partnership.
- By refusing to engage and negotiate in person despite Heke's repeated requests, the Crown breached te mātāpono o te houruatanga/the principle of partnership.
- By continuing its military campaign after sincere offers of peace had been made in May, July, August, and September of 1845, the Crown acted inconsistently with its duty of good faith conduct. It breached te mātāpono o te

matapopore moroki me te mātāpono o te houruatanga/the principles of active protection and partnership.

5.7 Ngā Whakahāwateatanga / Prejudice

The Northern War had immediate and long-term impacts for all of Ngāpuhi. Immediate effects included hardship, destruction of property, dislocation, increased internal division, and loss of life. Longer-term consequences included loss of identity and leadership, stigmatising of the families of 'rebel' and 'loyal' leaders, economic decline, and a breakdown of the Crown–Ngāpuhi relationship.

5.7.1 Immediate impacts

5.7.1.1 *Loss of life*

There are no definitive records of the numbers of Ngāpuhi killed and wounded in the various battles of the Northern War. Ralph Johnson, drawing on various sources, estimated Ngāpuhi defenders lost at least 63 killed and 72 were wounded from the battles of Te Kahika, Ōhaeawai, Waikare, and Ruapekapeka (which were initiated by the Crown). The figure for those killed is likely to be an underestimate: significant numbers died later from their wounds, and at least for some battles, only rangatira were counted.[1154] Others died or were wounded in battles between Hōne Heke and Tāmati Waka Nene. The Crown supported Nene's military efforts because they diverted and weakened Heke's forces.[1155]

Some of those who died during the conflict were non-combatants. Two children and one woman were killed during the shelling of Ruapekapeka. The woman was Emma Kopati, Kawiti's granddaughter.[1156] Significant numbers of rangatira were killed or wounded in the various battles. Pūmuka was killed at Kororāreka.[1157] Kawiti's son Taura was killed at Te Kahika. Family tradition is that he was struck by sniper fire while saving Heke's life.[1158] Two of Kawiti's nephews were also killed in that battle, as were Ruku of Te Uri Ngongoi, and Ngāwhitu of Ngāre Hauata.[1159] Riwhi Hare of Te Kapotai was killed at Waikare.[1160] At Ruapekapeka, the dead included Te Whau and Rewiri Nohe of Ngāti Tū, Houmatua of Ngāti Tautahi, Rimi Piheora and Pene Haimona of Te Roroa; Ripiro, Wharepapa, Te Horo and Te Aoro of Te Kapotai; Te Huarahi and Te Maunga of Ngāti Hine; and Tuhaia

1154. Johnson, 'The Northern War' (doc A5), pp 270, 377–379, 413; Johnson, presentation summary (doc A5(f)), pp 33–34. Specifically: 28 or more killed and 22 wounded at Te Kahika; 10 or more killed and 10 or more wounded at Ōhaeawai; nine or 10 wounded and possibly one killed among Te Kapotai defenders at Waikare; and 23 killed and 30 wounded at Ruapekapeka.

1155. Johnson, 'The Northern War' (doc A5), pp 289–290.

1156. Johnson, 'The Northern War' (doc A5), p 379.

1157. Johnson, 'The Northern War' (doc A5), pp 188, 190; Te Rūnanga o Ngāti Hine, 'Ngati Hine Evidence' (doc M24), pp 91–92.

1158. Mary-Anne Baker (doc AA94), p 5.

1159. Johnson, 'The Northern War' (doc A5), pp 252–253, 262.

1160. Te Kapotai claimants, 'Te Kapotai Hapu Korero: Mana, Rangatiratanga' (doc F25), p 50.

of Te Waiariki.[1161] Mr Johnson records Kawiti's general Te Aho as being severely wounded at Ruapekapeka,[1162] and he appears to have later died. His wife Tarahu composed a lament asking: 'Ma wai e ranga, i te mate i te ao' ('Who will avenge your death in this world?').[1163]

Te Kerei Tiatoa (Te Uri Taniwha and Te Whiu) reminded us of the effects of these deaths on whānau:

> The men would go to protect their whanau, their lands and their way of life from the Crown. At Ruapekapeka many men died. What happened with the women and children? There was no marae, no food, no money, no shelter, your man had died, and there were other women that were in the same position. They had three or four children. How did those women survive?[1164]

5.7.1.2 *Economic hardship and loss of resources*

The Crown's war strategy included establishing a naval blockade and destroying pā, kāinga, waka, and food supplies, which together were intended to undermine the economic base of resisting hapū. As kaumatua Richard Dargaville of Ngāti Kawau explained, these measures 'left a trail of severe social and economic impacts'. Many of the attacks involved plunder and destruction of food supplies that were supposed to last hapū through winter, and several hapū were displaced from their lands, forcing them to seek refuge among neighbours.[1165] The plunder of food, Mr Johnson told us, left many hapū in a 'desperate struggle for survival'.[1166]

At Ōtuihu, which had been an important trading settlement, soldiers destroyed waka, slaughtered livestock, plundered food supplies and other goods, and burned the pā to the ground.[1167] The pā's occupants, numbering several hundred, were forced to evacuate to a small kāinga at Taumārere, and then Puketohunoa Pā at Te Karetū. With the destruction of Ōtuihu and its waka, Ngāti Manu lost its trading relationships and its ability to seek sustenance from the sea. Arapeta Hamilton told us that Ngāti Manu 'have never forgotten the injustices of the Crown and the events that occurred at that time'.[1168]

Waikare, another significant Bay of Islands trading settlement with a population of over 150, was also attacked. Women and children were forced to flee at night into the hills as the British forces approached.[1169] 'The British soldiers intended to

1161. Johnson, 'The Northern War' (doc A5), pp 378–379; see also Ngā Hapū o Whāngārei site visit booklet, pt B (doc I45), p 19; Te Kapotai claimants, 'Te Kapotai Hapu Korero: Mana, Rangatiratanga' (doc F25), p 57.
1162. Johnson, 'The Northern War' (doc A5), p 366.
1163. Johnson, 'The Northern War' (doc A5), pp 383–385.
1164. Te Kerei Tiatoa (doc T11), p 16.
1165. Rihari Dargaville (doc G18), pp 43–44; see also Johnson, 'The Northern War' (doc A5), pp 316, 411–412.
1166. Johnson, 'The Northern War' (doc A5), p 412.
1167. Johnson, 'The Northern War' (doc A5), pp 237–238.
1168. Arapeta Hamilton (doc W7), p 9.
1169. Te Kapotai claimants, 'Te Kapotai Hapu Korero: Mana, Rangatiratanga' (doc F25), pp 29, 31, 46–47.

kill our people', Shirley Hakaraia told us. '[T]hey burnt our whare to the ground and plundered our pa of all crops, food stores and goods.'[1170] Among the buildings burned were a whare whakairo and several hostels which were used to accommodate visiting traders and labourers.[1171] Te Kapotai claimants told us their ancestors had been left without food for the winter months and that, coupled with the naval blockade, caused them serious hardship.[1172] The attack 'has had devastating and lasting effects for our hapu,' said Ms Hakaraia.[1173] Te Haratua's people were also forced to seek refuge and lost their winter food supply when their pā at Pākaraka was plundered and destroyed.[1174]

The three largest battles occurred at Te Kahika, Ōhaeawai, and Ruapekapeka, which were purpose-built fighting pā designed to be abandoned. This meant that Ngāpuhi communities would not be forced into exile at the end of each battle. Nonetheless, the plunder and destruction of these pā caused significant economic losses. British forces found several months' supply of corn and potatoes in Ōhaeawai, which they and Nene's people rapidly consumed.[1175]

Kāinga were destroyed at Waitangi, Kaipatiki, and Kaihera on the Bay of Islands coast. Pūmuka's pā at Whangae was burned.[1176] Waka and cultivations were also destroyed around the coast. Te Kapotai claimants told us that the destruction of waka contributed to their economic hardship, as they were unable to use the inlet to access other settlements for trading purposes.[1177] While the Crown destroyed coastal settlements, its Ngāpuhi allies burned inland kāinga. In August 1845, Hōne Heke wrote to the Governor saying he had lost more than £10,000 in fires lit by those forces, as well as livestock and other possessions.[1178]

The blockade of Bay of Islands shipping, later extended to Whāngārei and Whangaroa, affected all of Ngāpuhi irrespective of whether they had taken sides in the war.[1179] According to Mr Johnson, the blockade 'had a devastating impact on all Ngapuhi', afflicting large numbers of people who had chosen to remain neutral and leaving them in a state of hunger and 'increasing desperation'.[1180] Whangaroa claimants were particularly concerned about the blockade, since that harbour was heavily reliant on trade. Mr Dargaville told us that it 'destroyed our economic base'.[1181]

1170. Shirley Hakaraia (doc E49(h)), pp [3]–[4].
1171. Johnson, 'The Northern War' (doc A5), pp 263–264, 269; Te Kapotai claimants, 'Te Kapotai Hapu Korero: Mana, Rangatiratanga' (doc F25), p 50.
1172. Te Kapotai claimants, 'Te Kapotai Hapu Korero: Mana, Rangatiratanga' (doc F25), pp 46–47.
1173. Shirley Hakaraia (doc E49(h)), p [3].
1174. Johnson, 'The Northern War' (doc A5), pp 311–312.
1175. Johnson, 'The Northern War' (doc A5), p 311.
1176. Johnson, 'The Northern War' (doc A5), pp 256–257.
1177. Te Kapotai claimants, 'Te Kapotai Hapu Korero: Mana, Rangatiratanga' (doc F25), p 54.
1178. Johnson, 'The Northern War' (doc A5), p 323.
1179. Crown closing submissions (#3.3.403), p 35.
1180. Johnson, 'The Northern War' (doc A5), p 411.
1181. Rihari Dargaville (doc G18), p 43; see also Ani Taniwha (doc G3), p 13; Abraham Bent (doc S14), p 13; supplementary submission for Wai 2179, Wai 1673, Wai 1852, Wai 1681, Wai 179, Wai 1722, Wai 1582, Wai 1918, Wai 1666, Wai 2149, Wai 2010, and Wai 1832 (doc E57), p 6.

The Crown suggested that the economic impacts of its actions 'are sometimes overstated', and that Heke and Kawiti managed to acquire substantial supplies and ammunition in spite of the blockade.[1182] In respect of food, there is clear evidence that Heke and Kawiti had substantial supplies *before* the Crown destroyed their kāinga and the Ōhaeawai, Waikare, and Pākaraka pā.[1183] However, that changed. George Clarke senior reported on 1 July 1845:

> The destruction of the rebel pahs [*sic*], the consumption of their crops, the loss or disabling of their canoes, fishing nets, and other valuable property, has reduced them to a state of great privation and misery; and it is to be regretted that the loyal natives are more or less affected by these calamities, the unavoidable accompaniments of war. The blockading of the port, and the consequent suspension of commerce, equally afflictive to the loyalist and the rebel, has convinced them by sad experience what manifold evils the ambition of one man has occasioned.[1184]

In December, Governor Grey reported that Heke and Kawiti had very few remaining supplies and were waiting for their potatoes to ripen. This was one of the reasons for the timing of Grey's attack on Ruapekapeka.[1185] British forces do not appear to have discovered any substantial food supply at Ruapekapeka, though potatoes were growing behind the pā.[1186]

For some hapū, economic hardships were compounded by confiscation of land. In 1845, in one of the critical events in the lead-up to war, the Crown confiscated 1,000 acres of land (known as Te Poupouwhenua) at the southern Whāngārei harbour mouth as utu for a muru raid on a Matakana settler.[1187]

For Ngāti Manu, the loss of Ōtuihu was compounded by the arbitrary arrest of Pōmare II and the subsequent confiscation of his interests in Te Wahapū.[1188] According to Mr Hamilton, the Crown also took the island of Toretore, a wāhi tapu, even though Pōmare did not regard that as part of his pardon.[1189] After the war, British soldiers were initially garrisoned at Waitangi but moved to Te Wahapū, remaining there until 1858.[1190]

1182. Crown closing submissions (#3.3.403), p 8.

1183. Johnson, 'The Northern War' (doc A5), pp 270–271, 288, 290, 310–311.

1184. Chief Protector, half yearly report, 1 July 1845 (Crown document bank (doc W48), p 267).

1185. Johnson, 'The Northern War' (doc A5), pp 348–349.

1186. Johnson, 'The Northern War' (doc A5), pp 374, 385.

1187. O'Malley, 'Northland Crown Purchases' (doc A6), pp 71, 75, 77–78; see also Johnson, 'The Northern War' (doc A5), p 156; Guy Gudex (doc I14), pp 3–6. During February, the goods that had been taken during the muru were returned. and the land transferred. In March, FitzRoy cancelled his 8 January proclamation: O'Malley, 'Northland Crown Purchases' (doc A6), pp 76–77.

1188. Johnson, 'The Northern War' (doc A5), p 242; see also closing submissions for Wai 354, Wai 1514, Wai 1535, and Wai 1664 (#3.3.399), p 90; Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 350–351.

1189. Arapeta Hamilton (doc F12(a)), p 14.

1190. Johnson, 'The Northern War' (doc A5), p 398; O'Malley, 'Northland Crown Purchases' (doc A6), pp 89, 114.

Mr Hamilton said that Ngāti Manu had been a wealthy hapū with extensive influence over the Bay of Islands coast and waterways. With the Crown's arrival, their rangatiratanga was 'taken forcibly, and trampled into the ground', and all of Pōmare's hopes for a prosperous future 'were blasted into smithereens, just like the effects of a British mortar on our land'. Mr Hamilton summarised the effects of war, and the Crown's assertion of authority over his people, as follows: 'He raupatu whenua, he raupatu taaonga, he raupatu mana rangatira, he raupatu moana, he raupatu wai.'[1191] We translate this as: 'Our lands, our treasured possessions, our authority and leadership, our oceans and waterways: all were taken.'

5.7.2 Long-term impacts

The Crown entered the Northern War determined either to destroy Heke and Kawiti or to force them into submission.[1192] The war instead ended inconclusively. The Crown had captured an almost empty pā at Ruapekapeka,[1193] peace had been declared,[1194] and Heke and Kawiti returned to their lands to live almost as they had previously.[1195] However, Mr Johnson told us that the war resulted in a 'significant weakening' of Māori authority and seriously crippled Ngāpuhi's ability to exercise their tino rangatiratanga.[1196]

As we outlined in this chapter, the Crown fought to assert its practical sovereignty over Heke and others who resisted, but it did not achieve the decisive victory it sought. Instead, it accepted a peace that left questions of relative authority more or less as they had been before. The war's immediate effects on tino rangatiratanga were therefore limited. The Government left some soldiers at Waitangi, but they had little impact on Māori communities. Crown officials, fearing any new outbreak of conflict, made no attempt to control Heke and instead sought his assistance in resolving Māori–settler conflicts. While other rangatira may have been more circumspect, Heke felt able to take enforcement action against Māori and settlers alike for breaches of tikanga.[1197]

Crown and settler neglect of the district compounded the problems facing Ngāpuhi. The settler population did not recover after the war, and nor did the Ngāpuhi economy. Trade from the Bay of Islands declined rapidly to negligible levels during the 1850s. Market forces had some influence, but so, too, did a deliberate Crown policy of holding back settlement and neglecting development in the north. In essence, the Crown was not willing to engage unless questions of relative

1191. Arapeta Hamilton (doc F12(a)), p 14.
1192. Johnson, 'The Northern War' (doc A5), pp 226–227, 333; see also Crown document bank (doc W48), pp 247, 252–253.
1193. Johnson, 'The Northern War' (doc A5), pp 368–369, 370–372, 376–377; see also Belich, *The New Zealand Wars*, pp 60–61.
1194. Johnson, 'The Northern War' (doc A5), pp 394–398.
1195. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 360; see also O'Malley, 'Northland Crown Purchases' (doc A6), pp 88–90.
1196. Ralph Johnson, transcript 4.1.24, Oromāhoe Marae, p 690.
1197. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 360–361; O'Malley, 'Northland Crown Purchases' (doc A6), pp 88–90; see also Belich, *The New Zealand Wars*, pp 68–70.

authority were settled decisively in its favour. During the 1850s, rangatira turned with increasing urgency to the Crown, seeking to re-engage. Expressions of loyalty to the Queen quickly followed, and in 1858 Ngāti Hine and Te Kapotai rebuilt the flagstaff on Maiki Hill, gifting it to the Crown. The Crown began a limited re-engagement, withdrawing its soldiers and promising to build a town in return for rangatira acknowledging its authority in respect of both land and law enforcement.[1198] We will consider their impacts in chapter 7.

According to Dr Phillipson, it was during the 1860s that substantive authority over this district transferred from Māori to the Crown.[1199] Our view, as discussed in chapters 7 and 11, is more complex. Te Raki Māori post-war expressions of loyalty to the Queen and her Governor did not necessarily translate to acceptance of colonial institutions, especially as those institutions increasingly represented settlers' objectives and interests. Te Raki Māori engaged with the Crown's rūnanga and Native Land Court during the 1860s, and from that time onwards the Crown was increasingly able to assert its substantive authority – but Māori also resisted that encroachment, and pursued options for self-government at local, tribal, and national levels throughout the rest of the century. Throughout, they continued to view the treaty relationship as one that offered them the Queen's protection, not as one that provided for the subjection of the rangatiratanga sphere.

The prejudicial effects of Northern War on tino rangatiratanga would have been much more immediate had it not been for the brilliance of Kawiti's military strategies. Together with Heke, Hikitene, and others, he succeeded in defending land and authority against the Crown invaders. Nonetheless, the eventual transfer of substantive sovereignty was a prejudicial, if delayed, effect of war. The war sent Ngāpuhi a clear message that any direct challenge to the Crown's claim of sovereignty could be met with military force. But the war also caused the Crown to lose interest in the north and to adopt a policy of holding back settlement. In essence, the Crown responded to its own failure to achieve a decisive victory by withdrawing from the treaty relationship. It then re-engaged only to promote its land purchasing policies (see chapter 8) and the work of the Bell commission (see chapter 6), which the Crown expected to extend its authority over the district.[1200] 'The government would have us believe that the transfer of sovereignty was an orderly and legal affair, and that it is sovereign because we have accepted its sovereignty', the claimant Rueben Taipari Porter told us. 'But this is not true. . . . Rather, my tūpuna were forced to submit.'[1201]

The war also caused fresh and ongoing divisions within Ngāpuhi. Although Heke and Waka Nene met to make peace in 1846, their relationship remained strained up to the end of Heke's life, largely because Nene continued to assert rights over the Ōmāpere and Taiāmai lands his people had occupied during the

1198. O'Malley, 'Northland Crown Purchases' (doc A6), pp 129–130.
1199. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 361, 365.
1200. O'Malley, 'Northland Crown Purchases' (doc A6), pp 129–130; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 361–362.
1201. Reuben Porter (doc S6), p 38.

war. Nene's claims on these lands had arisen as a direct result of Crown actions – first, because occupation and then withdrawal of these areas by the Crown's forces created a power vacuum which Nene sought to fill; and secondly, because the Governor had promised Nene the spoils of war.[1202] Further conflict nearly erupted again in 1848, when Nene attempted to build a flour mill at Kaikohe, funding it from the government salary that he was drawing. Nene presented this as a peace offering, but Heke and his people opposed the project, fearing it would bring more settlers to their rohe.[1203]

Another enduring impact was the discredit and exclusion arising from the Crown branding some hapū as 'rebels'.[1204] Claimants told us that those who carried this stigma were excluded and rejected from settler society and the opportunities it brought.[1205] Mr Aldridge told us that Whangaroa Māori continue to carry this stigma, which reflected their widely misunderstood role in the 1809 *Boyd* affair (see chapter 3) as well as their limited support for Heke during the Northern War: 'We're often still viewed as a pack of rebels. Maybe we are to them [the Government]. But we question where they get the authority to call us that. This is our river, this is our whenua, this is our harbour. Where do they get the rebel label from?'[1206]

So, too, did descendants of Kawiti and Pōmare II.[1207] 'We . . . want to have our rights and privileges reinstated as rangatira . . . rather than as rebels,' Mary-Anne Baker told us.[1208] Erima Henare of Ngāti Hine told us that some of Kawiti's descendants had also changed their names to avoid being stigmatised.[1209] Claimants told us of the hurt arising from false narratives that had emerged about the war, including Governor Grey's claim of victory, which Ngāti Manu claimants saw as an attack on their tino rangatiratanga. Historians have written extensively about the Crown's justifications for the war and about Grey's claims of victory, which James Belich described as 'propaganda' and 'a hoax'.[1210] Nuki Aldridge told us:

> There is a lot of history that we have been told about the Northern War. We have been told about who was involved, where the battles took place, and what the consequences were. Most importantly, we have been told about how it all started and who can be blamed for its commencement. The history that we have heard, and that has been promoted by historians and government officials alike is not the history that our people have been told.[1211]

1202. Johnson, 'The Northern War' (doc A5), pp 287–291, 295, 332; Murray Painting (doc V12), pp 25–27.
1203. Henare, Petrie and Puckey, 'Northern Tribal Landscape Overview' (doc A37), p 477.
1204. Johnson, 'The Northern War' (doc A5), p 414.
1205. Closing submission for Wai 1536 (#3.3.368), pp 38–39; Hori Parata (doc C22), p 14.
1206. Nuki Aldridge (doc AA167), p 44.
1207. Closing submissions for Wai 354, Wai 1514, Wai 1535, and Wai 1664 (#3.3.399(b)), pp 95–96.
1208. Mary-Anne Baker (doc AA94), p 6.
1209. Erima Henare, transcript 4.1.14, Tau Henare Marae, pp 126–128.
1210. Belich, *The New Zealand Wars*, p 70; Johnson, 'The Northern War' (doc A5), p 414.
1211. Nuki Aldridge (doc AA167), p 33; closing submissions for Wai 354, Wai 1514, Wai 1535, and Wai 1664 (#3.3.399)(b)), p 95.

Sir James Henare, in a 1989 television interview, said that history books had been written to justify the Crown's actions and make the Crown look strong: 'Ki tāku nei titiro, e tino hē rawa atu ana.' ('From my perspective it is extremely wrong.')[1212] Wayne Stokes of Te Uri Kapana and Ngāre Hauata told us that his people had 'become almost invisible' in written histories, and the effects were still felt in modern times:

> Even amongst our own people we are often forgotten about as though we no longer exist. . . . Feelings of loss of identity from post 1840 and Northern War reverberate in losses today, from suicide, several of our whanau have taken their own lives, and illnesses such as alcoholism.[1213]

Other claimants – descendants of Nene and other Hokianga leaders – referred to the resentment and hurt arising from their tūpuna being branded 'traitors' and wrongly accused of having fought to defend the Crown.[1214]

1212. Henare, Petrie, and Puckey, 'Oral and Traditional History on Te Waimate Taiamai Alliance' (doc E33), pp 204–205.
1213. Wayne Stokes (doc H9(a)), p 14.
1214. Benjamin Pittman (doc W12), p 19; closing submissions for Wai 2059 (#3.3.296), p 28.

CHAPTER 6

NGĀ KERĒME WHENUA I MUA I TE TIRITI, NGĀ HOKONGA WHENUA KI TE KARAUNA ANAKE, ME NGĀ WHENUA TUWHENE / OLD LAND CLAIMS, PRE-EMPTION WAIVERS, AND SURPLUS LANDS

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

6.1 Hei Tīmatanga Kōrero/Introduction

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

Ngāpuhi rangatira thought the agreement reached as a result of the treaty negotiations was that they and the Governor would be equals and, looking to the future, that their relative authority and responsibilities would be worked out where their interests overlapped with those of settlers.[2] Governor William Hobson had also given a general assurance that Māori would be protected in autonomous

1. This quote is attributed to Heke in Richard Davis to Church Missionary Society, 23 August 1847 (cited in Bruce Stirling and Richard Towers, '"Not with the Sword but with the Pen": The Taking of the Northland Old Land Claims' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2007) (doc A9), p 309). The text is a contemporary translation; the orignal te reo Māori was not available with the source.

2. Waitangi Tribunal, *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry*, Wai 1040 (Wellington: Legislation Direct, 2014), pp 528, 529.

possession of their lands, and he had made a specific promise to investigate pre-treaty land transactions and return to them any lands that were unjustly held.

How the Crown set about fulfilling the promises made by Hobson and meeting Māori expectations of equal authority was one of the first important tests of their future relationship under the treaty, and this would be played out in the processes established to ratify the early land transactions.

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

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

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

In the late 1850s, the newly established colonial Legislature set up a second Land Claims Commission to bring finality to the process and certainty to both settler title and the Crown's ownership of any surplus lands. Settlers were required to survey the boundaries of the lands they had claimed and were incentivised to do so;

but again, the equity of the procedures established by the Crown would be at issue, and many decades followed in which Te Raki Māori protested at the loss of their lands as a result of the Crown's title ratification process.

6.1.1 The purpose of this chapter

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

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

6.1.2 How this chapter is structured

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

We then consider the conclusions and findings of other Tribunals which have looked at pre-treaty transactions and the Crown's handling of them; summarise the Crown's concessions and the key arguments of claimants and Crown; and at section 6.2.5, identify the issues to be determined.

We turn first (at section 6.3) to the core issue between the Crown and claimants: what was the nature of the pre-treaty land transactions? Did they signify arrangements involving ongoing reciprocal obligations, as the claimants said? Or, as the Crown submitted, were they in some instances transactions that equated to the

Crown (Pākehā) understanding of sale? In addressing this issue, we will consider the applicability of Tribunal findings in other inquiry districts to our own.

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

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

In chapter 4, we considered whether the Crown's assertion of a right of pre-emption and, conversely, FitzRoy's decision to waive that right to enable direct purchase of Māori land by settlers under certain restrictions was in breach of treaty principles. In section 6.6 of this chapter, we examine FitzRoy's pre-emption waiver policy in practice and the effectiveness of the protections for Māori that were put in place under his two proclamations in 1844. We then turn to the response of the Colonial Office and Governor Grey and assess the Crown's efforts to balance the requirements of settlers against the rights of Māori under the system FitzRoy had instituted.

We move next to the policies introduced by the newly established colonial Legislature in the 1850s intended to finally 'settle' old land and pre-emption waiver claims in section 6.7, many of which remained unsurveyed with no grant issued. We begin by discussing what commitments the Crown had made to Māori regarding the return of 'surplus' lands and assess whether they were kept as responsibility for 'native policy' shifted. We compare the treatment of Māori and Pākehā in the legislation and in the procedures followed by the second Land Claims Commission

Key Terms

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

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

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

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

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

(the Bell commission), itself established by that legislation. This section considers the contrasting treatment of the interests of Māori who objected that lands subject to old land claims were considered 'sold' and who, in many cases, continued to occupy portions of them. A separate discussion concerns the efforts of the commission to define 'scrip' lands claimed by the Crown (see key terms following) and

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

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

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

The district was one in which pre-treaty transactions and subsequent land claim commission investigations played a particularly prominent role. According to the historians Bruce Stirling and Richard Towers, who undertook detailed research on this issue, there were 519 Northland pre-treaty transactions filed with the first Land Claims Commission, excluding pre-emption waiver claims and those made later on behalf of Māori children. Of the 519 claims, 392 were allowed, and grants were made to settlers or the Crown or both. In 91 cases, the settler claimant failed to appear, 18 cases were withdrawn, and another 18 were disallowed. Subsequent interventions by the Crown, through its Governors or later commissions, resulted in further adjustments.[3]

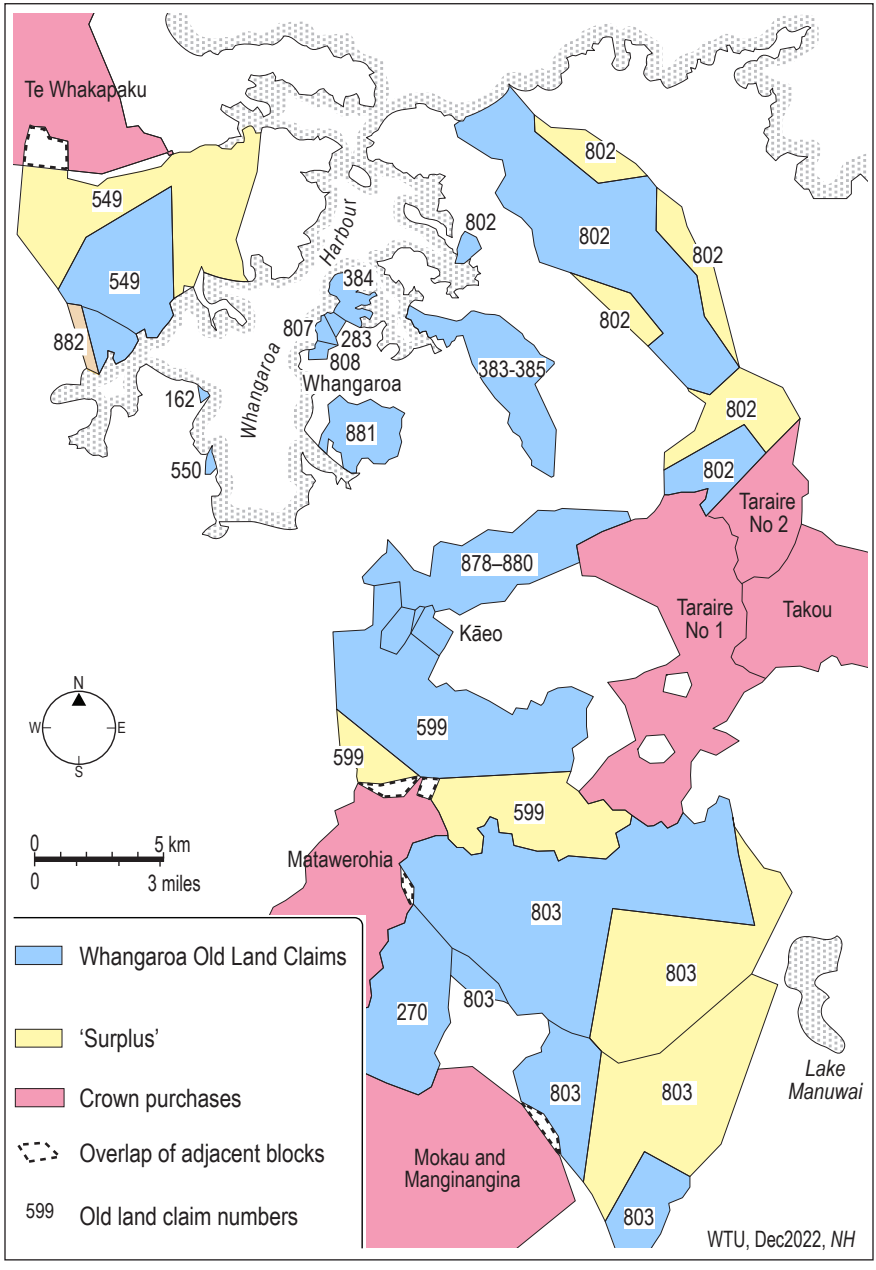
The vast majority of these claimed transactions, 356 identified claims in all, occurred in the Bay of Islands (broadly, the areas in this inquiry district covered by the Takutai Moana and Te Waimate Taiāmai ki Kaikohe taiwhenua), reflecting closer contact between Māori and Pākehā there. As such contact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

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

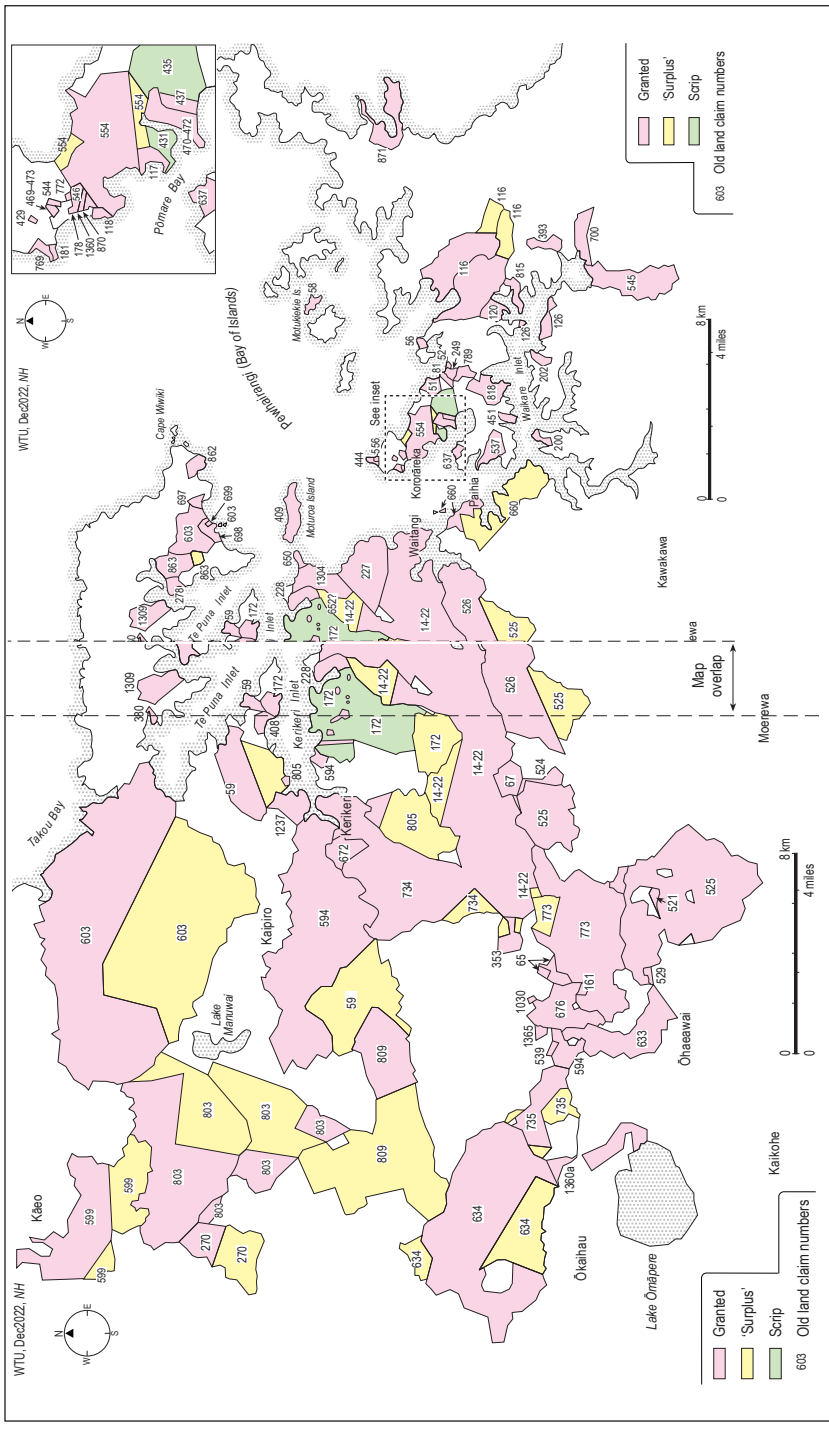
3. Stirling and Towers, 'Not with the Sword but with the Pen'(doc A9), pp 430–431. The Crown cites these figures for 'Northland' in closing submission (#3.3.412), p 3. The claimants' generic submissions simply say 'over 500' old land claims were investigated, see submission (#3.3.223), p 16.

4. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1.

5. Barry Rigby, 'Validation review of the Crown's tabulated data on land titling and alienation for the Te Paparahi o Te Raki inquiry region: Old land claims, surplus land and scrip' (commissioned research report, Wellington: Waitangi Tribunal, 2014) (doc A48 (a-e)).



Map 6.1: Whangaroa Old Land Claims and 'surplus' lands.



Map 6.2: Bay of Islands old land claims, scrip, and 'surplus' lands.

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

We break these figures down by taiwhenua in table 6.1.

Overall, it has been estimated that less than five per cent of New Zealand's total land area was alienated through old land claims processes.[6] This compares to an estimated 11 per cent of the Te Raki district (and 12.9 per cent if pre-emption waiver 'purchases' are included). For the claimants in our inquiry, then, and particularly for those with claims in the Bay of Islands where some 29 per cent of the area transferred out of hapū ownership,[7] the Crown's handling of old land claims was an especially important and significant issue.

6.1.4 Settlers involved in pre-treaty land transactions in Te Raki

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

As the stage 1 report noted, the Church Missionary Society (CMS) had led the way in entering land transactions with Māori, drawing up deeds for rangatira to put their mark on or sign. In 1815, the first mission station in New Zealand was established on 200 acres at Rangihoua under the patronage of Te Hikutū, 'the proceedings being formalised in European eyes in a deed written in English by [the Reverend] Samuel Marsden.'[8] As Marsden explained, he wished to secure more land than the piece on which the missionaries had begun to build and 'obtain and secure, as far as possible, a Legal Settlement for the Europeans whom [he] should leave upon the island'.[9] Four years later, a similar deed was drawn up for the land

6. Alan Ward, *National Overview*, vol 2, pp 64–65. This was as quoted in Donald Loveridge, '"The Knot of a Thousand Difficulties": Britain and New Zealand, 1769–1840' (commissioned research report, Wellington: Crown Law Office, 2009) (doc A18), p 240 n 688.

7. These figures are produced using the Crown approximation of the size of each taiwhenua and the overall size of the district (2,123,148 acres): Crown closing submissions (#3.3.404), pp 5–6; Crown closing submission (#3.3.412), p 6.

8. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 275.

9. Church Missionary Society, *The Missionary Register for* MDCCCXVI (London: L B Seeley, 1816), p 327.

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

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

Source: The figures in this table are sourced from the technical evidence produced for this inquiry and the reports produced by commissioner Francis Bell. The material from these sources has been modified by the removal of OLC 284, which is located in Kaipara not in Te Raki district, and the corrections made by Dr Rigby in dated September 2017: Francis Dillon Bell, 'Appendix to the Report of the Land Claims Commissioner', AJHR, 1863, D-14; Paula Berghan, 'Northland Block Research Narratives', vol 2, Northland Research Assistance Projects, comissioned by, 2006 (doc A39(a)); Barry Rigby, 'Validation Review of the Crown's tabulated Data on Land Titling and Alienation for the Te Paparahi o Te Raki Inquiry Region: Old Land Claims, Surplus Land and Scrip' (commissioned research report, Wellington: Waitangi Tribunal, 2014) (doc A48); Barry Rigby, Old land claims spreadsheet (doc A48(d); Barry Rigby, 'Validation Review of the Crown's tabulated Data on Land Titling and Alienation for the Te Paparahi o Te Raki Inquiry Region: Pre-Emption Waiver Claims' (commissioned research report, Wellington: Waitangi Tribunal, 2015) (doc A51); Barry Rigby, 'On Te Raki Old Land Claims, Pre-Emption Waiver Claims and Pre-1865 Crown Purchases: Corrections Requested by Crown Counsel', 2017 (doc A48(e)).

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

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

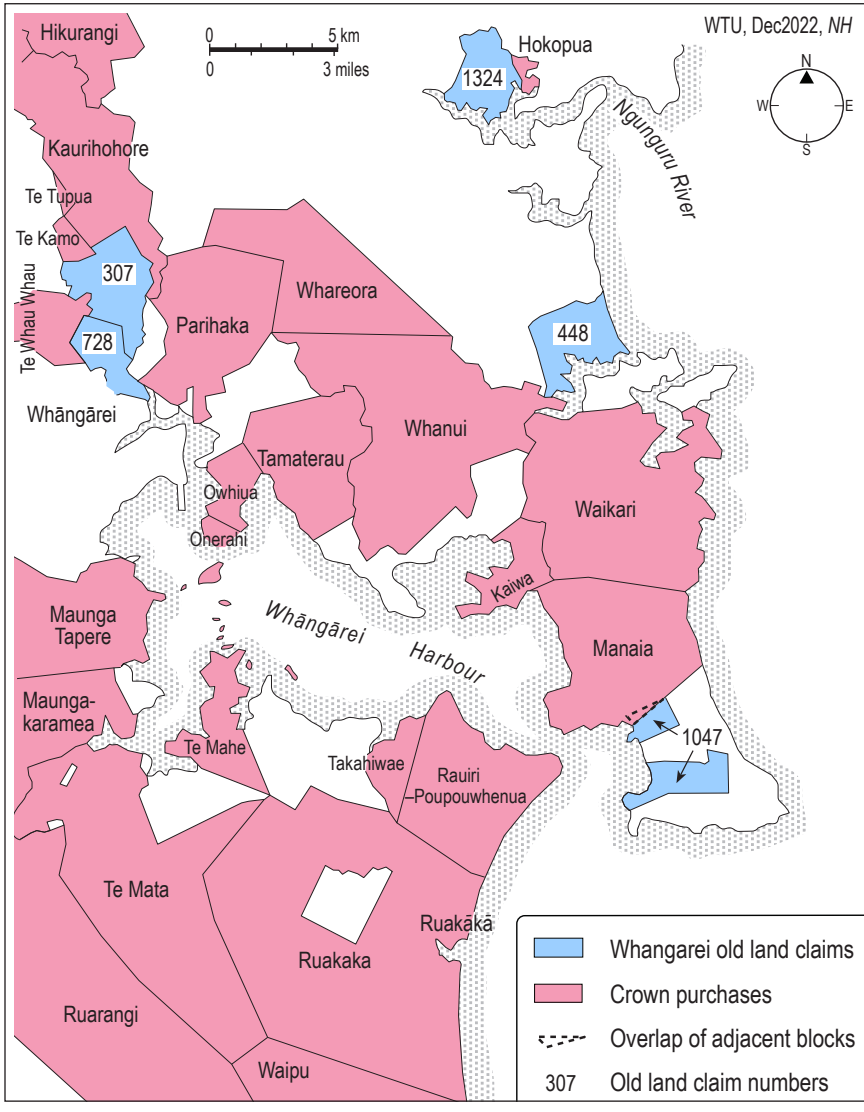
The British Resident James Busby, for example, at first sought to buy land at Waitangi for official and domestic purposes, but his own ambitions grew – and with them, the number and scale of his land transactions. Ultimately, he claimed 9,605 acres through nine deeds signed with Hōne Heke, Te Kēmara, Marupō, Toua, and other rangatira between June 1834 and November 1839;[13] and another 25,000 acres at Ruakākā (Bream Bay), 15,000 acres at Waipū, and 40,000 acres at Ngunguru through deeds signed in December 1839 and January 1840, by which he

10. D Moore, B Rigby and M Russell, *Old Land Claims*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997) (doc H1), pp 282, 285, 289, 299, 305–307, 310, 311, 317, 318 (cited in Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 275).

11. Moore, Rigby, and Russell, *Old Land Claims* (doc H1), pp 283, 285–286,288, 295–296 306–307; Kathleen A Shawcross, 'Maoris of the Bay of Islands, 1769–1840: a study in changing Maori attitudes to Europeans' (MA thesis, University of Auckland, 1966), fols 351–352, fig xix; Jack Lee, *The Bay of Islands* (Auckland: Reed, 1996), pp 162–164; Angela Ballara, 'Warfare and Government in Ngapuhi Tribal Society, 1814–1833' (MA thesis, University of Auckland, 1973), fol 97. See Henry Williams, *Early Journals of Henry Williams, senior missionary in New Zealand of the Church Missionary Society, 1826–40*, ed Lawrence M Rogers (Christchurch: Pegasus Press, 1961), pp 166, 168–169.

12. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, p 276.

13. Bruce Stirling, 'From Busby to Bledisloe: A History of the Waitangi Lands' (commissioned research report, Waitangi: Waitangi Marae Trustees and Sir James Henare Maori Research Centre, 2016) (doc W5), p 55.



Map 6.3: Whāngārei Old Land Claims.

District	Acres								
	None recorded	10 or fewer	11–50	51–100	101–200	201–1,000	1001–4,999	5,000+	Total
Bay of Islands	43	126	46	30	22	55	30	4	356
Whangaroa	3	3	10	6	2	5	11	2	42
Hokianga	7	5	8	10	15	48	19	6	118
Whāngārei / Mangakāhia	2	2	0	0	0	3	3	5	15
Mahurangi	1	0	0	0	0	2	2	8	13

Table 6.2: Land commission claims in this district, by land area and sub-district.
Source: These figures are based on Berghan, 'Northland Block Research Narratives' (doc A39(a)).

attempted, primarily, to secure timber resources.[14] As the timber trade developed, other settlers drew up deeds for lands at Whāngārei, Hokianga, and Whangaroa.[15] There were also some extensive claims in Mahurangi. For example, William Abercrombie, Captain Jeremiah Nagle, and William Webster claimed some 20,000 acres on Aotea (Great Barrier Island) through an 1838 deed, and were ultimately awarded more than 8,000 acres each.[16] At Mangakāhia, there was a single recorded transaction – a deed signed by the missionary Charles Baker with Wai, Huarahi, and others in 1836 for approximately 5,000 acres.[17] But as table 6.2 demonstrates, the majority of claims were for small areas in the Bay of Islands.

CMS activity also expanded through the late 1830s. Missionaries began to enter into deeds for purposes other than to secure the land on which their mission houses were built. A farm was established at Waimate in 1830, and missionaries began to acquire properties to provide for their own children and, in some cases, for both their children and for those of the Māori signatories. Arrangements in which sizeable tracts of land were placed into the hands of missionaries for the

14. Berghan, 'Northland Block Research Narratives' (doc A39(a), pp 14–15; Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1605–1606; see also closing submissions for Wai 2206 (#3.3.400), pp 140–142. Busby shared his Ngunguru claim with Gilbert Mair and John Lewington. The agreement was signed on 29 January 1840 and so post-dated Hobson's proclamation and was found to be invalid. For discussion of these transactions in more detail, see section 6.7.2.

15. Shawcross, 'Maoris of the Bay of Islands, fols 370–372; Alan Ward,(doc A19), pp 23–28; Phillipson, 'Bay of Islands Maori and the Crown, 1793–1853' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2005) (doc A1), pp 136–139; Moore, Rigby, and Russell, *Old Land Claims* (doc H1), pp 281–324.

16. Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 18.

17. Berghan, 'Northland Block Research Narratives' (doc A39(a), p 357.

intended purpose of preventing their future alienation were also recorded in trust deeds.[18] Missionary dealings on their own behalf could involve some extensive areas. For example, the missionary James Kemp claimed some 3,100 acres at Kerikeri on the basis of two deeds signed with Rewa, Wharerahi, Wakarua, and others in 1831 and 1834. That claim resulted in the first Land Claims Commission recommending a grant of 2,960 acres, which was later increased. The Williams family also claimed to have purchased some 11,000 acres at Pakaraka, an acquisition for which Williams, like the other CMS missionaries who claimed extensive property interests in this period, would later be heavily criticised.[19]

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

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

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

18. See Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 110, 131, 139; Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 32–33, 167–204.

19. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 50–51, 182; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 193.

20. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, pp 206–208, 276.

21. Shawcross, 'Maoris of the Bay of Islands', pp 370–372, fig 23; Ward (doc A19), pp 23–28; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 99, 136–139; Moore, Rigby, and Russell, *Old Land Claims* (doc H1), pp 281–324; see also Ormond Wilson, *From Hongi Hika to Hone Heke: A Quarter Century of Upheaval* (Dunedin: McIndoe, 1985), pp 200, 206–207; Jack Lee, *Hokianga* (Auckland: Hodder and Stoughton, 1987), pp 111–112.

22. Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 520–531, 606; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 139.

23. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 136–139.

24. The following discussion is based largely on the information provided within Berghan, 'Northland Block Research Narratives' (doc A39(a)) and is not comprehensive.

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

The Te Waimate, Taiāmai, and Kaikohe claimants have identified 64 deeds concerning lands in their taiwhenua;[26] Foremost amongst those making arrangements with missionaries and traders in the Bay of Islands was Rewa (Te Patukeha, Ngāi Tāwake), who signed or approved numerous deeds – with James Kemp, George Clarke senior, the CMS, James Reddy Clendon, John Israel Montefiore, and Captain John Roberton (at Pāroa Bay); Joel Samuel Polack, John Grant Johnson, and Henry Henderson (for 'Wangamamu'); and (in or near Kororāreka) with Robert Cunningham, John Evans, Thomas May Battersby, Ambroise Basil Victor de Sentis, Newton Lewyn (in a transaction that was later transferred to Francis Hodgkinson), and Donald McKay. In a number of these transactions, Rewa was joined by other rangatira, including Wharerahi, Moko, Kiwikiwi, Hongi, Heke, Korokoro, and Pau.[27] The name of Te Kēmara (or Tāreha),[28] marked by a tohu or a simple 'x', appeared on six of the nine deeds Busby drew up for lands at Waitangi (OLC 15, 17, 18, 19, 21, and 22).[29]

Mr Walzl identifies Tāreha, Te Pakera, Tītore, and most frequently Te Hakiro (Tāreha's son) as leading Ngāti Rēhia participation in some 70 deeds. These mostly concerned arrangements for small allotments at Kororāreka, but also included transactions at Kerikeri, Whangaroa, and Waimate as well as a handful at Pāroa Bay and Tākou.[30] Ngāti Manu claimants cite 27 deeds involving their rangatira, mostly concerning lands at Kororāreka and Waikare but also Ōtuihu, Okiato, and Wahapū (as well as many other deeds for lands at Kororāreka, Paihia, Ōpua, and elsewhere in which Ngāti Manu claimed rights but were not included).[31] Prominent among Ngāti Manu signatories were Kiwikiwi and Pōmare II, who had developed 'very good relationships with the European traders Clendon, Mair, and Charles Waetford'.[32]

The deeds signed for Whangaroa land and its resources also involved many rangatira, among whom Te Ururoa was pre-eminent. He entered into numerous arrangements: with William Alexander, who on-sold to Patrick Donovan (OLC 162); William Lillico (OLC 283); Hugh McLiver (OLC 302–304); Henry Southee, who on-sold to William Powditch (OLC 383); directly with Powditch (OLC384);

25. Tony Walzl, 'Ngati Rehia: Overview Report' (commissioned research report, Kerikeri: Ngati Rehia Claims Group, 2015) (doc R2), p 85.

26. Opening statement for Te Waimate, Taiāmai and Kaikohe taiwhenua (doc E58), p 3; for interested hapū, see also app C (doc E58(c).

27. See OLCs 594–5, 633, 658–659, 734–735, 13, 116, 616, 638, 871; 118, 181–183, 469, 739–743, 785, 798, 1004 (Berghan, 'Northland Block Research Narratives' (doc A39(a)).

28. Te Kēmara was originally known as Tāreha, 'not to be confused with Tāreha of Waimate': see 'Te Kēmara, *NZ History*, Ministry for Culture and Heritage, https://nzhistory.govt.nz/politics/treaty/signatory/1–19, accessed 17 October 2022.

29. Stirling, 'From Busby to Bedisloe' (doc W5), p 55.

30. Walzl, 'Ngati Rehia: Overview Report' (doc R2), pp 83–84.

31. Closing submissions for Wai 354, 1514, 1535, and 1664 (#3.3.399), pp 147–149; deeds excluding Ngāti Manu for lands in which they asserted rights are listed in submission (#3.3.399), pp 150–158.

32. Closing submissions for Wai 354 and others (#3.3.399), p 42.

Edward Stillard (OLC 446); Henry Snowden (OLC 549–550), which were transferred to William Baker; James Kemp (OLC 599–602); Thomas Cooper (OLC 713); Thomas Florance (OLC 738); James Shepherd (OLC 808); Robert Lawson (OLC 845); William Spickman (OLC 878–880); and John Lander (OLC 974–975).[33]

At Whāngārei, the senior Te Parawhau rangatira Te Tirarau also encouraged Europeans to settle in the territory of his hapū, allowing mission stations to be established at Tangiterōria (by the Wesleyans) and Te Hatoi (by the Roman Catholics). However, it was another Whāngārei rangatira, Wiremu Pohe, along with Wai and Huarahi, who led the way in dealing with settlers and allocating lands in the district.[34] Also significant were Te Tirarau's strenuous objections when he was not included in transactions in areas in which he considered he held rights – notably Charles Baker's arrangement with Huarahi, Wai, and others at Mangakāhia (OLC 547); the arrangement of Thomas Scott and others with Pohe, 'E Ware', and others for an estimated 3,000 acres at Whāngārei (OLC 842); and the arrangement requiring Gilbert Mair to make payments to 'Taurikura' with respect to earlier arrangements between the trader and Pohe.[35]

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

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

33. Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 112, 180, 183, 233, 279, 363, 393, 457, 467, 502, 539, 555, 602.
34. Closing submissions for Wai 2355 (#3.3.275), pp 19–20.
35. Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 357, 536–7, 632; Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1707–1713.
36. Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 202.
37. Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 593.

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

6.1.6 Were women rangatira involved in land arrangements?

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

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

38. Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 51, 161, 163, 215, 249, 313–314, 343–344, 412, 578, 601, 629–630.

39. Manuka Henare, Hazel Petrie and Adrienne Puckey, '"He Whenua Rangatira"Northern Tribal Landscape Overview' (Hokianga, Whangaroa, Bay of Islands, Whangarei, Mahurangi and Gulf Islands)' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2009) (doc A37), pp 510–514, 523–527; Angela Ballara, 'Wāhine Rangatira: Māori Women of Rank and their Role in the Women's Kotahitanga Movement of the 1890s', NZJH, vol 27, no 2 (1993), p 135.

40. Nichole Scully, transcript 4.1.31, Otangaroa Marae, p 827; see also Brooke Loader, transcript 4.1.30, Terenga Paraoa Marae, pp 131–132; Stuart Kett, transcript 4.1.30, Terenga Paraoa, pp 551–554.

41. Vincent O'Malley, transcript 4.1.12, North Harbour Stadium, pp 131, 134.

42. Meretini Waina Ryder (doc F15), pp 1–2; Meretini Waina Ryder, transcript 4.1.7, Waitaha Events Centre, Waitangi, p 343.

43. Awhirangi Lawrence (doc S15(b)), pp 7–8.

44. Ani Taniwha, transcript 4.1.8, Turners Centre, Kerikeri, pp 198–199, 216; Ruiha Collier, transcript 4.1.8, Turners Centre, Kerikeri, pp 384, 392–399; Rihari Dargaville, transcript 4.1.8, Turners Centre, Kerikeri, p 456; Ruiha Collier (doc G13), p 24.

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

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

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

One notable exception was the important rangatira Hamu, baptised as Ana in 1834, and the first woman to sign te Tiriti.[49] She was closely related to Patuone and was married to Te Koki (Te Uri o Ngongo), who consulted with her on all matters of strategy. Hamu and Te Koki allocated land to the CMS at Paihia and according to Lawrence Rogers, the editor of Williams' correspondence, the Waimate site was gifted by Hamu herself.[50] Hamu (with Tuperiri) allocated Kotikotinga (south-east

45. Patu Hohepa, transcript 4.1.13, Moria Marae, Hokianga, pp 9–10; Patu Hohepa, transcript 4.1.18, Tuhirangi Marae, Waima, pp 103–104.

46. Angela Ballara, 'Turikatuku', *Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, 1990, https://teara.govt.nz/en/biographies/1t114/turikatuku, accessed 17 October 2022; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 252–254.

47. Ani Taniwha (doc G3), pp 8–9; see also Awhirangi Lawrence (doc S15(b)), p 8.

48. It is difficult to be certain of the extent of their exclusion because Māori names were often non-gender-specific until English names began to be bestowed or adopted.

49. For discussion of other women in the Northland region who signed te Tiriti, see Henare, Petrie and Puckey, 'He Whenua Rangatira' (doc A37), pp 453–454.

50. Williams, *Early Journals*, p 34 n

of Paihia) to Williams in July 1831. The same year, she was also a principal participant in the allocation of land to Gilbert Mair at Te Wahapū, where she was one of five signatories to a deed for the area called Waipara and the island of Toretore; this recorded her receipt of 'One Musket, one Spade, one Hoe, one iron pot, one Hatchet, ten pounds tobacco, twelve pipes, one hundred flints, two Scizzors, one Blanket, tens pounds Powder, and two hundred Musket Balls'.[51]

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

These women were the aho, the weft to the warp of the land, and intimately involved in bringing the Pākehā newcomers onto it. But their existence was only briefly mentioned – if at all – as settlers sought to have their claims to lands ratified by the Crown.

6.2 Ngā Kaupapa/Issues

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

51. Evidence of Hamu (Berghan, supporting papers (doc A39(m)), vol 14, pp 8581–8585); H Hanson Turton, *Maori Deeds of Old Private Land Purchases in New Zealand, from the year 1815 to 1840, with Pre-emptive and other Claims* (Wellington: Government Printers, 1882), deed 86, Te Wahapu, pp 76–78.

52. Rihari Dargaville, transcript 4.1.6, Te Tii Marae, Waitangi, p 185; Marsha Davis, transcript 4.1.7, Waitaha Events Centre, Waitangi, p 443.

53. Ruiha Collier, transcript 4.1.8, Turners Centre, Kerikeri, p 397.

54. Pairama Tahere, transcript 4.1.8, Turners Centre, Kerikeri, pp 175–176.

55. J S Polack, *Manners and Customs of the New Zealanders*, 2 vols (London: James Madden, 1840), vol 2, p 81.

Marriages between Women Rangatira and Early Settlers in Te Raki

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

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

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

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

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

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

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

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

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

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

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

1. Evidence of Tamati Waka Nene, 18 March 1858 (Berghan, supporting papers (doc 39(m)), vol 26, pp 15275, 15415–15457.

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

2. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 121, 123, 124, 125, 126, 164, 372, 373, 404, 1322–1323; Margie Hohepa, 'Hokianga Waiata a Nga Tupuna Wahine: Journeys through Mana Wahine – Mana Tane', in *Mana Wahine Reader: A Collection of Writings 1987–1998*, 2 vols, ed Leonie Pihama, Linda Tuhiwai Smith, Naomi Simmonds, Joeliee Seed-Pihama, and Kirsten Gabel (Hamilton: Te Kotahi Research Institute, 2019), vol 1, p 112.

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

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

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

The Tribunal acknowledged that Māori had begun adapting in some ways to a European presence in their actions involving land; for example, by signing deeds and accepting cash payments, and in acknowledging the views of settlers by making allowances in what might constitute their usage rights. But it was 'a large step to assume that [Māori] were thinking outside their own cultural framework'; such adaptation did not necessarily indicate a change in the fundamental way in which they understood their relationship to the land and to the people making use of it.[57] The Tribunal concluded that Māori did not consider payments to represent permanent sale of all rights and obligations in land, but as an allocation of use rights that enhanced the settlers' mana and strengthened their relationship with the hapū. It stated: 'The view persisted that the underlying right to the land, and the authority over it, remained with the ancestral community. People did not buy land so much as buy into the community . . . the land was still the land of the people.' As part of this relationship, a settler's usage rights could be passed to his children

56. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45 (Wellington: GP Publications, 1997), p 106.
57. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 76.

and descendants but not handed on to other settlers without hapū approval. The Tribunal concluded that pre-treaty transactions 'did not effect, and could not have effected, binding sales'.[58]

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

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

In *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (2004), the Tribunal concluded from the evidence in that district that the same tikanga operated there much as it had in Muriwhenua. In particular, the papers of Archdeacon Alfred Brown, who had 'purchased' Te Papa for the CMS between 1838 and 1839, demonstrated that the transaction from a Māori point of view was conditional in nature, not an absolute English-style alienation. The same held true at Te Ngae (at Rotorua) and Matamata where Māori saw transactions as establishing an ongoing personal relationship between themselves and the missionary who was a source of trade, and their own right to use the land continued. As Te Waharoa expressed it in the instance of Matamata, the goods would soon be 'broken, worn out, and gone, but the ground will endure forever to supply our children and theirs'.[62] In both its majority and minority reports, the Tribunal agreed that the Crown should not have turned these conditional, customary arrangements into a freehold title.[63]

58. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 392.
59. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, pp 68, 106.
60. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, pp 106–108, 392.
61. See for example, Waitangi Tribunal, *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims*, Wai 215 (Wellington: Legislation Direct, 2004), p 213; Crown closing submissions (#3.3.412), p 9.
62. Waitangi Tribunal, *Te Raupatu o Tauranga Moana*, Wai 215, p 217.
63. Waitangi Tribunal, *Te Raupatu o Tauranga Moana*, Wai 215, pp 203–218, 413.

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

In reaching that conclusion, the Tribunal drew on the evidence of Drs Michael Belgrave and Grant Young, historians who had appeared on behalf of the Marutūahu claimants. In their view (as summarised by counsel), the Crown had provided 'a very substantial amount of evidence to show that Maori understandings of the transfer[s] or sales were very much closer to European understandings than the claimants had argued in Muriwhenua'. For example, Māori had allowed transfer of land to third parties without interference and 'Maori attitudes to the land that had been sold to Europeans illustrate a degree of loss and finality that would not have been appropriate where tuku whenua transactions had taken place.'[65] In the opinion of Belgrave and Young, 'it was possible for Maori to transfer substantial rights to Europeans . . . beyond those understood in the narrower tuku whenua position.'[66]

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

The Hauraki Tribunal acknowledged that it was dealing with a limited number of transactions, but concluded that 'there could be considerable variations in the pattern' in the district and that a 'sharp dichotomy between a classic "tuku whenua" model and "sale" in the European sense' was an inadequate framework for analysing pre-treaty transactions there.[68] Some transactions contained commercial

64. Waitangi Tribunal, *The Hauraki Report*, Wai 686, 3 vols (Wellington, Legislation Direct, 2006), vol 1, pp 86, 89.
65. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 1, p 87.
66. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 1, p 87.
67. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 1, pp 87–88.
68. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 1, pp 91, 153.

elements; for example, because they were undertaken with speculators who did not intend to occupy the land, or because rangatira did not necessarily intend to bind the settlers to their communities permanently. On the other hand, transactions were not purely commercial in nature either. Competing Hauraki groups were returning to previously abandoned lands and entering transactions to assert their mana. Although rangatira 'could well have intended to convey substantial and perhaps permanent rights to Pakeha' in that situation, there was nonetheless still a customary element at play. This was apparent when rival groups contested the validity of these transactions and when 'vendor' rangatira felt obliged to defend their settlers.[69]

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

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

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

69. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 1, pp 153–154.
70. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 1, pp 153–154, 163.
71. Waitangi Tribunal, *Wairarapa ki Tararua Report*, Wai 863, 3 vols (Wellington: Legislation Direct, 2010), vol 1, p 31.
72. Waitangi Tribunal, *Wairarapa ki Tararua Report*, Wai 863, vol 1, p 121.

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

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

The Tribunal again concluded in its report *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (2018)[78] that the 'evidence points to the ongoing application of Māori custom . . . during and after the time when pre-Treaty transactions were entered into', and that Māori brought those cultural expectations to their early land deals with Pākehā. There nevertheless remained many gaps in what could be known about Māori understandings of signing deeds, whether they understood their content, and the extent to which the first Land Claims Commission inquired into such matters.[79]

Despite acknowledgments of likely variations in numbers and pattern as well as gaps in the record, these earlier inquiries have all agreed that there were serious flaws in the procedures introduced by the Crown for the investigation and ratification of pre-1840 transactions under the New Zealand Land Claims Ordinance 1841, including the failure to direct the commissioners charged with investigating the validity of such transactions to take Māori customary law into account, ascertain whether a sale would be in breach of an intended trust, or verify whether

73. This report was published after our stage 1 report, *He Whakaputanga me te Tiriti*.
74. Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report*, Wai 903, 3 vols (Wellington: Legislation Direct, 2015), vol 1, pp 241–242.
75. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, pp 104–105.
76. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, pp 105,242.
77. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 243.
78. This report was published after our stage 1 report, *He Whakaputanga me te Tiriti*.
79. Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims – Pre-publication Version*, Wai 898 (Wellington: Legislation Direct, 2018), pts 1–2, p 236.

hapū retained sufficient other lands. They have also agreed that the later inquiry conducted under the Land Claims Settlement Act 1856 was similarly flawed: transactions were assumed to be valid and could not be overturned, even if it was found that not all owners had consented to the alienation. Again, the commission failed to consider whether the transactions had been conducted under customary law and that a permanent sale had not been intended. These Tribunals have found that the inquiries undertaken by the first and second Land Claims Commissions failed to protect Māori interests, and the resulting Crown grants breached treaty principles.[80]

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

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

- applying its own legal standards to pre-treaty transactions, when Māori law was the only applicable law;
- failing to adequately determine the true nature of the transactions in accordance with Māori custom, and instead assuming that all transactions found to be legitimate could be treated as permanent sales as settlers understood it when few, if any, Māori intended that;
- taking written deeds of sale at face value without giving adequate consideration to the meaning in te reo Māori or to the cultural context;
- failing to ensure that pre-treaty transactions had the consent of all customary owners;
- failing to ensure that the affected land was properly defined;
- failing to determine the adequacy of the consideration;
- failing to determine whether any fraud or unfair inducement was involved in the transaction;

80. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, pp 126, 171–2; Waitangi Tribunal, *The Kaipara Report*, Wai 674 (Wellington: Legislation Direct, 2006), pp 112–114; Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 1, pp 154, 156, 163–164; Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, pp 269–270; Waitangi Tribunal, *Te Mana. Whatu Ahuru*, Wai 898, vol 1, pp 237–238, 241.

81. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 178.

82. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 1, pp 159–160.

- failing to determine whether the transaction would leave Māori with sufficient lands, including their pā, kāinga, and cultivations;
- dealing with pre-treaty transactions in a manner that was protracted and inconsistent, through a series of inquiries over many years, in which awards were increased in favour of settlers; and
- breaching promises to return lands that had not been granted to settlers, retaining it as 'surplus'.[83]

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

As we discussed in chapter 4, a number of Tribunal inquiries have investigated the obligations resulting from the Crown's right of pre-emption and delineated the protective duties arising from it. Less attention has been paid to the decision by Governor FitzRoy to make a limited waiver of pre-emption in 1844. In the Mohaka ki Ahuriri inquiry, the Tribunal considered that the waiver was a 'direct violation of the Treaty' and its principles. While the treaty could be altered, 'any amendment needed to have the consent of both parties (ie, the Crown and an assembly of Maori as fully representative as the original signatories had been).' In its view, that condition had not been met. Although it was said, at the time, that Māori wanted the freedom to sell their land directly to the highest bidder, Māori were not fully consulted.[84]

The Hauraki Tribunal has also considered whether the 1844 waiver was a breach of the treaty. In its view, the Governor's policy was certainly a departure from the terms of the treaty but it is less clear whether it was also a breach of treaty principles. There was no reason to assume that the principle of protection should not apply to any purchases conducted under its waiver system. It was the view of officials in the Colonial Office that the Crown's obligation remained and FitzRoy showed concern for Māori rights in introducing his new policy. The Governor's references to Māori rights under article 3 and its 'implied contradiction with article 2' suggested 'rightly' that 'strict compliance with the actual terms of the Treaty might not always be possible'. The Tribunal's view was that 'In principle . . . FitzRoy's general statements can be regarded as showing a reasonable sense of the Crown's treaty obligations, both to include Maori in economic opportunities, as they perceived them, and to protect them from excessive and inequitable land alienation.'[85]

In other words, the waiver of pre-emption by FitzRoy was not in itself a breach of treaty principles but the policy might be if safeguards were inadequate or poorly

83. Waitangi Tribunal, *The Muriwhenua Land Report*, Wai 45, pp 75, 126, 392–394; Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 1, pp 100–104, 109, 154–160, 163–164; Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, parts I and II, pp 211–222, 241.

84. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, Wai 201, 2 vols (Wellington: Legislation Direct, 2006), vol 1, p 20.

85. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 1, pp 110–111.

administered.[86] This approach was also taken by the Tribunal in *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims*.[87]

6.2.3 Crown concessions

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

It made a number of important concessions and specific acknowledgements.

6.2.3.1 *Investigation of pre-treaty transactions*

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

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

The Crown also acknowledged:

- that its land claims commissioners 'were focussed on determining whether a permanent alienation had occurred rather than conducting a customary rights investigation';[91]
- that investigations 'did not always address whether the vendors had a customary right to the land';[92]
- that its investigations 'were not conducted in a timely manner';[93]
- that a 'large proportion of claims were not surveyed before Crown grants were issued to settlers, leaving uncertainty as to the exact area of the original purchase, the boundaries of the settler's grant, and the Crown's surplus land';[94]
- that '[n]umerous attempts to resolve the problems left many Māori and settlers feeling aggrieved';
- that large areas of land allocated to settlers or the Crown remained unoccupied and were resumed by Māori, causing considerable protest and confusion when the land transfers were later enforced;[95] and

86. See discussion of these aspects of policy in Waitangi Tribunal, *The Hauraki Report*, vol 1, pp 111–122.
87. Waitangi Tribunal, *Te Mana Whatu Ahuru*, parts I and II, pp 220–234, 239–241.
88. Crown statement of position and concessions (#1.3.2), p 54.
89. Crown statement of position and concessions (#1.3.2), p 52.
90. Crown statement of position and concessions (#1.3.2), p 52.
91. Crown statement of position and concessions (#1.3.2), p 66.
92. Crown statement of position and concessions (#1.3.2), p 56.
93. Crown statement of position and concessions (#1.3.2), p 56.
94. Crown statement of position and concessions (#1.3.2), p 56.
95. Crown statement of position and concessions (#1.3.2), p 55.

- that Te Raki Māori lost title to approximately 170,000 to 174,200 acres of lands that were granted to settlers (including as a result of pre-emption waivers); approximately 59,800 to 60,000 acres of lands that were retained by the Crown as surplus lands; and approximately 24,200 acres of lands that were retained by the Crown as 'scrip' lands.[96]

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

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

6.2.3.2 *Crown retention of 'surplus' lands*

The Crown also acknowledged that 'it took Māori "surplus lands" in the Bay of Islands, Hokianga, Whāngārei, Mahurangi, and Gulf Islands districts, . . . rather than returning these lands to Māori, and this has long been a source of grievance in the region.' Crown counsel conceded that 'its policy of taking surplus land from pre-Treaty purchases breached the Treaty of Waitangi and its principles *when it failed to require proper surveys and to require an assessment of the adequacy of lands that Māori held*' (emphasis added). This was in breach of the Crown's duty to actively protect Māori property interests, and its duty to deal with Māori in a manner that was reasonable and fair.[98] It acknowledged that these breaches 'resulted in some hapu losing vital kainga and cultivation areas', a matter compounded by its failure to investigate 'scrip' transactions, and by delays in determining title or asserting its claim to these lands.[99]

6.2.3.3 *Pre-emption waiver claims*

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

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

96. Crown closing submissions (#3.3.412), p 6.
97. Crown statement of position and concessions (#1.3.2), p 56.
98. Crown statement of position and concessions (#1.3.2), pp 1–2, 57.
99. Crown statement of position and concessions (#1.3.2), p 2.
100. Crown statement of position and concessions (#1.3.2), p 2.

6.2.4 The claimants' submissions

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

- the Crown's 'retrospective imposition of British law on[to] the pre-Tiriti transactions', when the law applying at the time of the transactions being made was tikanga Māori;[102]
- the Crown's determination to impose its own system of land tenure on Māori, and to extinguish customary rights, and its consequent failure to properly investigate the nature of pre-treaty transactions or acknowledge them as tuku whenua;[103]
- the failure of the New Zealand Land Claims Ordinance 1841 to provide for a proper inquiry into the customary understandings of the transactions under investigation, its purpose being to extinguish customary title, not to protect Māori;[104]
- flaws in the first Land Claims Commission's processes, including its failures to give adequate notification; conduct meaningful inquiry into who had rights; deal with all customary owners and ascertain that their rights had been validly extinguished and that signatures on deeds were genuine; consider the adequacy of compensation; and properly define the boundaries; and the failure of the Protector of Aborigines to carry out his duty of protection or to build an 'ethical wall' around his own land claims;[105]
- the Crown's failure to provide reserves when validating transactions and subsequently to honour promises that those lands would be set aside and protected, in breach of its fiduciary duty to protect Māori lands;[106]
- Governor FitzRoy's interventions in the Land Claims Commission process, which included issuing grants when the commission had recommended none, making grants of unsurveyed land, and making grants that exceeded the maximum area allowed under the law;[107]
- the failure to fully and consistently apply regulations intended to protect Māori when waiving pre-emption – including reservation of pā, urupā, and cultivations, the setting aside of tenths, and limitations on the area that could be purchased; and the subsequent failure to remedy known defects in the administration of pre-emptive waivers;[108]

101. Closing submission for Wai 354 and others (#3.3.399), p 105.
102. Claimant closing submission (#3.3.223), pp 28–31.
103. Claimant closing submission (#3.3.223), pp 7–19.
104. Claimant closing submissions (#3.3.223), pp 14–16.
105. Claimant closing submissions (#3.3.223), pp 19–24.
106. Claimant closing submissions (#3.3.223), pp 21–24.
107. Claimant closing submissions (#3.3.223), pp 24–25.
108. Claimant closing submissions (#3.3.207), pp 35–36; claimant closing submissions (#3.3.208), pp 34–50.

- the failure of the Land Claims Settlement Act 1856 to require the second Land Claims Commission to investigate Māori customary rights or adequately protect Māori, and the subsequent failure of the Bell commission to do so;[109]
- the Crown's taking of surplus lands in contravention of treaty guarantees and in spite of promises to the contrary;[110]
- the flawed investigation of and procedures for issuing scrip, which resulted in limited reserves and further takings by the Crown to '"make good" the amount of land that had been "paid for"';[111] and
- the Crown's failure to respond adequately to Māori protests and grievances.[112]

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

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

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

109. Claimant closing submissions (#3.3.223), pp 25–26.
110. Claimant closing submissions (#3.3.223), pp 13–14, 26–27.
111. Claimant closing submissions (#3.3.223), p 27.
112. Claimant closing submissions (#3.3.223), pp 45–46.
113. Claimant closing submissions (#3.3.223), pp 28–31.
114. Claimant closing submissions (#3.3.223), p 7.
115. Claimant closing submissions (#3.3.223), p 9.
116. Joint memorandum of counsel, app A (#3.3.236(a)), p 2.
117. Claimant closing submissions (#3.3.223), p 11.
118. Claimant closing submissions (#3.3.223), p 15.
119. Claimant closing submissions (#3.3.223), p 17.

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

The claimants also argued that the pre-emption waiver system FitzRoy introduced was not motivated by its protective obligations; rather, it was the Crown's solution to stagnation in the land market, a financial crisis, settler discontent, and Māori demands for direct sales to settlers.[122] Claimant counsel characterised the decision to waive pre-emption as 'unilateral' and cited the conclusions of the Tribunal in *The Mohaka ki Ahuriri Report* (2004) that this was 'in direct violation of the Treaty'.[123] Claimants acknowledged that FitzRoy's scheme could have brought significant benefits to Māori by enabling them to trade their land on an open market;[124] however flaws in the policy and its implementation precluded this result. The 10 shillings per acre fee required under the March 1844 proclamation meant that there was limited interest among Pākeha, leaving Māori desire for greater settlement and participation in the economy unfulfilled. On the other hand, the subsequent reduction in fees to 1d per acre in October 1844 represented a capitulation to settler demands rather than the 'parental care' that supposedly informed FitzRoy's policy.[125] Some of the regulations intended to protect Māori in terms of preventing excessive loss of land were too imprecise to be effective;[126] others were undermined by failures in implementation.

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

120. Claimant closing submissions (#3.3.223), p 24.
121. *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17 at [298] (claimant closing submissions (#3.3.223), p 40).
122. Claimant closing submissions (#3.3.208), pp 45–47.
123. Claimant closing submissions (#3.3.208), p 44.
124. Claimant closing submissions (#3.3.208), p 46.
125. Claimant closing submissions (#3.3.208), pp 47–48.
126. Claimant closing submissions (#3.3.208), pp 35–36.

reserves.'[127] Māori who objected were 'brushed aside', at best paid compensation while surplus lands were amassed for the Crown.[128]

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

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

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

In the submission of counsel, Crown officials knew that injustice had been done and that it might have been rectified. Instead, the Crown chose not to return surplus lands or rectify losses to Te Raki Māori, retaining the 'lion's share' in the early years of the colony, ignoring subsequent protests, and 'then proceeding to alienate more lands in the subsequent decades' in further breaches of te Tiriti.[134] Claimants submitted that the Crown's breaches of te Tiriti and its fiduciary duties 'cannot be viewed on the basis of individual claims' but rather as part of a cumulative process in which the Crown dispossessed Te Raki Māori of their lands and authority. Through its handling of pre-treaty claims, the Crown dispossessed Māori in this district of at least 218,000 acres and had started a process that had left some hapū

127. Claimant closing submissions (#3.3.223), p 26.
128. Claimant closing submissions (#3.3.223), pp 25–26.
129. Claimant closing submissions (#3.3.223), p 31; Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 115.
130. Claimant closing submissions (#3.3.223), p 31.
131. Closing submissions for Wai 354 and others (#3.3.399), p 143.
132. Claimant closing submissions (#3.3.223), pp 26–27.
133. Claimant closing submissions (#3.3.223), p 27.
134. Closing submission for Wai 49 and 682 (#3.3.382(b)), pp 37–38.

landless.[135] As we heard in specific closing submissions on pre-treaty claims, this is a key grievance for hapū in Te Raki.

6.2.5 The Crown's submissions

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

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

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

The Crown did acknowledge that its application of a surplus lands policy was flawed and in breach of the treaty but did not concede the same of the legal basis underpinning it (the Crown's radical title). Counsel submitted the Crown acquired title to 'all land in New Zealand as a function of obtaining sovereignty in 1840'.

135. Claimant closing submissions (#3.3.223), pp 41–42.
136. Crown closing submission (#3.3.412), p 13.
137. Crown closing submission (#3.3.412), p 18.
138. Crown closing submission (#3.3.412), p 9.
139. Crown closing submission (#3.3.412), pp 16–17, 23–24, 40–50.
140. Crown closing submission (3.3.412), pp 2, 25; Crown Statement of Position and Concessions (#1.3.2), pp 59–60.
141. Crown closing submission (#3.3.412), pp 35–39.
142. Crown closing submission (#3.3.412), pp 29–35.
143. Crown closing submission (#3.3.412), pp 50–52.
144. Crown closing submissions (#3.3.412); Crown closing submissions (#3.3.404).

Counsel explained that the Crown's radical title was considered to be 'burdened by, or subject to, customary title until [it] was extinguished', at which point the Crown considered that Māori had no further legal claim to the land: 'Accordingly, where Maori had actually sold land to settlers prior to 1840, the Crown considered that it held a full title to that land and had the discretion to grant or withhold that land to settlers who made claims through the Old Land Claims process.'[145]

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

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

6.2.6 Issues for determination

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

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

145. Crown closing submission (#3.3.412), pp 3–4.
146. Crown closing submission (#3.3.412), p 3.
147. Crown closing submission (#3.3.412), p 4.
148. Crown closing submission (#3.3.412), pp 61–62.
149. Crown closing submission (#3.3.412), p 82.

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

6.3.1 Introduction

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

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

The claimants' view was that '[t]he law of New Zealand at the time the transactions were made was tikanga Māori,'[153] and that tikanga Māori should therefore have been used to review the transactions.[154] In generic submissions, they argued that 'nothing in te Tiriti, or in any of the proceedings or the written record leading up to it . . . would have announced, justified or supported retrospective imposition of British law on the pre-Tiriti transactions'.[155] As counsel for Ngāti Manu submitted: 'Entering into a land transaction with a Pakeha newcomer did not involve Māori bowing to an alternative power structure. Rather, they viewed such arrangements in terms of their own law.'[156]

The claimants told us that, under Māori custom, land was not a commodity to be bought and sold but was 'inherited and collectively owned'. 'There was simply no such thing as permanent land alienation' and even if there had been, rangatira did not have the power to unilaterally enter such transactions.[157] Claimants argued

150. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 274.
151. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 276.
152. Claimant closing submissions (#3.3.223), p 20; Crown closing submissions (#3.3.412), p 9.
153. Claimant closing submissions (#3.3.223), p 28.
154. Claimant closing submissions (#3.3.223), p 28.
155. Claimant closing submissions (#3.3.223), p 29.
156. Closing submissions for Wai 354 and others (#3.3.399), pp 114–115.
157. Claimant closing submissions (#3.3.223), p 8.

that these principles remained essentially unchanged in 1840 and beyond. The early land transactions were 'consistent with tuku whenua, or in Pākehā terms, a use right'. These arrangements allowed settlers to live among Māori; they were 'more or less adopted by a hapū'; and their 'presence on the land was part of the bargain for the land'. Māori entered into these transactions because they brought benefits, such as access to knowledge and trade, and in so doing enhanced the mana of the host hapū. Critically, such arrangements did not require Māori to relinquish their ancestral rights.[158] Counsel for Ngāti Manu argued that Māori viewed pre-treaty land arrangements as 'creating personal bonds and as allocating conditional rights of resource use' in a defined area to particular Pākehā, who 'did not buy land so much as buy into the community'. Access to land and resources came with 'social obligations and responsibilities' and was 'conditional upon ongoing contribution to the community'.[159] Nor could those rights be assigned to another without the consent of that community.[160]

Claimants acknowledged that the tikanga relating to land could change over time, as occurred, for example, with the adoption of cash payments, written deeds, and language that implied that transactions were permanent. But, they argued, this did not mean that Māori were relinquishing their own rights or relationships with land. On the contrary, those ancestral rights endured; Māori 'were not "sellers" – they did not leave their land but continued to live in areas they had occupied before the transaction. In many cases Māori remained on transacted land for generations, until being forced off it by the Crown."[161] Counsel for Ngāti Manu reminded us of the Tribunal's view in the *Muriwhenua Land Report*: notwithstanding any changes in the 'outer form' of the transaction, 'it is a large step to assume that [Māori] were thinking outside their own cultural framework, or were operating within that peculiarly Western concept of absolute alienation."[162]

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

158. Claimant closing submissions (#3.3.223), pp 8–11; see also closing submissions for Wai 354 and others (#3.3.399), p 108.

159. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 108 (closing submissions for Wai 354 and others (#3.3.399), p 115).

160. Closing submissions for Wai 354 and others (#3.3.399), p 115.

161. Joint memorandum of counsel (#3.3.236(a)), para 29; Linda Thornton, transcript 4.1.28, Whakamaharatanga marae, p 99; claimant closing submissions (#3.3.223), p 9.

162. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 76 (closing submissions for Wai 354 and others (#3.3.399), p 104).

163. Crown closing submissions (#3.3.412), p 9.

coming from different cultural contexts, intended to engage one another in such arrangements.'[164] In the Crown's submission,

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

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

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

In sum, both parties in this inquiry accepted that Māori and settlers brought different legal and cultural assumptions to the pre-treaty land transactions; that there was variation in the exact details of the arrangements; that there was adaptation over time as Māori and settlers acquired greater understanding of each other's mindsets; and that there was an element of permanence in some transactions. Yet, despite these points of commonality, claimants saw most or all pre-treaty land arrangements governed by the tikanga of tuku whenua, whereas the Crown saw most as legitimate sales, worthy of validation under English law. As we will see, the parties arrived at these views by applying markedly different interpretations to key evidence, ranging from statements made by rangatira at Waitangi to statements made in this inquiry by expert witnesses. In our view, the essential question is this: did Māori who entered pre-treaty land arrangements intend to retain customary rights and interests in the land? Even allowing for variation and adaptation in the form these transactions took, if Māori did intend to retain rights and interests, and if the Crown was aware of that, it was obliged by treaty principles to protect those rights and interests to the fullest extent practicable. Any failure to do so would be in clear and significant breach of the treaty's article 2 guarantees.

Over several inquiries and despite minor exceptions in some circumstances,

164. Crown closing submissions (#3.3.412), p 9.
165. Crown closing submissions (#3.3.412), p 18.
166. Crown closing submissions (#3.3.412), p 179.
167. Crown closing submissions (#3.3.412), pp 10–14.
168. Crown closing submissions (#3.3.412), pp 8, 18.
169. Crown closing submissions (#3.3.412), p 3.

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

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

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

6.3.2 The Tribunal's analysis

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

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

170. Closing submissions for Wai 1514 (#3.3.357), p 31.
171. Te Ihi Tito (doc J18(b)), p 8.

who settled amongst his rohe. Te Tirarau protected the Pakeha, in accordance with the values of mana and manaakitanga.'[172]

Other witnesses described how their tūpuna continued to act in keeping with tuku whenua principles when making over land to Pākehā – who assumed that British norms should apply, and that the land had been sold to them for their permanent and exclusive use. Marsha Davis of Ngāti Manu explained that 'tuku' was a system of gifting and usage rights with terms and conditions, and its continuance was dependent on future actions; despite innovations such as written deeds, custom still regulated the arrangements. For example, when Pōmare, Kiwikiwi, and others allowed Clendon to occupy land at Okiato (OLC 114), the rangatira continued to make additional demands for goods. If settlers were 'absent for some time, the land would be transacted to someone else . . . Maori continued to live on lands that had been the land they "sold" for many years after confirming they continued to exercise mana whenua and mana rangatira.'[173] She argued that: '[W]hakapapa, whakawhanaungatanga and manaakitanga are all cultural norms which reinforce collective as opposed to individual interests and this norm is what would have informed our tupunas' perspective of land transactions.'[174]

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

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

Pairama Tāhere of Te Uri o te Aho agreed:

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

172. Te Ihi Tito (doc J18(b)), p 8.
173. Marsha Davis (doc F33(c)), pp 5–6.
174. Marsha Davis (doc F33(c)), p 4.
175. Tahua Murray (doc S21(b)), p 33.
176. Pairama Tahere (doc G17(b)), p 53.

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

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

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

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

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

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

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

177. Pairama Tahere (doc G17(b)), p 54.
178. Erimana Taniora (doc G1), pp 58–59.
179. Erimana Taniora (doc G1), p 59.
180. Nuki Aldridge (doc AA154), pp 11–12.
181. Nuki Aldridge (doc AA154), p 12.
182. For example, see Arapeta Hamilton (doc F22(a)), p 4; Marsha Davis (doc F33(c)), pp 3–5; Lloyd Pōpata (doc G9), p 26; Rose Huru (doc G10), p 7; Rihari Dargaville (doc G18), pp 50–51, 59; Hineamaru Lyndon (doc I7(b)), p 5; Popi Tahere (doc I20), p 9; Waimarie Bruce-Kingi (doc I25), pp 9–10, 18–21]; Arapeta Hamilton (doc K7(b)), pp 8–10; Michael Beazley (doc K8), p 33; Patuone Hoskins (doc P3), p 5; Haami Piripi (doc Q11), p 14; Hugh Rihari (doc R7), pp 29–31.

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

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

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

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

Thus, the overwhelming weight of claimant evidence was that early transactions between Māori and Europeans were not absolute sales as the British understood them, but agreements in which Māori retained their customary title, granted

183. Hugh Te Kiri Rihari (doc R7), pp 30–31.
184. Closing submissions for Wai 1540 (#3.3.357), p 31.
185. Closing submissions for Wai 354 and others (#3.3.399), p 113.
186. Closing submissions for Wai 354 and others (#3.3.399), p 114.

shared-use rights to the land, and created an ongoing relationship with missionaries and other settlers, so bringing them into the hapū community.[187]

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

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

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

In the Muriwhenua inquiry, Crown witness historian, Dr Fergus Sinclair, disputed Ms Wyatt's interpretation and argued that Māori had adopted the practice of commercial dealing in land from an early stage. To support this interpretation, he referred to steps taken by Māori to protect remaining lands (through trusts and reserves), and warnings by missionaries to Māori about the consequences of 'selling'. In Dr Sinclair's view, when Māori remained on the land, or demanded additional payments, or offered the land to other settlers, these were mere bargaining

187. Closing submissions for Wai 1514 (#3.3.357), p 31.

188. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 35–36; see also Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 54 n; Philippa Wyatt, 'The Old Land Claims and the Concept of "Sale": A Case Study' (MA thesis, University of Auckland, 1991) (Wai 45 ROI, doc E1).

189. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 37; Wyatt, 'The Old Land Claims and the Concept of Sale: a case study' (Wai 45, doc E15), pp 59–71.

tactics.[190] As discussed earlier, having considered these opposing views, as well as Māori traditions and evidence from other academic disciplines such as anthropology, the Muriwhenua tribunal found in favour of the claimants' interpretation.[191]

Subsequently, before the Hauraki inquiry panel, Drs Michael Belgrave and Grant Young questioned the Muriwhenua findings. In their view, the Crown had provided 'a very substantial amount of evidence to show that Maori understandings of the transfer[s] or sales were very much closer to European understandings than the claimants had argued in Muriwhenua'. For example, Māori had allowed transfer of land to third parties without interference, and 'Maori attitudes to the land that had been sold to Europeans illustrate a degree of loss and finality that would not have been appropriate where tuku whenua arrangements had taken place'.[192] Their opinion was that in Muriwhenua it had been 'possible for Maori to transfer substantial rights to Europeans . . . beyond those understood in the narrower tuku whenua position'.[193]

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

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

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

190. See Fergus Sinclair, 'Issues arising from Pre-Treaty Land Transactions', Crown Law Office (Wai 45, doc I3).

191. We do not discuss the evidence of Salmond and the others since they concentrated on Muriwhenua rather than Bay of Islands examples.

192. Waitangi Tribunal, *The Hauraki Report*, Wai 636, vol 1, p 87.

193. Waitangi Tribunal, *The Hauraki Report*, Wai 636, vol 1, p 87.

194. Margaret Mutu (doc A A91), p 43.

195. Margaret Mutu (doc A A91), p 44.

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

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

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

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

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

> Even from just the English-language documentary record, there is strong evidence the transactions were:

196. Margaret Mutu (doc A A91), p 45.
197. Mereata Kawharu (doc W10), pp 5–6; Mereata Kawharu transcript 4.1.24, Oromāhoe Marae, Oromāhoe, pp 99, 103–104.
198. Mereata Kawharu (doc W10), p 2.
199. Mereata Kawharu (doc W10), p 7.
200. Grant Phillipson, 'Bay of Islands Maori and the Crown, 1793–1853, 2005 (doc A1), pp 113, 158; see also Grant Phillipson, transcript 4.1.26, Turner Event Centre, Kerikeri, pp 199–200, 242.

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

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

Nonetheless, in Phillipson's opinion, some settlers believed the transactions set out in their deeds constituted absolute sales, notwithstanding clear on-the-ground evidence to the contrary in the form of continued Māori exercise of authority and (in many cases) occupation. To resolve this apparently contradictory view, he applied a 'middle ground' model, first developed to explain the Canadian frontier where the 'worlds of native Americans and Europeans overlapped, and there was a balance of power and mutual need' so that 'peoples had to accommodate each other rather than assimilating or attempting conquest'.[203] Under those circumstances, 'creative, and often expedient, misunderstandings' could emerge, which could then provide the basis for new, mutual understandings. Although there was clearly a measure of self-interest involved in settlers' insistence that their deeds reflected transactions that were actual land sales, in Phillipson's view the 'more compelling explanation for the honest and sustained divergence of views between Maori and (some) Pakeha' could be found in these cross-cultural misunderstandings.[204]

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

201. Phillipson, report summary (doc A1(f)), p 2. During the hearings, Dr Phillipson agreed that the first point should be amended as shown: transcript 4.1.26, Turner Event Centre, Kerikeri, p 194.
202. Phillipson, report summary (doc A1(f)), p 2.
203. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 76.
204. Phillipson, report summary (doc A1(f)), p 2.

resources, other spots were valuable for fishing so you can have quite different uses of land co-existing . . . with a settler living there permanently and farming a bit of it'.[205] The crucial issue, in Phillipson's view, was who held power, and therefore 'who was authorising whom'. In reality, in pre-treaty times, settlers had little or no choice but to tolerate ongoing Māori occupation of 'their' lands and use of 'their' resources.[206] They could turn a blind eye, try to persuade local rangatira to intervene, or attempt to protect their title by setting aside reserves in an effort to formalise and limit Māori use within their deed area, but they could not prevent Māori from exercising their customary rights within it.

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

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

Dr Phillipson provided evidence, for example, that in 1839 the missionary Richard Davis stated that while Māori had made agreements with settlers (by which he meant sales) for much of the area around the Bay of Islands, they continued to live on those lands. Davis was in 'no doubt', however, that Māori would

205. Grant Phillipson, transcript 4.1.26, Turner Event Centre, Kerikeri, pp 220–221.
206. Phillipson, report summary (doc A1(f)), p 4.
207. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 130.
208. Crown closing submissions (#3.3.412), pp 10–11.
209. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 130–131; see also Grant Phillipson, transcript 4.1.26, Turner Event Centre, Kerikeri, p 181.
210. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 131–132; Grant Phillipson, transcript 4.1.26, Turner Event Centre, Kerikeri, pp 199–200, 242.
211. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 131; Grant Phillipson, transcript 4.1.26, Turner Event Centre, Kerikeri, pp 215–216.

be 'driven from' the lands and forced back to Kaikohe 'when the Europeans get the upper hand'.[212] William Colenso, writing while Hobson was on his way to New Zealand in 1840, similarly predicted that Māori would soon be forced from their kāinga near Kerikeri; they had been living on these lands 'for years', but (Colenso assumed), having 'sold' the lands, they would soon have to move to the interior.[213] Phillipson commented that in the Muriwhenua inquiry, Sinclair had interpreted these missionary observations as evidence that Māori had sold their lands and would be forced to move, when (according to Phillipson) they in fact showed the opposite. Māori had entered deeds and stayed on their lands, which left the missionaries and other settlers unable to enforce their view of the transactions and waiting for the Crown or a shift in settler power to tilt the balance in their favour.[214] In Phillipson's view, that balance did not change until well after the signing of te Tiriti; indeed, not until the late 1850s.[215] This is a matter which we explore further in this chapter and in subsequent chapters.

Stirling and Towers also adopted a similar 'middle ground' framework before us to explain what was happening in this region. They argued that the 'fundamental question' was not one of opposite extremes – purely customary tuku whenua versus the fully commercial permanent sale of all the interests in the land – since 'neither end of that spectrum seems tenable in an era of contact and adaptation, during which each party adjusted their behaviour and expectations to accommodate ways that were foreign to them'. Instead, they agreed that Māori and Pākehā were 'meeting on what has come to be called the "middle ground"'.[216] They saw the fact of culture change as undeniable. On the part of Māori, there was the acceptance of innovations such as written deeds, while on the side of the missionaries and other settlers, there was acceptance of customary elements such as gift exchanges and shared occupation that were not part of what settlers understood as commercial real estate deals. Stirling and Towers also pointed to examples in which customary behaviours continued – demands for additional payments, or re-transacting land in the case of absentee 'purchasers'. They argued, however:

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

The major point for these researchers (as for Phillipson) was that if Māori insisted on transactions operating in the customary way, Pākehā had no choice

212. Davis to CMS, 1 March 1839 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 131).
213. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 131–132.
214. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 130–132.
215. Grant Phillipson, transcript 4.1.26, Turner Event Centre, Kerikeri, pp 199–200; see also p 242.
216. Stirling and Towers, presentation summary (doc A9(b)), para 11.
217. Stirling and Towers, presentation summary (doc A9(b)), para 13.

but to accept it. However, the colonists were confident that once they could assert rights on the basis of a title granted by the Crown,

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

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

> From a Maori perspective, the early land transactions with Pakeha represented 'the commencement of an on-going and mutually beneficial relationship'. The context in which these relationships existed was one in which Maori utterly dominated, and so any Pakeha desire for absolute alienation of the land, as it was understood in the European world, could not be enforced. The land transactions were but one part of a complex relationship which included trade in goods, exchanges of gifts, marriage alliances and further benefits such as education, access to technological advances and employment. There was an understanding, at least on the part of Maori, that the land and its resources were to be shared by Maori and Pakeha for their mutual benefit. This placed these exchanges of land firmly within the wider relationship which was premised on that same understanding, that is, on the idea of mutual benefit.[219]

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

In sum, the expert witnesses before us were overwhelmingly of the view that with pre-treaty land deeds, Māori retained customary rights in those lands and were able to enforce those rights up to and beyond 1840. Even if Māori understood the prevailing settler perspective by 1840, they did not consent to it; on the

218. Stirling and Towers, presentation summary (doc A9(b)), paras 14–15.
219. Tony Walzl, 'Ngati Rehia: Overview Report' (doc R2), p 78.
220. Walzl, 'Ngati Rehia: Overview Report' (doc R2), p 102.
221. Walzl, 'Ngati Rehia: Overview Report' (doc R2), p 102.
222. Walzl, 'Ngati Rehia: Overview Report' (doc R2), p 103.

contrary, as will be discussed later, the desire of rangatira to enforce their understandings while retaining productive relationships with the settlers was a significant factor in their decision to welcome the Crown to their lands. It would be simplistic, however, to suggest that from a Pākehā perspective, all land sales were based purely on commercial factors, as the many instances of marriage demonstrate. On the other hand, in such circumstances, Māori may have encouraged Pākehā to 'buy' land to cement community as well as trade interests. We note the Crown offered no new research on these matters, relying instead on the earlier work of Dr Sinclair and other historians in Muriwhenua, an analysis of the wording of a sample of the deeds, and on their reading of Dr Phillipson's evidence.

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

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

6.3.2.3.1 The 1838 House of Lords Select Committee

The 1838 House of Lords select committee inquiry on New Zealand heard significant evidence about the nature of pre-treaty land arrangements. Although the observers appearing before it expressed a range of opinions, there was a strong thread within the commentary acknowledging that permanent alienation was unknown in traditional Māori society and that, in many cases, Māori continued to occupy and otherwise exercise authority over lands that had been subject to transactions. These included examples of Māori re-occupying land and entering new arrangements if the settler was absent, of rejecting settler attempts to on-sell the land, and of requiring settlers to make multiple payments in order to secure their rights. Phillipson considered this inquiry particularly significant, since the committee was especially interested in the question of whether Māori intended permanent alienations when transacting lands, and the information it gathered was readily available to the British government and its officials.[223]

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

> There is no Form, no Taboo, to Europeans; that is confined to the Natives; it becomes British Property and they look upon it as such; they may hold it as Taboo

223. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 114, 123.

> so far to Europeans for a short Time during a short Absence from the Country, but if the Europeans were to leave it for several Years, and not to cultivate it, I would not be bound to say they would not sell it to a Purchaser after a few Years; and they would look upon the former Purchaser as dead.[224]

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

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

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

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

224. Minutes of Evidence to House of Lords Select Committee on NZ, 1838, BPP, vol 1, p 39 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 115).
225. Minutes of Evidence to House of Lords Select Committee on NZ, 1838, BPP, vol 1, p 337 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 115–116).
226. Minutes of Evidence to House of Lords Select Committee on NZ, 1838, BPP, vol 1, p 337 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 115–116).

and finite than sales, and were founded on principles of balance and renewal. When rangatira offered him land, they told him,

> Now, remember you are going to get our Land; this descended from our Forefathers; do not think to give us a mere Trifle for it; give us that which we should have. See that Stream; so let your Payment be; it goes in various Creeks, and refreshes all the Land about it; so must your Payment refresh all concerned.[227]

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

The Reverend Frederick Wilkinson, who visited New Zealand for three months in 1837, told the committee that Māori chiefs did not have the right to sell land and would resume it if it was not occupied or used. However, 'if you wish to settle among them they would give you a Piece of Land, and would be happy that you would remain there, and would respect your Property, and not go across it'. He believed there was some risk that Māori might invite too many settlers to live among them and be left with insufficient lands for themselves. In some instances, they had taken up other lands or gone to live with a neighbouring chief – for example, some Bay of Islands rangatira had gone to live with Pōmare II after entering transactions over their former lands.[230] On the other hand, Wilkinson rejected settlers' claims to have purchased large tracts of land as 'mere pretense', and noted that Māori might move back onto lands if they came to think the bargain had been a bad one, or that the settlers had enjoyed sufficient benefit from its resources. Questioned by the committee about the apparent contradictions in his evidence, Wilkinson maintained that "[t]here is no written Law; it is all Custom; but they will, when strong enough to do so, resume the Land. I believe they think the best Title of a Man is of very little Consequence if they are strong enough.'[231]

227. Minutes of Evidence to House of Lords Select Committee on NZ, 1838, BPP, vol 1, p 80 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 116).

228. Minutes of Evidence to House of Lords Select Committee on NZ, 1838, BPP, vol 1, p 83 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 116).

229. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 116.

230. Wilkinson saw this as an act of charity on Pōmare's part, but another possible explanation is that they had rights in those lands.

231. Minutes of Evidence to House of Lords Select Committee on NZ, 1838, BPP, vol 1, p 107 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 117–118).

The Secretary of the Wesleyan Missionary Society, the Reverend John Beecham, told the committee that he did not have much knowledge of land customs. He did, however, bring a letter from one of his missionaries, advising that the mission had sought to acquire land from a settler but had been obliged first to seek the consent of the chief who had entered into the original transaction. When asked by the committee whether he thought the mission had acquired an inalienable property in fee simple, Beecham replied cautiously as the Wesleyan land dealings were limited and he had no specific case in mind. But he did not think 'we should instruct our Missionaries to sell it without consulting the Natives of whom it is bought'. He 'rather lean[ed] to the Conclusion that the Natives have no very distinct Idea of the total Alienation of their Lands, but may cherish the Notion of resuming them at some future Period under certain Circumstances'.[232]

Not all witnesses shared Beecham's doubts about Māori understanding of transactions with Europeans. His counterpart in the CMS, the Reverend Dandeson Coates, asserted that the mission's land acquisitions were absolute but conceded that it was impossible to explain fully to Māori what this meant.[233] John Nicholas, who had befriended and been invited by missionary Samuel Marsden to accompany him to Rangihoua when the first CMS mission was established in 1815, believed that Māori understood they were parting with land forever. As evidence of this, he said that rangatira had placed the mission under a tapu so that others would not disturb the missionaries or their cultivations.[234] We note here that Marsden, who arranged the Rangihoua transaction, did not himself see it as a permanent sale. He wrote in his journal: 'No Maori at that time had any appreciation of the European concept of title or its transfer, and it was probably understood that the mission people would occupy the land, not necessarily exclusively, while they required it.'[235]

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

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

232. Minutes of Evidence to House of Lords Select Committee on NZ, 1838, BPP, vol 1, p 297 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 121).

233. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 121.

234. Minutes of Evidence to House of Lords Select Committee on NZ, 1838, BPP, vol 1, p 6 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 114).

235. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 49.

236. Minutes of Evidence to House of Lords Select Committee on NZ, 1838, BPP, vol 1, p 18 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 114–115).

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

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

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

> [Q] And if he [a land-selling chief] further disposed of his Rights of Sovereignty over his Land, his Rights of Sovereignty would pass to the Person to whom he disposed of them?
>
> [F] I apprehend they would at first, but whether that would be held good Twenty or Thirty Years hence would be a different Question; for those Natives do not understand parting with their Rights in Perpetuity; at present that would hold good, I have no Doubt.
>
> . . . . .
>
> [Q] When you say that the native Chiefs do not understand that they are alienating Land entirely for successive Generations, with respect to the Purchases made now by Europeans, have the New Zealanders any Sort of Notion, in your Opinion, that the Land will ever revert to their Tribes?
>
> [F] I think they consider it as their Country; they consider the People who come there as we considered Settlers in this Country in former Times, the Lombards, Flemings, or others. We had no Objection to their coming, provided they did not take away from us any Part of our Territory, for they would increase our Resources. If a piece of New Zealand where the English have settled themselves was to be transferred to the British Crown, and the Natives were no longer to

237. Grant Phillipson, transcript 4.1.26, Turner Event Centre, Kerikeri, p 221; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 40–41, 114–115.

238. For example, see Wiremu Reihana (doc T10(b)), p 6.

239. Grant Phillipson, transcript 4.1.26, Turner Event Centre, Kerikeri, p 221; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 40–41.

240. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 114–115.

have any Right to that Soil or Territory, I think it would put quite a new Face on the Matter.

[Q] Have the New Zealanders any Notion that the Compact is not final, that the Land will ever revert again to their Descendants; do not they consider it vested in Law?

[F] I do not think they do, because they consider that when a European purchases their Land, he is taken from that Moment under the protection of their Tribe. All the Purchases have been with the Understanding that the Settlers are to be protected by the Chief from whom they purchased the Land, which appears to me very much like their considering that they still have a Sovereignty over the Land, though they allow those People to make use of it.

[Q] Do you know whether those Persons have ever done any Act of Infeudation to the former Possessors of this Land? [ie, held it under feudal tenure]

[F] The Settlers have made Presents to the protecting Chief, the Chief under whom they live.[241]

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

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

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

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

FitzRoy was later recalled to clarify certain points of his evidence. He expanded on his view of the 'Right of Common', which he saw as including rights such as

241. Minutes of Evidence to House of Lords Select Committee on New Zealand, 11 May 1838, BPP, vol 1, p 171 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 119).

242. Minutes of Evidence to House of Lords Select Committee on New Zealand, 11 May 1838, BPP, vol 1, p 171 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 120).

243. Evidence of Captain FitzRoy, 11 May 1838, BPP, vol 1, pp 173–174 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 179).

setting up a camp, feeding cattle, and other uses short of permanent occupation. Questioned on the extent of land that had been alienated – much of it along one side of the Bay of Islands Harbour – and the likely impact upon Māori in the future, he reiterated that as matters then stood, Māori could 'go wherever they please; their having sold Land does not prevent their fishing from its Shore or crossing it in any Direction'.[244] However, that might change with colonisation:

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

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

The significance of FitzRoy's observations was disputed by historian witnesses in the Muriwhenua inquiry. Although Wyatt was heavily influenced by his evidence, Sinclair dismissed it as the opinions of somebody who had visited New Zealand briefly and was incorrect on several points. He thought that, given the length of his stay, FitzRoy must have relied on the opinions of the missionaries and Busby. Additionally, Sinclair considered FitzRoy was motivated by his desire to support the missionaries in their political battle with the New Zealand Company, and that his later actions suggested that he did not really think that Māori were

244. Minutes of Evidence to House of Lords Select Committee on NZ, 1838, BPP, vol 1, p 337 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 121).
245. Minutes of Evidence to House of Lords Select Committee on NZ, 1838, BPP, vol 1, p 337 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 122).
246. See Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 122.
247. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 122.
248. See Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 120.

doing anything other than selling their lands.[249] In our own inquiry, Phillipson cited FitzRoy's evidence at length. He suggested that Sinclair's reasoning was flawed, since both Busby and the missionaries firmly believed their own land transactions to be genuine purchases. As to the apparent confusion between land ownership and sovereignty, Phillipson's view was that: 'FitzRoy's evidence showed that where this was *Maori* authority, it involved land in ways that a British exercise of "sovereign" authority would not normally do. This probably makes it more relevant to the points at issue, not less' (emphasis in original).[250] At the least – and we agree – this was intelligence readily available to the Crown at the time that should have alerted it to questions about the nature of pre-treaty land arrangements.[251]

6.3.2.3.2 Ernest Dieffenbach's observations

Another early visitor who readily grasped that Māori understood land arrangements in different terms from settlers was Ernest Dieffenbach, a naturalist with the New Zealand Company, who sailed aboard the *Tory* in 1839. Key extracts of his account of *Travels in New Zealand*, published in 1843, were quoted by Phillipson, David Armstrong for the Crown in the Muriwhenua inquiry, and Stirling and Towers; these are reproduced here (see sidebar).[252] Dieffenbach observed that Māori 'acknowledge[d] the titles of those who [had] purchased from them', but far from having disposed of all their land, they 'generally retained such parts as were best suited for cultivation' and believed they had enduring rights to these lands, although this might not be recorded in the deeds. He argued that 'it never entered into their minds that they could be compelled to leave', or that the land might be on-sold to strangers who were unaware of and would not respect these informal arrangements. Dieffenbach cautioned against relying on the deeds, which were 'written in a foreign language and in a vague form', and noted that transactions 'were often conducted without a proper interpreter being present'. In Dieffenbach's view, the Crown ought to give legal protection to informal arrangements for shared use, and the commissioners in recommending awards should also consider what land Māori had left to them, even when they did not dispute the legality of the title being sought. Otherwise, 'hardship and injustice' would be inflicted on some hapū.[253]

Again, the validity of this contemporary and critical account was questioned by witnesses for the Crown in the Muriwhenua inquiry. In particular, Armstrong argued that Dieffenbach had not attended a Land Claims Commission hearing

249. Sinclair, 'Issues arising from Pre-Treaty Land Transactions' (Wai 45, doc I3). pp 212–220.
250. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 118–119.
251. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 123.
252. See Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 146–147; Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 276, David Armstrong, 'The Land Claims Commissions. Practice and Procedure: 1840–1845' (commissioned research report, Wellington: Crown Law Office, 1992) (Wai 45, doc I4), pp 138–139.
253. Ernest Dieffenbach, *Travels in New Zealand; With Contributions to the Geography, Geology, Botany, and Natural History of that Country*, 2 vols (London: 1843, reprint Christchurch, 1974), vol 2, pp 142–144 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 146–147).

An Implied Understanding that they Should Continue to Cultivate the Ground

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

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

1. Dieffenbach, *Travels in New Zealand*, vol 2, pp 143–144 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 146–147; also cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 276); Armstrong, 'The Land Claims Commission' (Wai 45, doc I4), pp 138–139.

and had incorrectly assumed that the commission would fail to respect informal arrangements over reserves.[254] In contrast, Phillipson described Dieffenbach as an 'acute and perceptive observer' who had examined matters all over the country, including the Bay of Islands, and whose views were therefore worth considering.[255] More importantly, 'This type of evidence suggests that the point ought not to have been opaque to the Commissioners. They certainly recognised the element of power at work in the transactions and that Maori had expected *their* view of the transactions to prevail' (emphasis in original).[256]

6.3.2.3.3 The views of early Crown officials

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

Other than the evidence before the House of Lords, Busby was the Crown's main source of information about New Zealand in the 1830s. He had arrived in the Bay of Islands in 1833, and as already mentioned, had engaged in substantial land dealings. Most of his initial transactions at Waitangi (in 1834 and 1835) were relatively modest, with his claims ranging from 25 acres (OLC 15) to 2,000 acres (OLC 17). But when the Crown moved towards annexation, he joined the rush to acquire as much land as possible, undertaking negotiations for some very large-scale properties at Whāngārei (25,000 acres at Bream Bay and another 15,000 acres at Waipū) as well as a further 5,000 acres in the Bay of Islands (OLC 21). In all, he would seek grants for nine Waitangi properties totalling 9,465 acres and another three at Whāngārei totalling some 80,000 acres (see discussion at section 6.7.2.10. In other words, he was heavily invested in the Crown endorsing Māori transactions as valid land conveyances under English law.

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

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

254. Armstrong, 'The Land Claims Commission' (Wai 45, doc I4), pp140–142.
255. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp146–147.
256. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp146–147.
257. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p123.

Even so, that same correspondence recorded incidents that suggest the matter was less clear-cut than Busby made out. For example, William Hall, who sold him the land for his residence at Waitangi, informed Busby that the deed would stand good only against the claims of other Pākehā, and that he would probably have to pay Māori again when he took up occupation.[258] Although Busby had entered into no transactions himself at Kororāreka, he observed that settlers who thought they had purchased land there, later had to accommodate changing customary circumstances. After 1830, as a result of the Girls' War, Ngāti Manu had vacated the town, leaving it to the chiefs of the northern alliance who considered they had a right to make their own arrangements. Busby informed his brother that one settler (Poyner) found his property occupied by one of the northern alliance chiefs, who had 'established himself in the Enclosure . . . and kept him out of possession till the day of his death'.[259] Nor did Ngāti Manu regard their rights as extinguished. As discussed in chapter 3, there was renewed fighting over the township in 1837 (see section 3.4.1); and much later, in 1854, Ngāti Manu joined with Ngāti Hine in demanding payment from the Crown in recognition of their rights.[260]

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

The same cannot be said, however, of the Chief Protector of Aborigines, George Clarke senior, whose views we consider especially influential in the pre-treaty land claims process. In chapter 4, we outlined the instructions of Secretary of State for War and the Colonies, Lord John Russell, in late 1840. In brief, these stated that it was the duty of the Chief Protector to become conversant with 'native customs', supply the Government 'all such information as may from time to time be required on that subject', and 'watch over the execution of the laws, in whatever concerned

258. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 123.

259. Busby to Busby, 17 November 1834 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 124).

260. Kemp to McLean, 26 July 1854 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 168–169).

261. Edward Shortland, *Traditions and Superstitions of the New Zealanders*, 2nd ed (London: 1856), pp 270–288, 298–299. See Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 145–146; Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 275–276.

262. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 146.

more immediately the rights and interests of the natives'.[263] As we discuss further in section 6.4, the protector and sub-protectors played integral roles in the first Land Claims Commission: they were charged with identifying those who held customary rights, bringing any possible opposition to the commission's attention, and attending the hearings to protect Māori interests. According to Armstrong, the commissioners relied particularly on Clarke (who has significant land claims at Waimate) and his sub-protectors for their understanding of Māori custom and for their assessment of who held rights.[264]

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

> it was never the custom of the natives to alienate a tract of country upon which they were living, unless they intended migrating or altogether abandoning it. The primary object of a New Zealander parting with his land is not only to obtain the paltry consideration which in many cases is given them for their land, but to secure to them the more permanent advantages of finding at all times a ready market for their produce with their white neighbours; but this important end is at once defeated upon the assumption of a total alienation, as claimed by the New Zealand Company.[266]

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

263. Russell to Hobson, 9 December 1840, BPP, vol 3, p 150 (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc 14), pp 66–67).

264. Armstrong, 'The Land Claims Commission' (Wai 45, doc 14), pp 40–59.

265. Clarke to Colonial Secretary, 25 February 1841 (cited in Armstrong, The Land Claims Commission' (Wai 45, doc 14), pp 48–49).

266. New Zealand Company 12th Report, Appendix E (cited in Armstrong, The Land Claims Commission' (Wai 45, doc 14), p 70).

Māori, settlers, and the Government in the future.[267] He again alluded to the possibility for misunderstanding:

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

According to his report of November 1843, 'no purchase could be effected, except by a person possessing some considerable knowledge of the principles by which the claims of the natives are governed, and that to perform such service satisfactorily would require considerable time'.[269]

Clarke typically related these observations back to the question of whether purchasers had ascertained to whom the land really belonged, showing less concern for the broader question of whether Māori understood the transaction in terms other than permanent sale. However, as Phillipson noted, the 'other implications are obvious'.[270] Certainly, Clarke was aware that Māori had a different view of land tenure – notably that rights in land might endure despite apparent dispossession. He observed, 'A tribe never ceases to maintain their title to the lands of their fathers, nor could a purchase be considered complete and valid without the concurrence of the original proprietors.'[271] However, the assertion by defeated hapū that they ought to be paid for lands they had formerly occupied did not give Clarke any apparent pause for thought, other than for the problems that might arise in the colony if such rights were not extinguished as well.

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

> it is I presume to say impossible to establish such a claim as that advanced by Baron de Thierry who not only assumes a right to the whole patrimony of two or three chiefs,

267. Clarke, half yearly report to the Governor, 30 September 1841 (cited in Armstrong, The Land Claims Commission' (Wai 45, doc 14), p 71).
268. Clarke, half yearly report to the Governor, 30 September 1841 (cited in Armstrong, The Land Claims Commission' (Wai 45, doc 14), pp 70–71).
269. Clarke, 'supplementary' report, 1 November 1843 (cited in Armstrong, The Land Claims Commission' (Wai 45, doc 14), p 75).
270. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 145.
271. Armstrong, 'The Land Claims Commission' (Wai 45, doc 14), p 75.

said to have signed his deed of purchase, but that of a vast number of other independent chiefs above those named by the Baron . . .[272]

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

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

Phillipson agreed that Clarke, along with other protectors and missionaries, had a 'vested interest in the outcome' of the Land Claims Commission process, which was dependent upon their advice and their knowledge of te reo. Clarke, Richard Davis, and James Kemp were all themselves claimants, either on their own behalf or for their families. Their sons were engaged in official roles as well. For instance, Henry Tacy Kemp was the sub-protector attached to the northern commission,

272. Clarke to Colonial Secretary, 25 July 1840 (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc 14), p 69).
273. Armstrong, 'The Land Claims Commission' (Wai 45, doc 14), p 68.
274. Armstrong, 'The Land Claims Commission' (Wai 45, doc 14), p 69.
275. Armstrong concludes that transactions were not 'tuku whenua': Armstrong, 'The Land Claims Commission' (Wai 45, doc 14), pp 84, 144.
276. Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 20.
277. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 268–269.

and James Davis also worked in that capacity on occasion and sometimes acted as protector. Notwithstanding, the transactions of the CMS missionaries had been so numerous that they drew fire from the Māori speakers at Waitangi (as we explored in our stage 1 report). Dr Phillipson also questioned Armstrong's conclusion that the lack of Māori challenge to Clarke's transactions demonstrated his expertise in such matters. An alternative explanation was the possible reluctance of the rangatira to 'speak frankly' in the presence of the missionary land claimants. Both the Anglican Bishop George Augustus Selwyn, and the missionary Robert Burrows had observed this.[278]

We note, finally, that New Zealand's first three Governors, whose combined tenure covered much of the first three decades after te Tiriti, all expressed clear views that Māori had not consented to permanent alienation of their lands. Hobson, while addressing a delegation of Sydney settlers in January 1840, expressed the view that Māori 'never were in a condition to treat with Europeans for the sale of their lands, any more than a minor w[oul]d be who knew not the consequences of his Acts'. While Hobson's racial ideology is abundantly clear, so too is the underlying point: Māori could not conceive of permanent alienation, let alone agree to it.[279] FitzRoy, when he became Governor in 1843, continued to hold the view that Māori had not consented to sale. As we will see later, he thought that Māori had given up none of their rights, other than to allow settlers to occupy a portion of their lands, and that they continued to use their lands as before.[280] Grey, who governed from 1845 to 1853 and again from 1861 to 1868, expressed similar views. In 1848, for example, he wrote that the title acquired by settlers was 'in all cases wholly distinct from a Crown Title in a British Country'; and that, 'even in the best cases for the purchaser, the title could not . . . be regarded as more than simply an adoption into the tribe, and a right of holding the land upon the same term as the Natives themselves'.[281]

6.3.2.4 *The CMS transactions*

The CMS had entered its first land arrangement with Māori in 1815, and other transactions had followed in 1819 and during the 1820s as new missions were established.[282] These early transactions reflected a desire by Māori to have missionaries in their midst. As noted earlier, Marsden saw them as conferring a right to occupy land for that purpose.[283] During the 1830s, the number of and area covered by missionaries' land deeds accelerated markedly with a series of transactions by Henry

278. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 144.

279. Hobson to Gipps, 16 January 1840 (cited in Donald Loveridge, 'The New Zealand Land Claims Act of 1840' (commissioned research report, Wellington: Crown Law Office, 1993) (Wai 45, doc I2), p 26).

280. FitzRoy to Lord Stanley, 16 May 1843, BPP, vol 2, p 387 (Crown document bank (doc H20), p 107).

281. Governor Grey to Earl Grey, 17 October 1848 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1, pp 196–197).

282. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 275.

283. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 49.

and William Williams, James Kemp, Richard Davis, James Shepherd, and others. In many of these, missionaries sought to acquire land for themselves and their children. Other transactions, covering a substantial area, involved so-called 'trust deeds', which were intended to secure those lands for ongoing occupation and cultivation by the resident Maōri populations. In our stage 1 report, we discussed whether Ngāpuhi interest in these arrangements indicated their growing concern at loss of land and authority;[284] here, we explore the effect of such arrangements on their understanding of what land deeds entailed.

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

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

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

284. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 278–279.
285. See Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 168–169.
286. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 170.
287. Henry Williams to Colonial Secretary, 5 November 1840; and Protector Clarke to Colonial Secretary, 16 November 1840 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 168).
288. Extract from CMS Trust Deed for Waimate, 1838 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 168).
289. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 168–169.
290. Extract from CMS Trust Deed for Waimate, August 1837 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 168).
291. Extract from CMS Trust Deed for Waimate, August 1837 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 168).
292. See Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 198–200.
293. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 171, 188.

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

In the Muriwhenua inquiry, Dr Sinclair argued that the trust deeds were clear evidence that Māori understood and accepted settler views of land transactions. In his analysis, the missionaries would have very unambiguously spelled out the implications of land sales at that time, and he considered the trust deeds reflected Māori desire to protect themselves from further land losses through sale.[295] Witnesses in our inquiry disagreed – and in fact took the opposite stance. In Dr Phillipson's view, the trust deeds came 'closest' to reflecting in writing what Māori expected of pre-treaty land transactions. However, they could not have 'helped improve understanding of "sales" . . . since they involved missionaries making the usual payments and getting deeds signed, but with the apparent intention that nothing would change rather than the reverse'.[296] By encouraging Māori to occupy transacted land, the missionaries had signalled something quite different from what other Pākehā – those who also had induced them to sign deeds – had intended.

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

Phillipson, and Stirling and Towers also rejected Sinclair's view that Māori entered the trust arrangements because they understood and were anxious about permanent land alienation; rather, they agreed that the trust deeds reflected missionaries' concerns more than those of Māori.[299] Stirling and Towers pointed out that, by 1835, the vast majority of land transactions Māori had entered into concerned blocks of a few dozen or a few hundred acres. The only exceptions were James Clendon's trading post at Okiato and transactions with the missionaries themselves. Even if Māori saw their transactions as total and permanent alien-

294. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 131; Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 170–171, 175–176.

295. Sinclair (Wai 45, doc I3), pp 152–153; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 139.

296. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 131.

297. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 131, 139.

298. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 139–140.

299. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 130–131; Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 171–172.

ations, they 'could scarcely have cause for concern' about impending landlessness '[g]iven that the missionaries, by their own admission, so freely shared their lands' with them.[300]

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

As Davis' comment indicates, the view promulgated by missionaries was that their land acquisitions secured a shared future where the prospects of Māori and mission children were intermingled. Shepherd, who claimed over 10,000 acres in the Whangaroa area, wrote in 1838 that 'it has therefore appeared to me most desirable to secure portions of land . . . to the benefit of the natives. This I have done, feeling it to be a duty no less incumbent upon me than to provide for my own children.'[305] Davis informed the CMS: 'It is but too true that purchases of an extensive nature have been made but even in some of them, I can have no doubt but the people who made them had the double end in view viz, of providing for the Natives as well as for their own families.' Davis presented this as a response to Māori land-selling (though, as already noted, in Te Raki the missionaries were responsible for more land dealings than any private speculator). Davis continued, 'Could your missionaries – or ought your missionaries – to have looked on in sullen silence? Certainly not. In the first place they did all they could . . . to secure a

300. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp171–172.
301. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p177.
302. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp139–140.
303. Davis Journal, 8 November 1839 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p177).
304. Davis Journal, 8 November 1838 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p177).
305. Shepherd to CMS, 12 September 1838 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p181).

future interest for the Aborigines as well as to provide for the maintenance of their own family.'[306]

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

The missionaries often asserted that Māori in fact continued to share the land with them long after the deeds had been signed. Henry Williams maintained that Māori had been 'repeatedly invited' to live on CMS land at Waimate and Paihia.[308] And Kemp, for example, told the Colonial Secretary in 1848, 'No natives have ever been compelled to leave their cultivations on the land but on the contrary have been encouraged to reside and cultivate and cut timber as they might require, a system universally adopted in all purchases of the missionaries.'[309]

We note that this is almost exactly what then-Captain FitzRoy had told the House of Lords select committee in 1838 when he referred to Māori retaining a 'right of common' in the lands covered by missionary transactions.[310] Another missionary, William Puckey, similarly defended the extensive transactions undertaken by Davis and himself on these grounds; their practice had been to 'buy more land than we otherwise should, and with this proviso stated in the deed that the natives should occupy it with our own children, thereby doing them a kindness by providing them with homes which they could never alienate from their families.'[311]

The missionaries' claims were regarded with some scepticism by other Pākehā. Busby, for one, thought that Henry Williams was being less than truthful in maintaining that they were acting for Māori benefit. Jealous of the 'very fine land' to which Williams had acquired deeds, Busby complained, 'He has been giving out at Korarareka that they are purchasing these extensive tracts *not for themselves but for the natives* – a statement which in the sense he has made it to be understood

306. Davis to CMS, 17 June 1840 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 140); Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 180.

307. See Margaret Mutu (doc AA 91), p 43, on this point.

308. Williams, 'Land Purchase' manuscript, no date (cited in Rose Daamen, Paul Hamer and Barry Rigby, *Auckland District Report*, Waitangi Tribunal Rangahaua Whanui Series, 1996 (doc H2), p 138).

309. Kemp, Kerikeri, to Colonial Secretary, 26 January 1848 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 182).

310. Evidence of Captain FitzRoy, 11 May 1838, BPP, vol 1, pp 173–174 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 179).

311. Puckey to CMS, 22 January 1846 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 180).

is I believe absolutely false' (emphasis in original).[312] Even stronger criticism of missionary land dealing came later from Governor Grey (see section 6.5), who condemned their 'pretended purchases', which he predicted would result in tribal warfare and disputes with the Government.[313]

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

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

While missionaries and other Pākehā readily appreciated the need to consolidate their claims by cultivating the land and erecting fences and houses upon it, they found that this could provoke countermeasures that necessitated additional negotiations, payments, and tolerance of further Māori use. Numerous incidents were recorded indicating that Māori did not view the deeds as restrictive. In 1832, after completing a deed with Hake, Te Ana, and others for Te Karaka, south of Paihia (OLC 669), Williams had sent in workers to begin clearing the ground for cultivation. In response to this – and also to an insult to Hake, who was wrongly accused of stealing from Williams' brother – a large group of Ngāti Manu began to cultivate the area themselves and erect buildings there. The missionary was obliged to make a further payment – this was compensation for the slight – and Ngāti Manu then agreed to take down the whare. Stirling noted that

312. Busby to Alexander Busby, 14 September 1839 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 182).

313. George Grey, marginal comments on Clarke to Colonial Secretary, 30 March 1846 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 193).

314. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 131, 150–151, 366.

315. Davis to CMS, 1 March 1839 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 131).

316. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 131, 150–151, 366; see also Phillipson, report summary (doc A1(f)), pp 2–3.

317. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 127.

318. Bruce Stirling, 'Historical Report on Taumarere River; Opua Okiato; Pomare Bay and Kororareka; Church Missionary Society pre-Treaty land transactions; and the Kawakawa and Ruapekapeka Crown Purchases', 2016 (doc W8), p 68.

Women Rangatira Exercise Manaaki at Paihia

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

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

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

1. Letters dated 12 January, 11 February and 17 March 1824, in Caroline Fitzgerald, ed, *Letters from the Bay of Islands: The Story of Marianne Williams* (Penguin, Auckland, 2004).

while this agreement allowed the CMS to establish a presence on the land, it did not end Māori occupation of Te Karaka.[319] In 1841, Williams told the Land Claims Commission that Māori were still using the area with his permission: 'The Natives [had] been allowed from time to time to cultivate at the "Karaka" and to sit there for the purpose of fishing which right I still leave with them, but they have no right to sell any of the land again.'[320] A similar arrangement existed for Kotikotinga (OLC 668).[321] Yet, there was no mention of any such arrangement in either deed.[322]

319. Stirling, 'Historical Report on Taumarere River' (doc w8), p 68.
320. Evidence of the Reverend Henry Williams, Kororāreka, 6 January 1842 (Berghan, supporting papers (doc A39(m)), vol 14, p 8596).
321. Agreement (translation) Tuperiri and Hamu, 26 July 1831 (Berghan, supporting papers (doc A39(m)), vol 14, p 8581).
322. For deeds, see Berghan, supporting papers (doc A39(m)), vol 14, pp 8581, 8599.

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

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

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

323. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 114; also cited in Phillip Bristow (doc M16), p 114.

324. Tuckwell and McIvor on behalf of Fairburn to Busby, 10 January 1835 (Stirling, 'Historical Report on Taumarere River' (doc W8), p 69).

325. Arapeta Hamilton (doc F22), para 17; Stirling, 'Historical Report on Taumarere River' (doc W8), p 69; Henry Williams, *Early Journals*, pp 386, 407.

326. Williams to Burrows, 26 February 1836 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 127–128).

327. Busby, Victoria (Waitangi), to Colonial Secretary, 12 October 1848 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1489).

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

According to Davis, 'in all the land purchases the tapu was paid for separately'.[329] As Stirling and Towers pointed out, long after 1840, Māori would seem to have 'established an entirely new urupa on land claimed by, and awarded [by the Land Claims Commission and the Crown] to, Davis but which they had continued to occupy on a permanent basis'. The burial of their dead on the land would suggest that Māori did not see their occupation as either temporary or as being under the authority of the missionary.[330]

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

> The value of the [mission family-owned] land of which so much has been said is less than nominal, as all in this District, certainly, occupy alone by sufferance, subject to the will of any turbulent set of boys . . . Any trifling circumstance may lead to the

328. Davis, Kaikohe, to CMS, 7 December 1850 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p1490).
329. Davis, Kaikohe, to CMS, 7 December 1850 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p1490).
330. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p1491.
331. Davis to Burrows, 9 January 1849 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p166).
332. Williams to Heathcote, 18 June 1850 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p167).
333. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p167.

stripping [muru] of a settler, to his utter ruin, and no protection can be afforded by the Govt either to person or property.[334]

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

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

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

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

The complex and overlapping nature of some of the pre-treaty transactions was evident in the case of Manawaora in the southern Bay of Islands. In 1830, the brothers Rewa, Moka, and Te Wharerahi of Ngāi Tāwake entered into a transaction with the trader James Clendon. According to the deed, the lands involved encompassed all territories from Manawaora to Ōrokawa, an area Clendon later estimated at some 3,000 acres. He did not immediately take up occupation and,

334. Williams to CMS, 30 January 1850 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p167).

335. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp18–19.

336. Grey to Gladstone, 21 June 1846 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p159).

on returning in 1832, was obliged to make another payment.[337] Neither of these transactions resulted in Ngāi Tāwake moving away from their pā, kāinga, or cultivations; on the contrary, Clendon and other settler claimants acknowledged that they remained and continued to make free use of the land.[338]

In 1836, Te Wharerahi granted another trader, John Montefiore, rights to occupy a portion of Clendon's claim at Ōpunga, in the north-eastern corner of Manawaora Bay. After Te Wharerahi had split the money among all Ngāi Tāwake leaders who were 'entitled to share in it',[339] the hapū continued to occupy and cultivate the land as before, sometimes discussing their actions with the trader and sometimes not. Nonetheless, Montefiore regarded himself as having purchased the land outright.[340] William Manery, who worked for Montefiore, told the commission that rangatira sometimes sought to 'annoy me a little' by telling him the land was Clendon's.[341] Stirling and Towers understood this as a gentle reminder that the traders' occupancy rights were limited and conditional.[342]

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

> I consider the Natives to have independent of Mr Montefiore' about nine hundred acres which includes the Pa where they reside and the Land joins to it. I should think that the Land which these Natives now possess is quite sufficient for all purposes required by that Tribe. My purchase deed is dated the 7 December 1830 and I believe my retransfer to the Natives for their life Interest took place about two years ago. I

337. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 289, 292. The claimant Shirley Hakaraia explained how Te Wharerahi acquired rights in the south-eastern Bay of Islands as part of a peacemaking with Ngāre Raumati following a series of military victories. This was part of a more general realignment that saw the Ngāpuhi 'northern alliance' take control of the whole coast, including Kororāreka: Shirley Hakaraia (doc F24), p 13.

338. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 130; Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 287–289. Also see Evidence of Montefiore in the Court of Claims, Russell, 25 January 1841 (Berghan, supporting papers (doc A39(m)), vol 1, pp 30–31).

339. Evidence of Ware Rahi [*sic*], 25 January 1841 (Berghan, supporting papers (doc A39(m)), vol 1, pp 37–40). Also see Evidence of Pau, 26 January 1841 (Berghan, supporting papers (doc A39(m)), vol 1, p 41).

340. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 152; Evidence of Montefiore in the Court of Claims, Russell, 25 January 1841 (Berghan, supporting papers (doc A39(m)), vol 1, pp 30–31).

341. [Sworn Statement] of William Manery, 25 January 1841 (Berghan, supporting papers (doc A39(m)), vol 1, p 35).

342. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 288.

343. Clendon presented this as an agreement to grant Te Wharerahi a 'life interest' in the hapū lands, but the deed contained no such condition: Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 78–79; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 130. Also see Evidence of Reverend Charles Baker, 2 February 1841 (Berghan, supporting papers (doc A39(m)), vol 1, p 42).

since made over the Land they now possess to Wharerahi and his children. This was promised about 18 months ago but only completed about 6 weeks since.[344]

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

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

In 1835, the English shipwrights William Cook and Robert Day agreed to give Kapotai, Pī, and other Waikare rangatira a small schooner in return for rights to land at 'Pakiho' in the Waikare inlet. This was a transaction with many dimensions. Cook and Day had established their business in the inlet, and as already noted, Cook married Kapotai's daughter Tiraha. Māori remained on the land, although Cook, like other settlers, maintained that it was by his permission 'with a clear understanding that I was to have full possession of the whole of the Land whenever I required it'.[348] As he saw it, the agreement allowed Te Kapotai to cultivate the land so long as the hapū did not sell it to others, as the land was an inheritance for the 12 children he shared with Tiraha.[349] Some opposition to the agreement was raised after the schooner was lost at sea, though Kapotai, Pī, and others continued to endorse the settlers' presence and gave evidence in their support.[350] Māori were still in occupation of the land during the 1840s and 1850s. Cook was forced off during the Northern War. When he returned, Wepiha (another rangatira and the son of Arama Karaka Pī) challenged the right of Cook and Tiraha

344. Evidence of James Clendon, 30 January 1841 (Berghan, supporting papers (doc A39(m)), vol 1, pp 44–45).

345. Shirley Hakaraia (doc F24), p 22.

346. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 130; Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 291–292.

347. Deed of transfer, 15 January 1841, OLC 1, 13 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 130).

348. Evidence of Cooke, 21 February 1842 (Berghan, supporting papers (doc A39(m)), vol 3, p 1548). Regarding Cooke's marriage, see Jack Lee, *I Have Named it the Bay of Islands* (Auckland: Hodder and Stoughton, 1983), p 165; see also notes of evidence, 19 March 1858 (Berghan, supporting papers (doc A39(m)), vol 3, p 1561).

349. Te Kapotai Hapu Korero (doc F26), p 18; Daamen, Hamer, and Rigby, *Auckland District Report* (doc H2), p 104.

350. Evidence of Pi, 21 February 1842 (Berghan, supporting papers (doc A39(m)), vol 3, p 1549); Evidence of Baker, 21 September 1842 (Berghan, supporting papers (doc A39(m)), vol 3, pp 1549–1550).

to part of the land.[351] Other areas at Pakiho also remained under occupation and cultivation at that time.[352]

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

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

In 1828, Moetara also entered into a land deed at Koutu with Captain John Kent, who was married to his sister, Wharo, without giving up all say over the land.[356] At the time of this transaction, according to evidence given before the commission, Ngāti Korokoro reserved the right to land on the beach, although this had not been recorded in the deed. There had been, Moetara said, 'a mutual understanding' that Māori and settlers could share its use.[357] After that initial agreement, Māori and settlers both entered further transactions for portions of the same land. Moetara granted occupation rights to another settler, George Nimmo,[358] while Kent passed his rights on to Francis Mitchell, who in turn passed those rights to Captain Young. Mitchell asked Rangatira Moetara not to 'molest' Young, which

351. Evidence of William Cooke, 19 March 1858 (Berghan, supporting papers (doc A39(m)), vol 3, p 1560).

352. Bell note, 19 March 1858 (Berghan, supporting papers (doc A39(m)), vol 3, p 1562); Bell memo, 3 April 1858 (Berghan, supporting papers (doc A39(m)), vol 3, pp 1562–1563).

353. Warren Moetara (doc C10(a)), p 10; Berghan, 'Northland Block Research Narratives' (doc A39(a)), vol 2, p 192.

354. Frederick E Maning, *Old New Zealand: A Tale of the Good Old Days* (Auckland: Robert J Creighton and Alfred Scales, 1863, reprint 1956), p 78.

355. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 121; David Colquhoun, 'Frederick Edward Maning', *The Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, 1990, https://teara.govt.nz/en/biographies/1m9/maning-frederick-edward, accessed 17 October 2022.

356. Evidence of Rangatira, 8 December 1842, OLC 1/539 (Berghan, supporting papers (doc A39(m)), vol 11, p 6303); see also Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1121.

357. Evidence of Rangatira, 8 December 1842, OLC 1/539 (Berghan, supporting papers (doc A39(m)), vol 11, p 6303).

358. John Klaricich (doc L1), p 27; Berghan, 'Northland Block Research Narratives' (doc A39(a)), vol 2, pp 342–343.

Moetara agreed to since Mitchell had paid for his interest.[359] In other words, Ngāti Korokoro accepted that settlers could transfer their rights for money, but new occupants might still consider it necessary to inform the hapū when that occurred.[360] It was later revealed that the original arrangement had been intended for the benefit of Wharo's children; that the sale to Kent (who had died in the interim) had been for a life interest only and so the claim of Young's descendants was rejected.[361]

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

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

As noted earlier, Busby entered substantial transactions during the 1830s for lands at Waitangi and Whāngārei. At Waitangi, Busby's correspondence with his brother Alexander indicated that Māori continued to use the land or assert rights over it. Although Busby represented this as an act of grace on his part, he had trouble denying the same right to those of whom he disapproved. The chief Tohitapu died shortly after Busby had arranged his first deed for land at Waitangi, in 1834. Not only did the British Resident have to make numerous payments to Tohitapu's kin in order to have the body moved away from its resting place near his house but also 'for all the time he was at Waitangi he was obliged to pay utu for the wahi tapu'.[364] In 1835, while reporting to the government, Busby rationalised what he had had to accept: that out of benevolence, he had allowed Māori to keep using their whare, which they occupied seasonally when fishing. But when he noticed his enemy Rete (or Reti) among those using the huts, he waited until they had left

359. Evidence of Rangatira, 8 December 1842, OLC 1/539 (Berghan, supporting papers (doc A39(m)), vol 11, p 6303).

360. Commissioner report, 10 November 1843 (Berghan, supporting papers (doc A39(m)), vol 11, p 6297).

361. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1121, 1354.

362. See Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 329; closing submissions for Wai 2003 and 250 (#3.3.272), pp 22, 27.

363. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 125, 151–152, 366; Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 18–19.

364. Peter Shaw, *Waitangi* (Napier: Cosmos, 1992), pp 31, 41 (cited in Stirling, 'From Busby to Bledisloe' (doc W5), p 34).

and then burned the whare down.[365] Rete had previously admitted to a raid on the British Residency, in which goods were taken and shots fired at Busby and his household. According to Busby:

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

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

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

365. Busby recorded his name as Rete, see Stirling, 'From Busby to Bledisloe' (doc w5), p 41, fn 133. For discussion of the conflict between Busby and Rete, see Waitangi Tribunal, *He Whakaputanga*, Wai 1040, pp 135–137.

366. Busby to Colonial Secretary, 11 May 1835 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 124–125).

367. Busby to Colonial Secretary, 25 September 1835 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 125).

368. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 125.

369. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 124.

370. Busby to Colonial Secretary, 28 March 1837 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 125).

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

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

Busby adopted a similar strategy at Waipū (OLC 24) and Ruakākā (Bream Bay) (OLC 23) where his 're-gifting' confirmed that the vendors might continue to 'dwell upon the land of their birth' and defined the areas on which they could live exclusively. However, while the rest of the land was for Busby to farm, the vendors could use it as well, not only for customary resources but also to run their own stock. In other words, the land Busby considered as 'sold' was to be shared between Māori and Busby's descendants into the future. John Grant Johnson, who negotiated the Crown purchase of the two blocks in the 1850s, later recalled that Māori (Te Patuharakeke) thought they 'were to continue in possession of all the land which they desired for themselves, and that the rest was to remain for their own and Mr Busby's children'. But in a separate account, Johnson took a different view that threw doubt on Busby's motivations, arguing that he had been trying to thwart the Government's plans to acquire Ruakākā. He claimed Busby had gone among Māori advising them to hold onto the land, but again had expressed the idea that Māori and Pākehā would share the land into the future, promising, 'you may all live on it, it will remain for your children, and for my children'.[373]

In summary then, Busby found that Māori continued to occupy land that he thought he had purchased but which Māori considered an allocation of use rights. His first response was to make informal arrangements to accommodate the practice, and later he attempted to formalise those understandings. It had been demonstrated that he could not keep Māori off the land 'without constant negotiation

371. Busby to Busby, 5 May 1837 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 125).

372. House of Commons Committee on New Zealand, 1840 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 126).

373. Johnson evidence, no date (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1597).

and effort'; in Phillipson's opinion, 'even then he was a realist enough to know that he could not always succeed'.[374]

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

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

> I [Heke] have spoken about the place for the erection of his house it is good. But let there be no more Europeans, let no other seek to come here, let John Irving be the last himself, Busby and Hingston. Let the other Europeans remain at Kororareka. Because

374. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p126; Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp1488–1489.

375. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p1494.

376. Busby, Victoria (Waitangi), to Colonial Secretary, 12 October 1848 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p1491).

377. Stirling, 'From Busby to Bledisloe' (doc W5), p65.

378. Busby, Victoria (Waitangi), to Colonial Secretary, 29 December 1848 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p1495).

379. Busby, Victoria (Waitangi), to Colonial Secretary, 29 December 1848 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p1495).

> the sea is the boundary of the Town of the Europeans that was arranged at the end of the war between the Governor and myself. Should this not be adhered to my good intentions to either will be ended . . . But Irving I am pleased he should build his house here and remain in [?] at Waitangi.[380]

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

> They did not see it as acting by permission. In fact they saw themselves as having the authority over not just the land but over the settler, and that they were the ones whose law governed how the land could be used [even though] rights were involved on both sides.[381]

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

6.3.2.5.5 Additional payments and resumption of land

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

The research presented in evidence for our inquiry showed numerous instances of this practice, which were the subject of frequent contemporary comment by Pākehā and Māori alike. Clendon, Polack, Gilbert Mair, and the missionary John King were amongst those who said that they had made more than one payment to the same chiefs for one of their claims.[383] The Wesleyan missionary William Woon, who attended the commission hearings in October 1842 at Waimate, observed that the 'covetousness' of Māori had given CMS missionary Davis 'much pain of mind' as 'portions of land which he had purchased for the Society, and for his own use, were again claimed by them, and they demanded more payment!', including for the land where the church had been built, years earlier.[384] Selwyn later recorded that a second payment was always required.[385] The Catholic Bishop, Jean Baptiste

380. Heke to Irving, 11 January 1849 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p1498).
381. Grant Phillipson, transcript 4.1.26, Turner Event Centre, Kerikeri, p196.
382. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p166.
383. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p150.
384. Woon to Wesleyan Missionary Society, London, 9 November 1842 (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc I4), p155).
385. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p170.

Pompallier, noted that land allocated to settlers might be resumed if 'the price given for [it] was also consumed by the use'.[386] As Taratikitiki explained to the commission when setting out his hapū's dispute with Mair over land at Kohekohe (discussed later), 'the natives frequently demand a second payment for land.'[387]

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

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

Māori asked for further payments for many reasons, though all in some way concerned the ongoing relationship between settlers and their hosts. Sometimes the additional payments were to satisfy those left out of the original transaction. Sometimes they were sought because Māori began to realise that they had been unfairly treated and subsequent settlers might pay more for the land than 'mere trifles' (as the missionaries phrased it). On other occasions, further payments were seen as part of obligations expected of those who had acquired land rights, to replace goods that had been consumed or lost since the original transaction, for transgressions against tapu, or for additional rights such as use of mahinga kai or timber. The history of these arrangements and information about payments was carefully preserved in their memories, irrespective of the deed. On deciding to dissolve a relationship, rangatira would sometimes produce the payment and return it to a settler, if the circumstances dictated.[392]

386. Evidence of Pompallier, Board of Inquiry, 1856 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 81).

387. Evidence of Taratikitiki, 21 October 1841 (cited in Stirling and Towers, doc A9, p 78).

388. For example, see Joel Samuel Polack, *New Zealand: Being a Narrative of Travels and Adventures During a Residence in that Country Between the Years 1831 and 1837*, 2 vols (1838; repr Christchurch: Capper Press, 1974), vol 2, p 355 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 82).

389. Sinclair (Wai 45, doc I3), pp 273–275.

390. Merata Kawharu (doc W10), p 8.

391. Arapeta Hamilton (doc F22(a)), p 4.

392. See Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 83, 178, 370.

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

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

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

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

The evidence before the Land Claims Commission shows that Māori were sometimes still expecting ongoing payments as late as 1838 and 1839, including at Kororāreka, where European presence was strongest and where Māori might have

393. This was a large, shallow pot used to boil down waste from pigsties to make potassium nitrate, also called saltpetre, an ingredient of gunpowder. It suggests Ngāpuhi were making their own gunpowder in the 1820s. The other ingredients were sulphur and charcoal.

394. Manuka Henare, Hazel Petrie, and Adrienne Puckey, 'Ko Te Tino o Taiamai: Te Waimate – Taiamai Oral and Traditional History Report' (commissioned research report, Auckland: Auckland UniServices Ltd, 2009) (doc E33), p 134.

395. Evidence of William Cook, no date, OLC 25-A (Berghan supporting papers (doc A39(m)) vol 26, p 15418).

396. Evidence of Taratikitiki, 21 October 1841, OLC 306 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 76).

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

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

A circumstance that could trigger demands for additional payment was when a settler's rights were transferred to others. In general, land arrangements were seen

397. For discussion of Māori expectation of additional and ongoing payments in general, see Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 72–89. Examples in which Māori vendors appeared in support of derivative claimants, testifying to the original transaction at Kororāreka and Bay of Islands, include Hugh McLiver (OLC 305), James Stuart (OLC 450), Benjamin Evans Turner (OLC 469), and John Scott (OLC 643): Berghan, 'Northland Block Research Narratives' (doc A39(a)), vol 2, pp 185, 283–284, 301, 422.

398. Evidence of Kitara, Timotiu and Mangonui, 29 October 1841, OLC 1/441 (Berghan, supporting papers (doc A39(m)), vol 8, pp 4757–9); Berghan, 'Northland Block Research Narratives' (doc A39(a)), vol 2, p 272.

399. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 80.

400. Evidence of Hector, 15 February 1842 (Berghan, supporting papers (doc A39(m)), vol 18, p 10955).

401. Evidence of Wariki, 30 September 1842 (Berghan, supporting papers (doc A39(m)), vol 18, p 10957).

402. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 80.

as establishing personal relationships between a hapū and a settler's whānau, and attempts to transfer rights were therefore resisted – as we saw, for example, in the case of Irving's attempt to settle at Waitangi. Sometimes, Māori would tolerate the transfer of rights, as when Kent passed on his interests at Koutu.

This practice was also tolerated at times at Kororāreka,[403] but on other occasions, new arrivals had to make payments to rangatira to validate their transactions. Joel Polack needed to make several rounds of payments to secure properties there. As Phillipson observed, these transactions reflected a contest between rival Ngāpuhi factions for authority over the town. Tohitapu had installed Henry Williams on the land, but Tohitapu's death in 1833 opened the claim up to challenge. Whangaroa rangatira Te Ururoa installed William Baker on the same land, then Williams sold his rights to Polack. Hōne Heke, claiming Tohitapu's authority, endorsed this transfer, but Rewa of Ngāi Tāwake rejected Heke's claim. Ultimately, Polack had to pay multiple times, to 'Williams, Heke, Tohitapu's wives, and later many other Nga Puhi rangatira'. Dr Phillipson concluded: 'These were not brown-skinned Pakeha conducting purely commercial transactions, no matter how one characterises the behaviours of accommodation and communication on the middle ground.'[404] Rangatira had no intention of abandoning the town to Pākehā, though Heke sought to confine Pākehā to it. The underlying objective at Kororāreka remained one of a shared future and shared benefits.[405]

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

But in many cases, land rights changed hands – even multiple times – without apparent interference from Māori. There may have been circumstances that made these transfers acceptable to them even though the practice deviated from the customary standards. Many transfers (though far from all) took place in the context of Kororāreka and the nearby district where the activities of traders who took on the role of land agents was largely, if not invariably, accepted. As we have noted earlier, Clayton and Spicer, both of whom frequently traded in land, had to make concessions and give additional payments in some instances although, it

403. See, for example, OLC 305 and OLC 450, in Berghan, 'Northland Block Research Narratives' (doc A39(a)), vol 2, pp 185, 283.

404. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 135.

405. See Walzl, 'Ngati Rehia Overview Report' (doc R2), pp 102–103.

406. Evidence of Ewai, 17 December 1841, OLC 1/100 (Berghan, supporting papers (doc A39(m)), vol 3, pp 1103–1104).

407. Evidence of Moko, 9 November 1841 (Berghan, supporting papers (doc A39(m)), vol 9, p 5540).

seems, not all; or if they did, it did not merit mention before the commission.[408] Other on-sales often concerned Hokianga lands. In several instances, the parties involved were known to Māori already, but sometimes Māori may not even have realised that land had been on-sold until a new owner arrived. It seems likely that gifts were given but unrecorded in many cases. However, historian Paula Berghan's block narratives suggest that this dimension of tuku whenua had undergone considerable modification by the late 1830s, and there were many instances where land was on-sold multiple times without any indication of Māori interest. For some Māori, the prospect of future trade transcended the importance of the personal relationship as more settlers arrived. This in turn indicates a greater willingness to forfeit rights than would have traditionally been experienced.[409]

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

6.3.2.6 *Mana wāhine and signing deeds*

Written deeds were all-important to missionaries and other settlers wanting to establish their rights under British law. The missionaries, in particular, promoted the protocol of formal document signings, with the male leaders sitting at the table and acting like 'gentlemen'. Marianne Williams described how in resolving a

408. See Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 68–85, 261–274. For Spicer's transactions on behalf of the Kororareka Land Company, see Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 520–525, 527–533.

409. See examples in Berghan, 'Northland Block Research Narratives' (doc A39(a)), OLC 47 Atherton, p 24; OLC 65 Bedgood, p 42; OLC 75, William Brown, p 47; OLC 89, Charles Henry Chambers, p 56; OLC 94, Alexander Chapman, p 62; OLC 96, Christie and Duffies, p 65; OLC 117, Clendon, p 91; OLC 122, Cochrane, p 98; OLC 140, Cooper, p 108; OLC 162, Donovan, p 112; OLC 172, John Edmonds, p 115; OLC 272 James Kelly and others, p 172; OLC 656, James Stiles, p 431. For reference to settlers on-selling without Māori knowing, see Rosemarie Tonk, 'The First NZ Land Commissions,1840–1845', MA thesis, University of Canterbury, 1986, pp 92–93.

410. See Michael Belgrave, Tracy Tulloch, and Grant Young, 'Marutuahu Historical Overview' (commissioned research report, no place: Marutuahu Treaty Claims Committee, 2002) (Wai 686, doc V1), pp 103–104.

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

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

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

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

411. Caroline Fitzgerald (ed), Letters from the Bay of Islands: The Story of Marianne Williams (Auckland: Penguin, 2010), p 94.

412. Fitzgerald (ed), Letters from the Bay of Islands, p 91.

413. Awhirangi Lawrence (doc s15(b)), p 8.

414. OLC 667 (Berghan, supporting papers (doc A39(m)), vol 14, pp 8581–8584.

415. OLC 669 (Berghan, supporting papers (doc A39(m)), vol 14, pp 8590, 8594–8596; Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 305.

416. Evidence of Ngangia, 3 February 1842 (cited in Berghan, 'Northland Block Research Narratives' (doc A39(a)), vol 2, p 244); Statement of Tiraha, 2 April 1858 (Berghan supporting papers (doc 38(m)), vol 3, p 1561.

'Lady Proprietresses' and Signing the Deed

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

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

> This stickler to the rights of man had not ceased his harangue, when apprehensive of its probable prolixity, two of the lady proprietresses addressed us in a similar strain directed to the same object. "I have no garment to make myself respectable of a Sunday, 'said Kohora, the ladie love (wife we must add) of Reti, a chief also interested in the purchase. Rungi-apiti, sister to the chief, also added in her shrill voice a confirmation of the plaintive fact, and that the payment should comprise an article of a similar nature for herself. The argument was concluded by Kamura [Te Kēmara], who spoke for his tribe. "This tree, 'he observed, pointing to one of the numerous peach trees that fronted our residence at Parramatta, "look at it, should a single branch fall, does not another supply its place; if you die, the land you purchase will yet belong to your children, but what will fall to my children" (na tamariki naku) pointing to his tribe, "when your payments have ceased to be serviceable?" The payment was then arranged, and the several articles taken from

1. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 58; Jocelyn Chilsolm, 'Polack, Joel Samuel', *Dictionary of New Zealand Biography*, Ministry of Culture and Heritage, 1990, https://teara.govt.nz/en/biographies/1p 18/polack-joel-samuel, last modified March 2006.
2. Chisholm, 'Polack, Joel Samuel', https://teara.govt.nz/en/biographies/1p 18/polack-joel-samuel last modified March 2006.

the store, and laid in the centre of the circle which the chiefs, females, and tribe, had made. Kamura, as head proprietor, distributed to each chief such articles as he knew they required, and in quantity according to the interest they personally possessed in the property, reserving a very minor portion to himself.

The title-deed was then read, describing with minute care, the several boundary-lines, which on being named, was assentingly nodded to by the chiefs most interested in the part described. The deed was then presented to Kamura, in presence of several native chiefs, as witnesses on the part of the late owners, and some Europeans performing a similar service on our part. Kamura then drew his moko or representation of a portion of the tattooing on his face, as his signature, which was followed by the other recipients of the purchase doing the same. Congratulations passed on both sides, the chief, Kamura, declaring that we had become incorporated in his tribe, as an actual possessor of territory in the same district as themselves. The slaves were also well pleased, as a moiety of the articles also fell to their share. On the title deed being signed, as also by the European witnesses, the meeting separated, the natives taking to their canoes, well pleased with the transaction of the day.

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

3. JS Polack, *Manners and Customs of the New Zealanders*, 2 vols (London: James Madden, 1840), vol 2, pp 80–81; Polack memorandum on claims, no date (Berghan, supporting papers (doc A39(m), vol 14, pp 8142–8146).

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

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

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

417. Kawharu (doc W10), pp 5–6 (closing submissions for Wai 354 and others (#3.3.399), p 121).

at individual and hapū levels. The deeds were therefore entirely conducted on Maori terms.[418]

The assumption among settlers was quite different. For them, the written words were more important than the broader context of the agreement, and indeed more important than Māori intentions. As Phillipson explained it, this reflected 'a cultural mindset that it doesn't really matter who you are or what your views are, if you've signed a deed you're committed and . . . you will eventually be brought to carry out your obligations that arise from that deed'.[419]

To assist our understanding of how transactions were negotiated and handled within the validation process, in generic submissions claimant counsel explored the implications of Pākehā authoring deeds (discussed in section 6.3). It was submitted that the earlier the transaction, the more likely it was to have taken place in te reo Māori and the greater the reliance on the missionaries as translators. Although deeds of sale were later introduced, in counsel's view, 'Given the non-written nature of te reo', they were 'evidence of the transactions, not the embodiment of the substance of them.'[420] And while the deeds may have been 'capable of being understood by both parties, there is ample evidence that they were understood *differently* by both parties' (emphasis in original).[421] Further, even on their own terms, many deeds demonstrated that the drafters recognised that the terms being used in te reo were not readily understood by Māori as meaning a 'sale'. Counsel submitted that the frequent use of the word 'tuku' accompanied by the English wording of 'make over' or 'let go' was a 'very clear concession to Maori law governing transactions' that ought to have alerted the commissioners to the different understanding of the parties of the meaning of deeds.[422] Counsel for Mr Rueben Taipari Porter and descendants of Te Whānaupani, Tahawai, and Kaitangata hapū also condemned the commission's failure 'to provide proper and practical attention to Māori language deeds of sale' as a deliberate act in breach of the treaty principles of good faith and active protection.[423]

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

418. Merata Kawharu, transcript 4.1.24, Oromāhoe Marae, Oromāhoe, p 103.
419. Grant Phillipson, transcript 4.1.26, Turner Event Centre, Kerikeri, pp 215–216.
420. Claimant closing submissions (#3.3.222), para 36.
421. Claimant closing submissions (#3.3.222), para 37.
422. Claimant closing submissions (#3.3.222), paras 39,41.
423. Closing submissions for Wai 1968 (#3.3.337), pp 46, 48.

To the contrary: 'The numerous references to land being given up forever clearly imply that the Māori vendors understood these transactions to create permanent alienations.' Furthermore, the Crown submitted, 'references to the purchaser and their heirs being empowered to do whatever they wish with the land also implies that the vendors were knowingly imparting exclusive rights to the lands and relinquishing any future claim of ownership or authority over that land'.[424]

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

The deeds were sourced from H Hanson Turton's *Maori Deeds of Old Private Land Purchases in New Zealand* and cross-referenced with the block narratives undertaken for this inquiry by Paula Berghan.[427] According to a memorandum accompanying the Crown's finalised table, all the extant Māori language deeds had been included.[428] Bay of Islands deeds dominated the Crown's examples, with a preponderance concerning the lands at Waimate. There were also examples from Whangaroa (7), Hokianga (5), Whāngārei (3), Mangakāhia (1), and Mahurangi (3). The table included two of Busby's deeds and those of Mair, Clendon, Bedgood, and Twaites. The rest were missionary deeds.

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

424. Crown closing submissions (#3.3.412), pp 23–24.
425. Crown memorandum (#3.2.2677(b)), no 8.
426. Crown closing submissions (#3.3.412), p 20.
427. Berghan, 'Northland Block Research Narratives' (doc A39(a)), vol 2.
428. Crown memorandum (#3.2.2677), p 13; and Crown memorandum (#3.2.2677(b)). It seems that while there are other deeds in existence, they are indecipherable.
429. See submissions in reply for Wai 354 and others (#3.3.475), p 34.

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

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

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

6.3.2.7.1 Laying out the texts – the Crown's analysis

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

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

- 34 used the word 'tuku' or a derivative such as 'tukunga' to describe the transaction in the absence of a word such as 'hoko' or a derivative; but
- in 29 of these cases, the deed also contained phrases such as 'tukia tukua ake tonu te wenua katoa' ('give up forever') and 'kia puritia mariretia e ratou e o

430. Charles Terry, New Zealand its Advantages and Prospects as a British Colony; with a full account of the land claims, sales of Crown lands, Aborigines etc etc (London: T & W Boone, 1842) pp 97–108 (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc I4), p 137; and Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 322–323).
431. Owen Kingi (doc N15), pp 12–13.
432. Submissions in reply for Wai 354 and others (#3.3.475), p 41.
433. Arena Munro (doc R16), p 53.
434. Crown closing submissions (#3.3.412), pp 23–24.

ratou tamariki ake tonu atu' ('to be held and enjoyed by them and their heirs for ever') to convey the concept of permanence and exclusivity;
- 46 deeds used the word 'hoko' or a derivative; and
- 69 deeds in all used phrases such as 'ake ake ake' or 'a mua tonu atu' to convey the notion of permanence.

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

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

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

The first deed in the table was dated May 1828 (OLC 698) and recorded an arrangement between Wharepoaka, Waikato, and others with the CMS missionary John King for land at Te Puna. The English phrases were expressed in te reo as follows:
- 'let go and sell' was translated as 'ka tuku ka hoko';
- 'for them for ever to dwell on to sell or do whatsoever they list with' as 'mo ratou mo amua tonu atu kia noho kia hoko kia aha noa';
- 'marks of this transaction' as 'hei tohu ki tenei tukunga ki tenei hoko-nga'; and
- 'this is the payment which we have received . . .' by the phrase 'Ko te utu tenei . . .'[438]

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

435. Crown closing submissions (#3.3.412), pp 22–23.
436. Crown closing submissions (#3.3.412), pp 14–15.
437. Crown memorandum (#3.2.2677(b)), no 83.
438. Crown memorandum (#3.2.2677(b)), no 1.

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

Table 6.3: OLC 306 deed and translations.

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

However, the distinction between payment and gift was blurred even in the English text. The phrase '. . . has agreed to purchase, and by these presents has purchased' was translated as 'Kua wakaae kia hokoa a kua hokoa etahi wenua kikonei'; the phrase 'to have received the said articles set opposite their respective names as good and entire satisfaction for the said lands' was translated as 'kua rite nga utu ki a ratou mo aua kainga . . . amua atu'; and the phrase 'To Hamu . . . for the land . . . as full and sufficient payment for the said lands or possessions . . . make over and give up . . . to the said Gilbert Mair' was expressed as 'Ki a Hamu . . . mo te kainga . . . kua ea te utu mo aua kainga . . . otira ka tukua katoatia ki taua Kirepeti Mea'.[440]

As a result of this agreement, in the English text, Mair was entitled to 'occupy, cultivate, build upon, or alienate the whole or any part of the said lands . . . to the full extent of the custom or laws observed in the country of the said Kingdom of Great Britain and Ireland'; this was rendered as 'kua riro i a ia . . . te mahi, te ngaki, te hanga ware, a e hei ano te mea i taua kainga, te tuku atu ki a wai noa atu ranei, pena me to tawahi i te Rangatiratanga o Piritane Nui o Airirani'. Our translation is as follows: 'Because it was left to him, to Gilbert Mair to work, to cultivate, to build on, or to be able to give that land to whomever, as is done overseas in accordance with the [Rangatiratanga] of Great Britain and Ireland'. Here 'rangatiratanga' appears to have been a translation for 'to the full extent of the custom or laws'.

A deed signed by Tohu with Richard Davis in December 1831 for the CMS families to have land at Waimate (OLC 736) employed the phrase 'kia tukua ake tonu te wenua katoa' to express the English 'on his part and on the part of his Tribe

439. Crown memorandum (#3.2.2677(b)), no 3.
440. Crown memorandum (#3.2.2677(b)), no 3.

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

Table 6.4: OLC 306 deed and translations.

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

Almost all the deeds made reference to the tamariki of the purchaser – although whether Māori thought that this necessarily excluded themselves is a question we discuss later in the chapter – and used phrases such as 'ake ake ake' and 'ake tonu atu' in an attempt to convey the idea that the arrangement was permanent. For example, Rewa, Wharerahi, and others signed a deed with George Clarke for land at Waimate in 1832, one of the 36 deeds making up his OLC 633 claim. The deed used the phrase 'Kua oti e Rewa te tuku . . . ki ona tamariki me ona wanaunga tetahi wahi o tona Mara' to give effect to the expression 'delivered . . . to his Children and to his relatives a portion of this cultivation'.[443] The deed signed two years later, in September 1834, by Tuwakawa used the phrase 'kua oti nei te tuku e ratou e Tuwakawa ma ki a te Karaka ki nga tamariki a te Karaka ki a ratou wakapaparanga katoa ake tonu atu . . . Kua oti te kainga nei te tuku e Tuwakawa ma' to convey the idea that he would 'let go to Mr Clarke, to the children of Mr Clarke, to all their generations for ever a portion of their land'.[444] Another deed signed by Rewa, Wharerahi, and others in April 1837 (also for Waimate) indicated the extent

441. Crown memorandum (#3.2.2677(b)), no 5.
442. Crown memorandum (#3.2.2677(b)), no 5.
443. Crown memorandum (#3.2.2677(b)), no 6.
444. Crown memorandum (#3.2.2677(b)), no 10.

of their tuku; the signatories would 'let go, and sell also, to George Clarke and to his children for ever to do whatever they like with', and this was expressed as 'ka tukua nei e matou ka hokona . . . ki ona tamariki ake tonu atu kia ahatia kia ahatia ranei'.[445] We translate this as 'Given by us and sold . . . to his children for ever to do as they wish'. This latter phrase ('ko ona Tamariki ake tonu atu kia ahatia kia ahatia ranei') was also used in an undated deed included within the Waimate OLC 633 claim to convey the meaning of 'sells to Mr George Clarke and his children for their disposal'.[446] We note that whereas the English wording in the deed goes directly to Clarke's power to sell, the Māori text about doing as they wished could mean any number of things.

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

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

Hamlin's deed of 19 September 1834 (OLC 898) used the phrase 'e tukua e matou nei taua wahi wenua e huaina Takapuotehara me nga rakau katoa e tu ana e takoto ana ranei ki runga o taua wahi wenua ki a te Hemara me ana tamariki o muri i a ia me o ratou wakapaparanga ake ake ake' to convey, in English, 'give up, renounce and consign for ever to James Hamlin his heirs and successors, assignee or assigns all that parcel of land called Takapuotehara with every kind of wood standing or lying upon the same'.[449] We accept these two translations as accurate.

Te Tirarau also engaged with Shepherd for land, in this case for Waitete, Kerikeri (OLC 805), in April 1837. Here the phrase 'made over . . . to be the property of James Shepherd, for him and his heirs for ever' was rendered as 'Kua oti te tuku . . . he kainga oti tonu ki a Hemi Hepara mona mo ona uri ake ake ake'. We translate this as 'The giving is completed . . . a residence for James Shepherd, for him and his descendants for ever'. Later in the deed, the phrase, 'And because the place

445. Crown memorandum (#3.2.2677(b)), no 34.
446. Crown memorandum (#3.2.2677(b)), no 36.
447. Crown memorandum (#3.2.2677(b)), no 64.
448. Crown memorandum (#3.2.2677(b)), no 90.
449. Crown memorandum (#3.2.2677(b)), no 65.

now made over by Tirarau to James Shepherd is to be for him and his children for ever, therefore we write our names and our marks' was rendered as 'kia oti tonu atu tenei kainga ka oti nei te tuku e te Tirarau ki a te Hepara mo ana tamariki mo ona uri koia matou ka tuhituhi ai ou matou ingoa ou matou tohu.'[450] The idea of permanence – of the transaction being forever – was not explicitly conveyed by the te reo but was, it seems, assumed by the drafter of the deed to be implicit in the reference to tamariki.

6.3.2.7.2 Did the deeds in te reo convey the English concept of sale?

The Crown submitted that this language demonstrated that 'there is no linguistic argument, based solely on the Māori text of the pre-1840 Northland deeds, that all transactions were something other than a permanent alienation that transferred exclusive rights to the purchaser.'[451] We agree that use of the word 'tuku' in a deed does not conclusively prove that the arrangement was something other than a sale. We do not accept the Crown's further conclusion, however, that 'numerous references to land being given up forever' and to 'the purchaser and their heirs being empowered to do whatever they wish with the land' demonstrated that 'Māori vendors understood these transactions to create permanent alienations'.[452]

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

450. Crown memorandum (#3.2.2677(b)), no 94.
451. Crown closing submissions (#3.3.412), pp 23–24.
452. Crown closing submissions (#3.3.412), pp 23–24.

contact deepened during the 1830s, was this reflected in the wording of the deeds they signed?

The effectiveness of te reo expressions at conveying British legal concepts has been questioned in other regions and contexts. The treaty itself demonstrates the potential for a profound mismatch between English legal terms and their translations into Māori, and for an absence of mutual understanding; two peoples 'talking past each other' as the Tribunal in the Muriwhenua inquiry phrased it.[453] Philippa Wyatt (along with other scholars) has pointed out the dangers of relying too much on written deeds as evidence of Māori intentions. She noted that the written word itself was new and alien to Māori – let alone the idea of 'selling' land and, by so doing, losing all rights for all time in the English system of land 'ownership'. In her view, the 'terms, purposes and consequences of its use in deeds' were all unknown to Māori.[454]

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

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

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

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

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

453. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 116. The Tribunal acknowledged Dame Joan Metge as the source of the phrase.

454. Wyatt, 'The Old Land Claims' (Wai 45, doc E15), p 79.

455. Wyatt, 'The Old Land Claims' (Wai 45, doc E15), p 92.

456. Wyatt, 'The Old Land Claims' (Wai 45, doc E15), pp 69–71; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 106.

457. Closing submissions for Wai 1968 (#3.3.337), p 48.

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

Anthropologist and linguist Professor Bruce Biggs made the essential point many years ago that it is a dangerous practice to ascribe meanings (such as sale) based in one culture to words (such as hoko) used in another, in order to reach quick consensus. He highlighted the difference between the intentions of a translator and how his or her words might be understood by the audience.[460] Biggs called this the 'Humpty-Dumpty principle', a reference to *Through the Looking Glass*, where that character states, 'When I use a word it means exactly what I choose it to mean, neither more nor less.' The result, Biggs argued, is likely to be 'a lot of misunderstanding'.[461] Meaning may change as 'further cultural contacts . . . modif[y] the connotations of the old word', a point which brings us back to the core issue at dispute between claimants and Crown as to whether the British concept of sale was understood by Māori who signed the deeds. As we see it, in their references to 'forever' and future generations, and in phrases describing rights to 'occupy, cultivate, build upon or alienate', the missionaries and traders like Mair were clearly attempting to express ideas about sale or at least permanence. Most scholars agree, however, that the text can only be safely read as indicating what Pākehā wanted from the arrangement – which, in the case of land deeds, was a discrete, defined property that they could do with as they liked. Of course, Māori wanted something too, but it does not follow that they were giving away all their rights to get it.

Even in the deeds highlighted by the Crown as expressing the concept of permanent alienation, there were ambiguities and plenty of room for Māori to assume that something rather different was happening. For example, the idea of 'noho tahi' (sitting or living together) was acceptable to Māori but, as the Reverend John Whiteley of Kāwhia acknowledged in 1843, they 'would never dream of losing their

458. Nuki Aldridge (doc AA154), p 31.

459. Joan Metge, 'Cross cultural communication and land transfer in western Muriwhenua 1832–1840', submission to the Waitangi Tribunal, 1992 (Wai 45, doc F13), p 86.

460. Bruce Biggs, 'Humpty-Dumpty and the Treaty of Waitangi', in Ian Hugh Kawharu (ed), *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Auckland: Oxford University Press, 1989), p 304.

461. Biggs, 'Humpty-Dumpty', p 304.

authority or chieftainship'.[462] So, although the word 'noho' might be used in a deed to convey the idea that the European 'purchaser' could live or stay on the land, it did not preclude the hapū from living alongside him there, nor did it necessarily follow that they had given up all their rights and interests as a consequence.[463]

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

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

462. Reverend Whiteley, 20 July 1843 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 46).
463. Merata Kawharu, transcript 4.1.24, Oromāhoe Marae, Oromāhoe, p 127.
464. See deeds no 3 and no 111 in Crown memorandum (#3.2.2677(b)).
465. Submissions in reply for Wai 354 and others (#3.3.475), pp 34–35.
466. Submissions in reply for Wai 354 and others (#3.3.475), p 35.

behind the transactions only when Richard Davis elaborated on them when giving evidence.[467]

6.3.2.7.3 Does the language demonstrate growing Māori consent to 'sale' over time?

Leaving aside the issue of interpreting Māori intention through deeds they did not themselves design, at a time when tikanga dominated, and when the legal effect of attaching signatures to documents was utterly unknown to them, we ask: does the language employed in deeds demonstrate any change in how land transactions were being viewed – as one might expect if they are to be seen a guide to growing Māori understanding of and consent to sale? It seems to us that no such change is revealed. The key words and phrases in te reo Māori used to convey the idea of a final and exclusive alienation remain substantially the same between the early 1820s and the late 1830s, indicating the established views of the Pākehā drafters rather than any evolution in those of the Māori signatories. The phrases highlighted by the Crown to argue that Māori had gained a fuller understanding of sale were in fact used early on, not only in the late 1830s after a sustained period of contact. For example, 'amua tonu atu' was used in the Te Puna deed entered into by CMS missionary John King and Wharepoaka, Waitato, and other rangatira of Te Hikitū in 1828, and regularly thereafter.[468] 'Hoko' and 'tuku' were sometimes used interchangeably, even within a single deed.[469]

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

Most importantly, we cannot know what Māori understood by the te reo terms that the Pākehā who drafted deeds borrowed in an attempt to convey the meaning of alien concepts. While the authors of those deeds may have intended particular words and phrases to mean one thing, Māori would have adopted interpretations consistent with the worldview they held at the time – one bound by values such as manaakitanga and utu in which land arrangements were seen as part of a broader, mutually beneficial social relationship; and where terms that referred to gifting or

467. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 187–190; submissions in reply for Wai 354 and others (#3.3.475), p 35.
468. Deed in Crown memorandum (#3.2.2677(b)), no 1.
469. Deed in Crown memorandum (#3.2.2677(b)), no 1 and no 7.

exchange were seen through that lens, not through one of finite commercial transaction. We reiterate the Tribunal's earlier admonition in the *Muriwhenua Land Report*: 'The Europeans' attribution of new meanings to Maori words and practices does not mean that they had acquired the full or any such meaning in Maori minds.'[470] In conclusion, then, we cannot accept the deeds as conclusive evidence of Māori intentions.

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

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

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

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

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

Te Kēmara's descendants strongly rejected the Crown's interpretation. Emma Gibbs-Smith told us that her ancestor had not consented to any sale, and that, on the contrary, there were ongoing tensions between Te Kēmara and Henry Williams over the Paihia land. She and other claimants read Te Kēmara's kōrero as indicating a rejection of the European understanding of sale and an assertion that Māori understanding must prevail. Another descendant, Maryanne Baker, pointed to the

470. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 392.
471. William Colenso, The Authentic and Genuine History of the signing of the Treaty of Waitangi, New Zealand, February 5 and 6, 1840 (1890; repr Christchurch: Capper Press, 1971), p 18.
472. Crown closing submissions (#3.3.412), pp 11, 14–16.

apparent contradiction in Te Kēmara's words: on the one hand, the land was 'all gone'; on the other hand, the land 'is mine'. She interpreted this to mean that the land was shared. Busby occupied it because Te Kēmara, as host and rangatira, had allocated him rights in the land.[473]

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

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

> Where land was a concern, the question that remains is: how might Māori have expected those concerns to be addressed? To the extent that rangatira had concerns about different Māori and European ways of relating to land and understanding land transactions, we think that Māori retained the capacity to enforce their understandings. Right up to the end of the decade, they had the numbers and the on-the-ground military power. The main factor constraining them was their own desire for the economic and other benefits that Europeans brought, and more generally their desire to maintain relationships, bearing in mind that the largest land transactions involved

473. Emma Gibbs-Smith (doc B18(a)), pp 15–17; Enna Gibbs-Smith, transcript 4.1.24, Orāmahoe marae, pp 407–408; Maryanne Baker (doc E44), pp 3, 5, 7–8; Maryanne Baker, transcript 4.1.24, Orāmahoe marae, pp 12, 19, 43–44; see also Merata Kawharu, transcript 4.1.24, Orāmahoe marae, pp 125–126; claimant closing submissions (#3.3.223), p 9.
474. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 130.
475. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 142.
476. Waitangi Tribunal, *The Hauraki Report*, Wai 636, vol 1, p 89.
477. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 280.
478. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 382.

people who had lived among them for years. They were also aware of British military power, but this in itself was not necessarily a constraint on their continued occupation, cultivation or other use of land that had been subject to transactions.[479]

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

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

The Crown emphasised that Māori often appeared before the first Land Claims Commission in support of Pākehā claimants, apparently confirming that valid sales had taken place. In closing submissions, Crown counsel cited the evidence of Te Kēmara regarding the arrangements he had made with Williams over Te Hihi in 1836. During the Tiriti discussions, as outlined earlier, the chief had lamented the loss of his land. Now, although he had 'every incentive and opportunity to repudiate the transaction', he supported it instead.[481] He confirmed that it was his signature on the deed, and that he and the other rangatira had 'sold the land' to Williams and received payment. He also confirmed that the boundaries were correct and that the signatories 'understood that [they] parted with the Land for ever'. The deed had been read out before signing, and Te Kēmara was recorded as testifying, 'I fully understood it and was satisfied.'[482] In the Crown's view, Te Kēmara's evidence before the commission (along with the wording of the deed, which stated 'ka tukua e matou, ka hokona ki a te Wiremu, ki ona Tamariki, ki ona Putanga, ake, ake, ake, kia nohoia, kia mahia, kia hokona, kia ahatia, kia ahatia') amounts to 'a clear example of a pre-1840 transaction that was intended by the Māori party to be a full and final sale of land'.[483] If customary usages still prevailed and Te Kēmara and other Māori did not intend for these arrangements to be permanent alienations of the land and resources concerned, why did they apparently tell the commission that they understood and were satisfied that they were parting with that land forever?

There is much we do not know about who witnesses represented, what they were asked, what they said, and how this was interpreted and recorded. In our view, it all must have seemed very odd and unfamiliar to the Māori participants. There

479. Waitangi Tribunal, *He Whakaputanga me te Tirit*, Wai 1040, pp 281–282.
480. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 523.
481. Crown closing submissions (#3.3.412), p 16.
482. Te Kemara evidence as interpreted by Henry Tacy Kemp (cited in Crown closing submissions (#3.3.412), pp 16–17).
483. Crown closing submissions (#3.3.412), p 17; for Crown analysis of the deed, see pp 14–15.The English version of the deed stated, 'we give over and sell to Mr Williams, to his children, and his seed for ever, the land called the Hihi, for them to reside on, to work on, to sell, or do what they like with it'; see deed no 83 in Crown memorandum (#3.2.2677(b)).

was a formal air to the proceedings. But those in charge were not known to them and could not speak te reo (other than the Chief Protector, who was usually in attendance), yet it was these young Pākehā who were asking Māori participants (in effect) whether they stood by their words as written down in the deeds that were now produced. Also, as we discuss in section 6.4, the Land Claims Commission was not at all concerned with Māori customary understandings when considering the validity of transactions. Such information was elicited only incidentally.

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

Following the work of Wyatt in Muriwhenua, researchers in our inquiry also emphasised the formulaic nature of the commission's record of the evidence, and instances when important kōrero failed to find its way into the commission's minutes. The rhetoric of noted orators such as Te Kēmara and Tāreha was rendered into precise and colourless statements that they had signed the deed, which had been read out, explained, and understood; that the boundaries had been correctly described; that the payment had been received; that they had the right to dispose of the land; that they accepted the land had been 'sold'; that they had sold it to no one else; and their rights to sell had not been challenged by either Māori or Pākehā.[485] Statements to this effect were repeated, with minor variations, by witness after witness. Regarding John Montefiore's claim at Manawaora, for example, Te Wharerahi testified that he had signed the deed, which had been explained 'to them', then he had received the money and divided it among the rangatira 'entitled to a share'. By these actions, he said, 'he thought it was to make a sale of or letting go the land'.[486] On the basis of this and similar evidence, we agree with Phillipson's assessment that 'the person recording the evidence [was] rationalising and reconceptualising it into brief formulaic statements that expressed, in English, the essence of what Pakeha believed Maori were saying.'[487]

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

484. Merata Kawharu (doc W10), p 20.
485. See Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 156–157.
486. Evidence of Ware RarI [*sic*], 25 January 1841 (Berghan, supporting papers (doc A39(m)), vol 1, pp 37–40).
487. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 157.
488. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 157.

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

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

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

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

489. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 157.

490. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 179; Clarke to Hobson, 18 June 1842, BPP, vol 2, p 191 (Armstrong, 'The Land Claims Commission' (Wai 45 R01, doc 14), pp 136–137; letter to editor, *Auckland Chronicle and New Zealand Colonist*, 10 June 1843 (Armstrong, 'The Land Claims Commission' (Wai 45 R01, doc 14), p 136); Godfrey and Richmond to Colonial Secretary, 4 May 1843, BPP, vol 2, p 334 (Armstrong, 'The Land Claims Commission' (Wai 45 R01, doc 14), p 174).

491. Merata Kawharu (doc W10), p 20.

492. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 99, 129, 146–147.

493. Crown statement of position and concessions (#1.3.2), p 64.

demonstrated that he understood his land to be gone; and his subsequent evidence in support of Williams before the Land Claims Commission.[494]

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

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

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

494. Crown closing submissions (#3.3.412), pp 14–17.

495. Williams to Heathcote, 18 June 1850 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 166–167).

6.3.3 Was there a middle ground?

As outlined in section 6.3.2.2, several historians giving expert evidence in our inquiry argued that Pākehā and Māori were meeting in a 'middle ground' in a frontier society where both parties were modifying their behaviour to obtain what they wanted from each other. Colonisers had the goods, the new skills, and could provide access to trade and commercial opportunities; the indigenous people had the land – and the women so desired by settlers other than the missionaries. In addition, Māori were also able to provide hospitality, protection, local knowledge, and labour – all essential to the success of early settler endeavours, although the latter was generally negotiated separately. The crux was the desire of both sides for a successful trading relationship. To bring this about, it was necessary for them to find means of communicating to negotiate terms of trade and avoid disputes. Those expectations, and the relationships that were thus forged, had to be mutually understood and mutually acceptable. Although it was possible to trade without cultural change, matters would proceed more smoothly if both sides acquired some knowledge of the language and customs of the other and modified their own expectations and behaviours accordingly.

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

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

496. See Grant Phillipson, transcript 4.1.26, Turner Event Centre, pp 163–165; see also Vincent O'Malley and John Hutton, 'The Nature and Extent of Contact and Adaptation in Northland, c.1769–1840' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2013) (doc E35), pp 19–20; Grant Phillipson, 'Bay of Islands Maori and the Crown'(doc A1) pp 1, 70–76.

497. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 366 (Crown closing submissions (#3.3.412), p 10). Phillipson was explaining here how Richard White had described the 'middle ground'.

That conclusion was rejected by claimants, some of whom were wary of the idea of a 'middle ground' gaining too much traction. They saw potential for it to be misinterpreted to mean that their tūpuna had surrendered all authority over particular pieces of land and over land in general. For example, Annette Sykes, counsel for many of the claimants, suggested that in pre-treaty New Zealand, 'there was no middle ground there was only Māori ground'; that is, by 1840, Māori had not yet surrendered substantive on-the-ground authority, and there was therefore no balance of power which they needed to negotiate with settlers.[498] Phillipson, although a proponent of the concept to explain apparent contradictions in Māori (and Pākekā) behaviour, agreed that Māori remained the dominant power and adapted only because they wanted settlers among them. When Pākehā attempted to control Māori, who continued to occupy land they had supposedly sold, they failed. As Phillipson put it, when Māori exercised control over lands that settlers believed they had bought, the settlers 'had to put up with it'.[499]

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

The place of Māori women in the supposed middle ground is worthy of special comment too. As we noted earlier, land was often allocated to Pākehā men who married into the hapū yet whose legal rights were created separately by means of deeds, written by men, and addressed to 'tangata' in te reo, but to 'men' in the English texts. Māori women who were married to these early Pākehā arrivals brought with them rights to access land and trade, and protection in both the physical and spiritual realms. We might observe that while the missionaries recorded their own frequent transgressions against wāhi tapu, the knowledge of local atua and wāhi tapu that Māori wives brought to their Pākehā husbands is unrecorded, as is the assistance they undoubtedly offered in avoiding serious violations of tapu. A number of these early marriages resulted in enduring whānau

498. Grant Phillipson, transcript 4.1.26, Turner Event Centre, pp 241–242.

499. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 131. Phillipson discussed these issues in transcript 4.1.26, Turner Event Centre, pp 216–222, 240–241.

500. Submissions in reply for Wai 2389 and others (#3.3.443), p 11.

lines in the region; indeed, we heard kōrero from some of their descendants. Yet, as we see it, while negotiating the middle ground (if such existed) for Pākehā men, these wāhine were being rapidly excluded from it by cultural assumptions being developed about the place of women in the new society. This in turn raises doubts about how far settlers were in fact modifying their expectations and behaviours, as the middle ground required.

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

The Crown argued that the appropriate focus of this inquiry is 'the extent to which the Crown, when determining the outcome of these early transactions, conducted a process that was Treaty compliant and which had outcomes that did not prejudice Māori.'[501] We agree that this is so. We also agree that the evidence is such to make conclusions difficult as to the 'precise' understandings that informed every transaction – indeed, in our view, impossible.[502] Yet this is not a question we can avoid. It is at the core of the claimants' grievances that the underlying principles of the arrangements their tūpuna had made to express their acceptance of Europeans into the community remained customary in nature, but that these understandings were transformed by the Crown processes on which Māori had relied into something quite different – to their lasting prejudice. It is also, we think, implicit in the Crown's argument that *many* transactions within the 'middle ground' were commercial in character and permanent alienation was intended; this was indicated by the Crown's emphasis on the language of numerous deeds and the failure of Māori to repudiate their transactions when they were given the opportunity to do so.

In our view, that argument cannot be sustained even if a 'middle ground' existed. Although there might have been a growing awareness among Māori of what Pākehā meant by 'sale' by 1840, they did not accept that the European view

501. Crown statement of position and concessions (#1.3.2), p 64.
502. Crown statement of position and concessions (#1.3.2), p 62.

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

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

6.4.1 Introduction

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

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

503. Bruce Stirling and Richard Towers, 'Not with the Sword but with the Pen' (doc A9), p 430. The Crown cites these figures for 'Northland' at #3.3.412, p 3. The claimant's state that 'over 500' old land claims were investigated: claimant closing submissions (#3.3.223), p 16,.

504. Claimant closing submissions (#3.3.223), pp 11–14; Closing submissions for Wai 1477 (#3.3.338), pp 73–74.

505. Claimant closing submissions (#3.3.223), pp 11–14.

506. Closing submissions for Wai 354 and others (#3.3.399), p 103.

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

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

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

507. Claimant closing submissions (#3.3.223), pp 15–16, 18; see also pp 20–21.
508. Claimant closing submissions (#3.3.223), p 23.
509. Closing submissions for Wai 1477 (#3.3.338), pp 73–74.
510. Closing submissions for Wai 1477 (#3.3.338), pp 75–76.
511. Claimant closing submissions (#3.3.223), pp 15, 20–21.
512. Claimant closing submissions (#3.3.223), pp 21–24.
513. Claimant closing submissions (#3.3.223), p 23.
514. Crown closing submissions (#3.3.412), pp 3 n, 3–4.
515. Crown closing submissions (#3.3.412), pp 2–3.

Crown, in other words, had the right to pass laws that would supplant tikanga and establish a Pākehā commission to decide these matters.

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

On other issues, the Crown disputed the allegations. It did not accept the claimants' criticisms of the roles played by George Clarke and other protectors, submitting that they had properly investigated and advised the commission about pre-treaty transactions, and that there was no demonstrable conflict between their personal land interests and professional duties.[523] Nor did the Crown accept that the commission had only rarely disallowed settlers' claims; in its view, the number of withdrawn claims demonstrated that 'the Land Commission system protected Māori interests both through its formal hearing process and through the fact of its existence, which deterred claimants from pursuing unjust claims'. When Māori signatories opposed a claim, the Crown said this was taken seriously and the claim would be disallowed, or Māori interests otherwise protected by excising portions of the land that was being awarded.[524]

We have already found, in chapter 4, that the Crown breached the treaty and its principles when it asserted sovereignty over New Zealand and introduced the doctrine of radical title. In neither case did it fully inform Te Raki Māori of its intentions or obtain their consent. It therefore follows that not only were pre-treaty

516. Crown statement of position and concessions (#1.3.2), p 52.
517. Crown closing submissions (#3.3.412), pp 24–36.
518. Crown statement of position and concessions (#1.3.2), p 66.
519. Crown closing submissions (#3.3.412), pp 36–38.
520. Crown statement of position and concessions (#1.3.2), p 56.
521. Crown statement of position and concessions (#1.3.2), p 56.
522. Crown statement of position and concessions (#1.3.2), p 56.
523. Crown closing submissions (#3.3.412), pp 29–36.
524. Crown closing submissions (#3.3.412), p 8.

transactions governed by tikanga Māori, but so was any post-treaty investigation into their nature and legitimacy.

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

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

6.4.2 The Tribunal's analysis

6.4.2.1 *Did Crown instruction and early land claims legislation respect Māori tino rangatiratanga?*

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

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

- there would be 'strict inquiry . . . into the mode . . . the extent and situation' of the lands being claimed and also into 'all the circumstances upon which such claims may be founded';
- in conducting that inquiry, the commissioners were to be 'guided by the real justice and good conscience of the case without regard to legal forms and solemnities, and shall direct themselves to the best evidence they can procure or that is laid before them';

525. Armstrong, 'The Land Claims Commission' (Wai 45, doc 14), p 5; Gipps, proclamation, 14 January 1840, BPP, vol 3, pp 38–39.

- the commission was also to ascertain the price paid, the time and manner of payment, and the circumstances under which such payment was made. No regard was to be given to any on-sale price; and
- evidence from Māori was to be considered 'subject to such credit as it may be entitled to from corroborating or other circumstances'.

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

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

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

526. For further details of the ordinance, see Alan Ward, *National Overview*, vol 2, p 34; Alan Ward (doc A19), p 91; Armstrong, 'The Land Claims Commission' (Wai 45, doc I4), pp 7–11; Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 17. Armstrong used the title New South Wales Act. As Ward explained, that was in fact the title of an imperial Act passed in 1841 to repeal the original ordinance and transfer jurisdiction to New Zealand.

527. Richard Boast, 'Surplus Lands: Policy-making and Practice in the Nineteenth Century' (commissioned research report, Wellington: Waitangi Tribunal, 1992) (Wai 45, doc F16), p 76; see New Zealand Land Claims Ordinance 1841 (David Armstrong, supporting papers (Wai 45, doc I4(a)), p 376).

528. 'Report from the Select Committee on New Zealand', 1844, BPP, vol 2, p 3; Boast, 'Surplus Lands' (Wai 45, doc F16), pp 71–72.

529. New Zealand Land Claims Ordinance 1841, s 2; Boast, 'Surplus Lands' (Wai 45, doc F16), p 87.

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

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

The implications for the wider question of the nature of Māori land transactions with settlers seems to have escaped the Governor and his officials. While Gipps was denying that Māori possessed any title capable of alienation, the Crown was establishing a process by which pre-treaty alienations could be confirmed. Nonetheless, Gipps correctly anticipated that once it was 'rightly understood that leases from the natives will not be admitted as valid by the Crown after the lands may have been purchased, the practice of taking land on lease will, I apprehend, speedily fall into disuse'.[534] Lord Russell, on succeeding Normanby as Secretary of State for War and the Colonies, ordered Hobson to immediately introduce legislation declaring invalid any direct leasing of land from Māori that had occurred since the January 1840 proclamation.[535]

Commissioners were also directed to ascertain the validity of transfers of land from original purchasers to derivative claimants who had acquired land from the original Pākehā 'purchaser'. Otherwise, the 1841 ordinance closely followed its 1840 predecessor, repeating its key terms which required the commissioners to inquire into the circumstances of the transaction, guided by the real justice and good conscience of the case. If, having considered the best available evidence,

530. Gipps to Hobson, 30 November 1840 (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc 14), p 20).

531. Hobson to Gipps, 17 February 1841, BPP, vol 3, p 439 (Armstrong, 'The Land Claims Commission' (Wai 45, doc 14), pp 19, 20).

532. New Zealand Land Claims Ordinance, 9 June 1841, BPP, vol 3, p 471.

533. Gipps to Hobson, 6 March 1841, BPP, vol 3, p 439 (Armstrong, 'The Land Claims Commission' (Wai 45, doc 14), p 19).

534. Gipps to Hobson, 6 March 1841, BPP, vol 3, p 439 (Armstrong, 'The Land Claims Commission' (Wai 45, doc 14), p 19).

535. Russell to Hobson, 3 August 1841, BPP, vol 3, p 440.

they determined that the land had been 'obtained on equitable terms' that were not contrary to the interests of other subjects, they could recommend that a grant be made. The directions regarding price and acreage were retained, and a schedule fixed that defined the number of acres which 'such payment would have been equivalent to', ranging from sixpence per acre for the earliest purchases to four to eight shillings per acre for those undertaken in 1839. The upper limit of 2,560 acres (unless authorised by the Governor on the advice of the Executive Council) also remained.[536]

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

On 2 October 1840, Gipps issued more detailed instructions to the commissioners, appointed the month before, expanding on their duties. These included a direction that notice was to be published in the newspapers at least 14 days prior to investigation, giving the name of the alleged vendors, the boundaries, the estimated extent of the land, the names of any opponents, and the place and time of the hearing. A Protector of Aborigines or some person appointed in his place was to attend all investigations to 'protect the rights and interests of the natives'. Attendance of a 'competent interpreter' was also required. Proceedings were to be conducted as far as practicable with 'open doors'. The commissioners were

536. Ward, *National Overview*, vol 2, p 34; Armstrong, 'The Land Claims Commission' (Wai 45, doc I4), p 9; Moore, Rigby, and Russell, *Old Land Claims* (doc H1), pp 15–17, 20.

537. Donald Loveridge, '"An Object of the First Importance": Land Rights, Land Claims and Colonization in New Zealand, 1839–1852' (commissioned research report, Wellington: Crown Law Office, 2004) (Wai 863, doc A81), p 84.

538. Governor's speech, 'Opening of the Legislative Council', 14 December 1841, BPP, vol 3, p 548; see also 'Opening of the Second Session of the Legislative Council', *New Zealand Herald and Auckland Gazette*, 15 December 1841, p 2 (cited in Loveridge, An Object of the First Importance' (Wai 863, doc A81), p 84).

539. Loveridge, 'An Object of the First Importance' (Wai 863, doc A81), pp 87–88.

540. See Armstrong, 'The Land Claims Commission' (Wai 45, doc I4), pp 93–106.

'absolutely' bound by the terms of the ordinance when it came to examining witnesses and other steps of their procedure but allowed some discretion in applying the scale. Each report was to include a description of the 'mode of conveyance used in the purchase . . . whether a formal deed or otherwise, the parties to it, and the proof'; and a description of the land 'alienated by such conveyance, but not awarded to the claimant' (in other words, the 'surplus', which we discuss in section 6.7). The information needed to be sufficiently detailed to identify the area and prevent 'subsequent intrusion or encroachment'.[541] There was no instruction to the commissioners about reserving kāinga and other places of occupation out of the settler grants, though it seems that Gipps anticipated that any necessary reserves could be set aside out of the 'considerable tracts of land' that would be placed at the Government's disposal as a result of the commission's work. That responsibility devolved on the willingness of the 'purchaser' to acknowledge reserves in their deeds.

The commissioners themselves subsequently asked for clarification of several points. The most important (for our purposes) concerned whether the land could be claimed without presentation of the original deed, which elicited the response that formal deeds were not the only proof of sale. According to Gipps, this had been implicit in his earlier instructions, but he now added that 'proof of conveyance according to the customs of the country and in the manner deemed valid by the inhabitants is all that is required'.[542] Therefore, a written deed was not needed so long as Māori confirmed that they had assented to the transaction. To be clear, Gipps's answer was directed at the question of whether a written deed was required, rather than the broader question of whether the transaction should be understood on Māori terms. His language made this explicit: '[i]n every case in which the chiefs *admit the sale* of land to individuals, the title of such chiefs to such lands [is] of course to be considered as extinct' (emphasis added). If rangatira admitted the 'sale', its validity was not affected by questions of price, although more compensation might be awarded by the Governor in consultation with the protector. Gipps further instructed that Māori (and those appearing on their behalf) were not subject to fees charged by the commission.[543]

The Australian origins of the New Zealand ordinances clearly throw doubt on the Crown's contention that the Land Claims Commission was set up to fulfil promises made to Māori at Waitangi. The 1840 ordinance was based on earlier New South Wales legislation that had nothing to do with the indigenous inhabitants, and was rather designed to sort out transactions between squatters who

541. Gipps instructions to commissioners, 2 October 1840, BPP, vol 3, p 429; see also (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc 14), p 14.

542. Commissioners to Gipps, 18 September 1840 (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc 14), p 17).

543. Gipps to Hobson, 30 November 1840 (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc 14), pp 20–21).

assumed that no native title existed under the doctrine of *terra nullius*.[544] As the Tribunal observed in the *Muriwhenua Land Report*:

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

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

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

544. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 393; closing submissions for Wai 354 and others (#3.3.399), pp 103–104.
545. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 76; (cited in closing submissions for Wai 354 and others (#3.3.399), pp 103–104).
546. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, pp 393–394.
547. Waitangi Tribunal, *The Hauraki Report*, Wai 636, vol 1, pp 95–96.
548. Waitangi Tribunal, *The Hauraki Report*, Wai 636, vol 1, p 96.
549. Waitangi Tribunal, *The Hauraki Report*, Wai 636, vol 1, p 97.

silence reflected the predisposition of the commissioners and officials, or of Māori themselves.

Our own view is that neither the ordinance nor the instructions required or anticipated any genuine inquiry into Māori understanding of the transactions, with all that entailed. They did not require any consideration of Māori customary law, or of what Māori intended when they entered these transactions, or of whether there had been any meeting of minds. As discussed in section 6.3, Clarke and other officials were aware that Māori and settlers had different views of what the transactions meant, yet the Crown essentially dismissed the Māori view. Instead, the language of the ordinance and accompanying instructions revealed that the transactions were to be understood through the lens of English law – as sales, leases, or some other form of conveyance – and the inquiry was to determine whether Māori had or had not assented. Nor was the standard for measuring assent particularly high. There was no requirement to ensure that the hapū had been consulted and understood the meaning of the transaction. If a deed existed, or two rangatira confirmed that a transaction had taken place and money had changed hands, that was to be considered a sufficient basis on which to extinguish all Māori rights.

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

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

6.4.2.2 *How did the commission operate?*

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

550. See Armstrong, 'The Land Claims Commission' (Wai 45, doc 14), p 35.

551. Armstrong, 'The Land Claims Commission' (Wai 45, doc 14), pp 11–12; see also Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 252.

552. An additional commissioner, Robert FitzGerald, was later appointed by Governor FitzRoy, in 1844, to revisit the decisions of Godfrey and Richmond. See Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 33.

extinguished; and on the accuracy of the translations provided by interpreters drawn from the missionary families.

According to Godfrey, it was the commission's intention to obtain 'from the best sources as full information and evidence as can be procured of the nature of the Aboriginal titles and the rights of the chiefs and others to the particular lands they may have sold or to which they claim an exclusive proprietorship against others of the same tribe'.[553] As we discussed earlier, a list of claims and notice of the commission's proceedings was sent to George Clarke so he could carry out his duties as Chief Protector as 'defender of the rights and interests of the natives' at the upcoming hearing. Godfrey informed Hobson that 'he took it for granted' that

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

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

Prior to a claim being heard, a sub-protector should also carry out an on-site inspection so that an 'intelligible description of the whole character of the purchase be given at the court when investigated'.[556] In Clarke's opinion, this was necessary because 'the greater part of these land transactions were conducted by parties very partially understanding each other', and 'in many cases but little pains [were] taken to ascertain to whom the land they claimed belonged'.[557] Clarke also advocated that hearings take place close to the areas claimed for ease of access of affected parties. Delayed, Clarke was unable to attend the first hearing himself,

553. Clarke to Colonial Secretary, 9 December 1840 (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc 14), p 40).

554. Godfrey to Hobson, 19 January 1841 (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc 14), p 43).

555. Clarke to Colonial Secretary, 9 February 1841 (cited in Armstrong, '"The Land Claims Commission' (Wai 45, doc 14), pp 46–47).

556. Clarke to Colonial Secretary, 25 February 1841 (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc 14), pp 48–49).

557. Clarke to Colonial Secretary, 25 February 1841 (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc 14), pp 48–49).

The Following

Notices of Hearing

Claims to Grants of Land,
in the
Bay of Islands District
. . . . .
New Zealand Land Commission,
. . . . .

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

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

The cases will be heard consecutively.

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

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

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

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

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

New Zealand Herald and *Auckland Gazette*, 28 August 1841

but he or a sub-protector attended all subsequent hearings. The commission also heeded his advice as to the need to hold hearings in the district in which claims were located, at least in the case of the Bay of Islands and Hokianga, although the Whāngārei claims were heard in the Bay of Islands or Auckland. We have already commented on the views of Clarke and the role of the missionaries in official proceedings, and this is an issue to which we return later, given the key part they played. A circular was duly prepared for distribution among Māori communities,

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

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

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

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

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

558. Encl in Clarke to Col. Sec., 16 July 1841 in H. H. Turton, *Epitome of Official Documents Relative To Native Affairs and Land Purchases in the North Island of New Zealand* (Wellington: Government Printer, 1877), B, p 3 (cited in Wyatt, 'Old Land Claims' (doc E15), pp 211–212).

559. 'Notices of Hearing Claims to Grants of Land in the Bay of Islands District', *New Zealand Herald and Auckland Gazette*, 28 August 1841, p 2 (supplement).

560. Bruce Stirling, Turner Centre, Kerikeri, transcript 4.1.9, p 137.

561. Armstrong, 'The Land Claims Commission' (Wai 45, doc I4), pp 20–21.

562. The schedule setting out the fees to be paid to the commission implied that two witnesses would be required. In February 1842, Richmond informed Busby that at least two of the vendors were required to appear in support of his claim. In practice, the word of two vendors was considered sufficient to confirm a sale. See Armstrong, 'The Land Claims Commission' (Wai 45, doc I4), p 127; Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, pp 122, 126, 169; Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 1, p 96.

563. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 354–363.

564. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 363.

. . . where claims were approved in the absence of Māori evidence in support . . . and only one where a claim was allowed in part in those circumstances'.[565]

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

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

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

We know of two instances in which the first commission disallowed a claim when no Māori witness appeared, but where the decision was later reversed. One concerned another derivative claim in Kororāreka (OLC 567), regarding three-quarters of an acre on the beach front. In that case, Godfrey disallowed the claim because Brodie was unable to produce any Māori witnesses, and the 'sellers [were] known to dispute the whole of the frontage to the beach of this claim'. Indeed,

565. Crown closing submissions (#3.3.412), p 41. The Crown analyses these cases on pp 42–49.
566. A derivative claim refers to one that is derived from another, usually where the connection to the original transaction has become blurred, for example, by further transactions.
567. Commissioner's award, OLC 615, 23 March 1843 (cited in Berghan, 'Northland block research Narratives' (doc A39(a), p 405).
568. Berghan, 'Northland block research Narratives' (doc A39(a)), pp 261–262.
569. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 358.
570. Berghan, 'Northland block research Narratives' (doc A39(a)), p 247; Rigby, 'Old land claims, surplus land and scrip' (doc A48), appendix A.
571. Crown closing submissions (#3.3.412), p 41. The Crown analyses these cases on pp 42–49.
572. See Didier Huma Joubert OLC 789 (cited in Berghan, 'Northland block research Narratives' (doc A39(a)), p 488).

the land was part of a fenced compound occupied by Rewa and Moka,[573] and the specific area Brodie was claiming had initially been granted to a settler who had married into Moka's whānau.[574] Nonetheless, Brodie continued to press his claim. In 1846, he appealed to Governor Grey, producing evidence that he had made an additional £20 payment to Tāmati Waka Nene, which had then been shared with the Kororāreka chiefs;[575] on that basis, Grey awarded him an area of seven perches on the water frontage.[576] A decade later, seeking to increase his award, Brodie placed his claim before the second commission (discussed in section 6.7), to whom he explained that Grey's grant had covered the initially disputed area while excluding an undisputed site that he lived on without any opposition from Māori. Commissioner Bell duly increased his award,[577] which according to Berghan, totalled two roods six perches.[578]

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

In other cases, the absence of Māori support did count against settlers, although the commission might be still disposed to offer them concessions – for example, Gundry's claim to 500 acres at Mangamuka (OLC 209). FitzGerald, who heard this case, was satisfied as to the validity of the original purchase, but decided he could award no part of the land in the absence of Māori testimony and awarded

573. Godfrey [judgement] on Claim 260 Walter Brodie, 29 April 1843 (Berghan, supporting papers (doc A39(m)), vol 12, p 7002).

574. Evidence of E Moka, 6 May 1847, and Wariaria and Harris, 14 July 1847 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7051–7056).

575. Statement by Waka Nene, 16 September 1846 (Berghan, supporting papers (doc A39(m)), vol 12, p 7081).

576. Sketch map, 14 July 1847 and Bell report, 21 June 1862 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7057–7058, 7026); Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 356.

577. Grey to Lt Gov Wynyard, 9 February 1852 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7073–7079); Evidence of Brodie, 12 October 1847 (Berghan, supporting papers (doc A39(m)), vol 12, p 7096); Bell report, 21 June 1862 and evidence of Brodie, 12 October 1857 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7026, 7095–7098).

578. Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 372.

579. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 372, 1229; Berghan, 'Northland block research Narratives' (doc A39(a)), pp 196–197; Berghan, supporting papers (doc A39(m)), vol 6, pp 3371–3373.

Gundry £500 in scrip instead. Again, the fate of the land is unclear.[580] In another example, Thomas Potter's claim for 80 acres on the Mangonui River (OLC 380) was disallowed when he failed to appear or produce witnesses. He later appealed, and Governor FitzRoy said he would allow the grant if Potter could show that he had the support of the Protector. Potter failed in this, and the claim lapsed.[581]

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

- As noted earlier, Marmon's claim for Kapakapa, 300 acres at Hokianga (OLC 317) failed when Raumati (his father-in-law) stated that he had not intended to sell the land;[583]
- Brind's claim to Urupukapuka Island of 150 acres (OLC 555). It was based on a transaction that Rewa had rescinded, returning the horse he had received when his demand for a further payment was refused. Rewa told the commissioners that he did not consider the land to be sold. Notably, the integrity of Rewa's evidence was preferred over that of Clendon and Brind;[584]
- Walmsley's claim to 'Taumatakai' in the Bay of Islands (OLC 960) failed when Hikitene said that Tukarangatira, whom he had succeeded, did not have the right to sell the area concerned. In this case, the commission accepted Hikitene's evidence over that of the missionary Charles Baker, who had made and witnessed the original arrangements;[585]
- Brodie's claim to 'Otawaki' in the Bay of Islands (OLC 568) was disallowed on the strength of Korokoro's evidence that he had not intended to sell the island which his hapū continued to occupy, and that he had returned the goods he had received. The transaction had foundered after a breakdown in the relationship between Korokoro and Brodie's agent (Bateman);[586]
- Brodie's claim to 1,000 acres at Matauri Bay and another 2,000 acres covering the entirety of the Cavalli Islands (OLC 571) was disallowed on the evidence of two rangatira who said they had returned the payment after learning the scale of the land Brodie was claiming, their understanding being that the transaction involved only one portion (named as 'Ocoddee'). Brodie also revealed that, after this dispute emerged, he had withheld the payment that (in his view) was supposed to complete the transaction;[587]
- One of de Thierry's Hokianga claims (OLC 1045), for 3,000 acres on the upper Waimā River, was disallowed on the objection of Mohi Tāwhai that

580. We note that the Crown included the 500 acres in its surplus total, but this was unable to be confirmed by Rigby, 'Old land claims, surplus land and scrip' (doc A48), appendix A; see also Berghan, 'Northland block research Narratives' (doc A39(a)), p144; Crown closing submissions (#3.3.412), pp 43–44.

581. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p362.

582. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp363, 380, 430.

583. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p372.

584. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p364.

585. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p365.

586. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp366–367. This was presumably the island now known as Waewaetorea, which has a coast known as Ōtāwake.

587. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp370–371.

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

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

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

1. Commissioner's report, 23 March 1843 (Berghan, 'Northland block research Narratives' (doc A39(a)), p 373).
2. Brodie to Shortland, 28 September 1842, BPP, vol 2, p 47 (Armstrong, 'The Land Claims Commission' (Wai 45 R01, doc I4), p 124); see also Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 368.

Tiro, who had led the transaction, had received only 'trifling articles . . . as earnest' for a 'small portion of land' in the valley. Tiro himself acknowledged that Tāwhai and others had 'opposed [his] right to dispose of this land';[588] and

- According to Stirling and Towers, it is possible that Reid's Mangonui River claim (OLC 395) was disallowed because of Māori opposition, but the commission recorded 'defective evidence', without giving further detail.[589]

Stirling and Towers also identified several claims known to be opposed by Māori but that were disallowed for a different reason – usually the non-appearance of the settler concerned.[590] Whether the failure to pursue claims related to the existence of that opposition, as the Crown suggested in its submissions, is unknown. The record is almost entirely silent on the matter and while a 'chilling effect' is certainly possible, this remains a matter of conjecture only. There were, however, no

588. Evidence of Mohi Tawhai, 18 March 1844 (Berghan, supporting papers (doc A39(m)), vol 23, p 13476).
589. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 364.
590. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 375–377.

instances when the commission recommended the award of land when a signatory to a pre-1840 deed denied the transaction. We therefore accept the Crown's point that, 'where Maori [signatories] did voice their opposition, this mattered.'[591]

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

In general, Stirling and Towers were critical of the degree of investigation undertaken by the commission when presented with conflicting Māori evidence on rights. For example, when Kokia opposed Greenway's claim to 200 acres on the Waikare River (OLC 202), the commission's award excluded 'any portion' belonging to him, while commenting that his interests were 'supposed to be very trifling'. Nothing in the record indicates how the commission reached that conclusion; it is not in the notes of evidence, nor was Kokia questioned on the matter. It seems most likely to have been the assessment of the protector, but, as noted by Stirling and Towers, if the record is to be believed, Kokia was not given an opportunity to refute that view.[593] The survey did not occur until the late 1850s, taking in 117 acres. By that time, the land had been on-sold (to Waetford), and there is no indication of any opposition. It is apparent that Waetford had, as he informed Commissioner Bell, 'submitted to a large curtailment of the original purchase in order to prevent dispute with the Natives in their present excited state respecting their lands as well as in future'.[594] As we discuss further 6.7, this was a rare instance in which the exclusions set out in the first commission's awards were respected and worked in Māori favour. Of course, Kokia's land was still not reserved, but it remained in Māori hands.

Stirling and Towers drew attention to a 'similar lack of inquiry' in other cases, including Palmer's derivative claim to 20 acres of land at Waimate. Ngere, who was the father of the two signatories, reportedly opposed the claim, but his objection was discounted on the strength of their evidence that he had no rights there. No evidence was called other than that of the two signatories brought by the claimant as witnesses, and Ngere himself was not questioned. The claim was deemed valid, although ultimately it was never surveyed, and the land reverted to (or, rather, remained with) Māori.[595] In the case of Nicholas and Chadwick's claim for 700 acres on the Waimā River, no further inquiry was made into assurances by the claimants' witnesses that those within the tribe who opposed the transaction had

591. Crown closing submissions (#3.3.412), p 40.
592. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 380–381.
593. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 381.
594. Waetford to Bell, 21 May 1860, OLC 202 (Berghan, supporting papers (doc A39(m)), vol 5, p 2370).
595. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 381–382.

'no right whatever to make any opposition'. Again, the deed was validated.[596] There was a similar lack of investigation into the claims of Tio, whose opposition to a transaction with Marriner, at Te Kauere in Hokianga (on-sold to Cooper), came to light as Marriner's witnesses gave evidence. Again, Tio himself was not called upon, and the land was duly awarded to the claimant.[597]

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

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

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

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

Brodie complained before the 1844 House of Commons select committee on New Zealand that while Māori 'vendors' would admit to bona fide transactions, 'nearly all the parties who took their claims up before the commissioners had to

596. Evidence of Waiotara, 28 February 1843, OLC 87 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 382–383.
597. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 383–384.
598. Crown closing submissions (#3.3.412), p 49.
599. Crown closing submissions (#3.3.412), pp 49–50.
600. Claimant submissions in reply (#3.3.430), pp 21–23.
601. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 394.

pay the natives a certain amount to make them actually tell the truth.'[602] Brodie blamed the commissioners for this state of affairs, since it had become known that 'if a native disputed any land, and the case came before their Court, the chances were that the Commissioners would give it against the Europeans'. This had given Māori the upper hand and, Brodie said, 'there was hardly a case brought forward but something extra was given to the natives'.[603] If settlers 'had . . . not paid the natives something extra, their claims would have been disputed and like my own, never reported upon.'[604]

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

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

602. Brodie's evidence to the Select Committee on New Zealand, 4 June 1844 (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc 14), p 125).
603. Brodie's evidence to the Select Committee on New Zealand, 4 June 1844 (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc 14), p 125).
604. Brodie, 'The Adventures of a Roving Englishman', 1845, p 66 (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc 14), p 126).
605. S M Martin, *New Zealand in a Series of Letters* (London: Simmonds and Ward, 1845), p 111 (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc 14), p 132.

[A] Yes; and this has been the cause of so much perjury in the natives.[606]

When questioned about the commission's treatment of the evidence, McDonnell expressed indignation. He had heard of instances where a commissioner had 'actually stated, that he would sooner take a native's word than a European's'.[607] McDonnell petitioned the government in 1856, again alleging that Māori had never questioned his right to the land he claimed to have purchased 'until they were informed that the Commissioners had instructions from the Queen to reinstate them in the land formerly sold . . . when urged on by certain European settlers living amongst them'.[608]

Certainly, Clarke thought that the commission was determined to see justice done to Māori,[609] but the Chief Protector also feared that the ratification process had not been good for the 'character of the natives'. In his June 1842 report, he lamented that 'bribes' had been employed 'for the accomplishment of the designs of Europeans'. This had resulted in an 'unfavourable view' being held of Māori even though the blame mostly lay with unscrupulous Europeans.[610] In his next report, Clarke repeated his observation that Māori conduct in the hearings had caused 'a great alienation of feeling between the parties, and a disposition in some cases has been manifested to get returned to them lands which they formerly sold'.[611] Commissioner Godfrey himself acknowledged that 'pretty generally the natives have required some present to induce them to undergo our examinations'; but in contrast to Clarke, he was convinced of the integrity of their testimony. He reported that in very few instances – where they had been seduced by tempting offers from Europeans to sell the same land to two different parties – they would, perhaps, give their evidence in favour of the greatest bribe, even if offered to them by the later purchaser. But such cases had been most rare and only occurred when the morality of the buyers appeared quite as questionable as that of the sellers. Otherwise, Godfrey considered that Māori witnesses were 'deserving of the most entire credibility'.[612]

As noted earlier, in the great majority of cases, at least *some* Māori evidence (two witnesses) in support of the claim was necessary for the first Land Claims Commission to recommend a grant. If Māori came before the commission and

606. McDonnell's evidence to the Select Committee on New Zealand, [June] 1844 (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc I4), p135).

607. McDonnell's evidence to the Select Committee on New Zealand, [June] 1844 (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc I4), p135).

608. Petition by McDonnell to the House of Representatives, 1856 (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc I4), p135).

609. See Rosemarie V Tonk, 'The first NZ Land Commissions,1840–1845' (MA thesis, Canterbury University, 1986), p84.

610. George Clarke, Half Yearly Report, June 1842 (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc I4), pp135–136).

611. George Clark to Colonial Secretary, 4 January 1843 (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc I4), p173).

612. Godfrey to Colonial Secretary Shortland, 4 May 1843 (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc I4), p174).

said they *did not* sell the land in question, the commission respected that, usually putting aside a section of the claimed land for them. However, Māori witnesses were brought to the hearings by the settlers wanting a grant, and it was rare for a signatory to a land deed to repudiate it. The attendance of those who had been left out of the transaction was dependent on the sub-protectors, or on word of mouth, in a situation where it was usually far from clear which lands were under scrutiny.

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

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

613. Clarke to Godfrey, 20 June 1841 (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc I4), p 51).

614. See Armstrong, 'The Land Claims Commission' (Wai 45, doc I4), p 51; Crown closing submission (#3.3.412), p 29.

615. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 216, 353–354; 432–433.

616. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp, 353–354, 361.

617. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 216.

618. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 367; Grant Phillipson, transcript 4.1.26, Turner Event Centre, Kerikeri, p 164.

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

The most serious shortcoming was the failure to give proper recognition to tikanga, even though there is no question that this had been in effect when transactions had been entered into. Even a casual – though astute – observer such as Dieffenbach appreciated that the unexpressed trusts or shared-use arrangements underlying many of the deeds entered into by Māori should be given legal effect, but the commission had no powers to do this, even if they were so disposed. Yet there was no real investigation into how Māori understood the transactions, or why they continued to occupy and use sites, or why they made other demands of the settlers they had placed on their lands. Matters such as whether the deeds expressed in te reo what the drafters had intended were not examined at all.

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

6.4.2.4 *How effective were provisions for identification of Māori owners?*

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

The aspect of customary tenure that caused Chief Protector Clarke and the commissioners the most anxiety was the overlapping rights of different hapū and rangatira. Their concern was to protect both Māori and future purchasers of

619. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 367; Grant Phillipson, transcript 4.1.26, Turner Event Centre, Kerikeri, p 164.

620. Crown statement of position and concessions (#1.3.2), pp 60, 65.

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

The first step in attempting to remedy the problem had been to require sub-protectors to visit the district, prior to hearings. They did so to ascertain who held rights, to determine whether there was any opposition to the claims about to be investigated, and to ensure the attendance of witnesses. In April 1843, the Crown took further measures intended to verify that the rights of Māori had been 'completely extinguished' before a grant was issued. The 'Officer Administering the Government', Willoughby Shortland, informed Clarke that, in future, two reports would be required, the first from a surveyor stating whether the survey had been interrupted 'by the natives on the ground of ownership, and whether any claim [had] been preferred by them, or on their behalf, for any part of the land'. The protector of the district would supply the second report, affirming that 'after due inquiry', he was 'satisfied of the alienation of the lands by their former owners'.[624] According to Armstrong (in evidence to the Muriwhenua inquiry), no surveyor reports have been found. In his view, this was likely the result of a lack of surveyors rather than destruction of the record;[625] however, he considered that the fragmentary records that do exist suggest that the sub-protectors were active in carrying out these inquiries. On one occasion, sub-protector Kemp informed Clarke about the difficulties he had encountered in obtaining information on Mair's claim in the Bay of Islands. Like others, Kemp maintained that Māori had to be paid before they would attend the hearings, stating that 'the obstacles are so great in the discharge of this duty, that without the promise of a consideration the chiefs

621. Armstrong, 'The Land Claims Commission' (Wai 45, doc 14), p 69.
622. Crown Titles Bill 1849, second reading, BPP, vol 9 [1280], p 71 (cited in Waitangi Tribunal, *The Hauraki Report*, Wai 636, vol 1, p 96).
623. Waitangi Tribunal, *The Hauraki Report*, Wai 636, vol 1, p 96.
624. Shortland to Clarke, [21 April 1843] (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc 14), p 175.
625. Armstrong, 'The Land Claims Commission' (Wai 45, doc 14), p 175.

decline giving assent to the claims in which they may be interested'.[626] In three other recent cases, he said, he had been obliged to meet the demands made by chiefs 'upon his private means'.[627]

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

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

6.4.2.5 *Were the requirements for survey carried out?*

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

626. Kemp to Clarke, 19 November 1843 (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc I4), p176).

627. Kemp to Clarke, 19 November 1843, OLC 1/537 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p348).

628. See Crown document bank (doc H20), p16; Crown closing submissions (#3.3.412), p31; Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p346.

629. Submissions in reply for Wai 354, 1514, 1535 and 1664 (#3.3.475), pp48–49.

630. FitzRoy minute, 16 December 1843 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p350.

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

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

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

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

The commission's work did little to solve this ongoing problem. The absence of surveys would undermine the effectiveness of the first Land Claims Commission throughout its operation, causing delays in issuing grants and resulting in a legacy of confusion and obfuscation for Māori. At the end of the process, they still might have little idea about what lands the Crown considered to have been sold, and this remained the case until the work of the Bell commission some 20 years later. The immediate cause was the imprecision and overlap of deeds, but this was compounded by a lack of survey personnel. The problem was greatest at Kororāreka where there was particular difficulty in deciding the exact boundaries of the areas claimed, which when totalled, exceeded the amount of land in the town. By early 1842, Godfrey had come to realise that in 'many cases', the Pākehā claimants had failed to measure their allotments, and deeds had been signed without any statement of the extent of the area being claimed and only a rough description of where the boundaries ran. The result was a gross exaggeration of what had

631. Godfrey to Colonial Secretary, 4 May 1843 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 342.

632. Charles Terry, *New Zealand its advantages and prospects as a British colony* (London, T & W Boone, 1842) (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc I4), p 137, and Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 322–323).

been supposedly purchased, and 'as the natives, when examined [were] incapable of describing quantity', the commission was unable to 'safely recommend a specific grant to one individual without the likelihood of encroaching upon the claim of another'.[633] While Godfrey did not mention it, such claims must also have encroached on the rights of Māori who had not been party to the transactions or who retained wāhi tapu and other rights in the town area.

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

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

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

In preceding sections, we outlined examples of Māori making demands for further payments after entering land transactions, many of them drawn from the testimony heard by the first Land Claims Commission. There were also plenty of instances of deeds being signed for the same land or for overlapping portions of it. In their report of May 1842, the commissioners noted that difficulties in defining

633. Godfrey to Colonial Secretary, 9 March 1842 (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc 14), p 61).

634. Armstrong, 'The Land Claims Commission' (Wai 45, doc 14), pp 63–64.

635. Crown closing submissions (#3.3.412), p 75.

boundaries were compounded by multiple 'sales' of the same land: 'natives have repeatedly sold portions of land twice or thrice over, and can generally assign some native usage for such acts'.[636] Phillipson pointed out that this should have been 'cause for concern' since the 'Commissioners were finding according to the equity of the case, that Maori had intended an absolute alienation of land'.[637] Not only were boundaries and acreages unclear, but so – to the commissioners – were the 'native usages' that permitted Māori to assert rights in lands supposedly sold.

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

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

636. Report by Richmond and Godfrey, 2 May 1842 (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc I4), p 118); Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 148.

637. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 148.

638. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 149.

639. Clarke to Colonial Secretary, 25 July 1840 (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc I4), pp 20, 69).

640. Gipps to Hobson, 30 November 1840 (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc I4), pp 20–21); Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 239–240.

objections to the 'trifling' nature of the payment, which he considered an 'earnest' only. In general, officials seem to have given very little credence to Māori allegations that payments had been unfair, attributing such complaints to their growing appreciation of the monetary value that Europeans placed on land.[641]

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

In fact, what was equitable and what was not was defined neither by ordinance, nor instruction, nor by the commission itself. The only guidance related to fairness between older and newer settlers (expressed by the sliding scale set out in the land claims ordinances). This reflected the Australian origins of the legislation, which was designed to protect the older, 'genuine' settlers as opposed to more recent speculators. While the ordinance directed commissioners to be guided by 'real justice and good conscience' rather than 'legal forms and solemnities', the *Muriwhenua Land Report* found that this wording had more to do with the law on fraud and the requirement for land sales to be evidenced in writing among an illiterate settler population than with protection for Māori.[644] After its early examination of Busby, all further commission engagement with issues of equity and 'real justice' had to do with balancing settler interests.[645] If Māori had been paid the

641. See evidence of McDonnell before the 1844 Select Committee (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc 14), p135); see also Stanley to FitzRoy, 30 November 1840, BPP, vol 4, p 209 (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc 14), p144).

642. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 242–243.

643. Evidence of Busby, Okiato, 30 January 1841 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 243–244).

644. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p124.

645. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 249–251.

amount stated in the deed, the transaction was treated as valid and equitable, and the omission of other customary owners was addressed by a reduction in the area for which a grant was recommended. The result, as Stirling and Towers observed, was that 'not one of the more than 500 Northland old land claims was rejected on the grounds that it was inequitable'.[646] In our view, the commission's failings in this respect were particularly prejudicial to Māori when it is remembered that

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

6.4.2.7 *Did the commission turn a blind eye to evidence of fraud?*

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

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

646. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 237.
647. Closing submissions for Wai 1968 (#3.3.337), pp 22–32; closing submissions for Wai 2382 (#3.339), pp 16–30.
648. Rueben Taipari Porter (doc S6), p 9.
649. Rueben Taipari Porter (doc S6), pp 9–10; Reuben Taipari Porter, transcript 4.1.20, Te Tapui Marae, Matauri Bay, pp 492–494.
650. Rueben Taipari Porter (doc S6), pp 9–10.
651. Rueben Taipari Porter (doc S6), pp 10–15.

Similar concerns were raised by Nuki Aldridge with regard to deeds supposedly signed by Te Ururoa and Hāre Hongi Hika for several areas in Whangaroa and the Bay of Islands.[652] Mr Aldridge said Hāre Hongi Hika knew how to read and write, and again the 'X' that appeared on some deeds and the tohu on others contrasted with the signatures and tohu with which these rangatira signed he Whakaputanga.[653] Mr Aldridge made the further point that Hāre Hongi continued to use the land and make demands for ongoing payments.[654] He acknowledged, though, that Hāre Hongi appeared before the commission and gave evidence that he had signed some of these deeds. Our own scrutiny of the record shows that he did so in respect of Baker's OLC 548–549 and Kemp's OLC 597 claims, leaving several other claims for which there is no record of his presence. In all cases where he did appear, his evidence followed the usual format. We note that for Kemp's OLC 600 claim, Hāre Hongi did not appear even though he was named as a participant in the transaction.

We are not in a position, however, to come to a definite conclusion. We cannot know whether particular tohu were falsely drawn or if crosses were fake. Nor can we be certain whether letters were penned by those whose views were expressed or if they were written on their behalf.[655] But given the circumstances that the claimants raised before us, their suspicions that forgeries had taken place are unsurprising. We agree that there were many defects in the procedures followed by the commission, that the record of what was said at the hearings clearly failed to capture all the kōrero, and that it was often formulaic in nature. What was asked and how it was recorded reflected the point of view of the British settler and British law, not Māori and Māori law. We also accept claimant criticisms of the commission's over-reliance on the missionaries as advisers (in their role of protectors) and interpreters, especially when their own family interests were involved. Notably, interpreters who worked for the commission and the protectorate also worked for Pākehā claimants – a dual role that Governor Grey would condemn as a conflict of interest on their part.[656] Henry Kemp occasionally interpreted when his father (James) was the claimant, apparently to the disgruntlement of other settlers.[657] Deeds, too, are unreliable evidence of what Māori understood by them; they only indicate what Clarke and other missionary drafters intended (as discussed earlier in section 6.3).

652. Nuki Aldridge (doc AA154(c)), pp 21–27. For example, Mr Aldridge specifically referred to claims by McLiver (OLC 302–304), Powditch (OLC 383–385), Baker (OLC 549–550), Kemp (OLC 559–602), and Cooper (OLC 713), all from Whangaroa; Turner and Evans at Kororāreka (OLC 178–183); Spicer at 'Paramatta and Waeparoa' (OLC 430 and 432); and Spicer and Graham at 'Paramatta' (OLC 643).

653. Nuki Aldridge (doc AA154(c)), pp 21–30.

654. Nuki Aldridge (doc AA154(c)), p 21.

655. See Crown cross-examination, transcript 4.1.20, Te Tapui Marae, Matauri Bay, pp 517–518.

656. See Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 22, 269–271; Rueben Taipari Porter (doc S6), p 11.

657. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 269–270.

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

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

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

Māori retention of lands 'essential, or highly conducive, to their own comfort, safety or subsistence' was a key Crown obligation stated within Normanby's instructions and reaffirmed by his successors. Lord Russell instructed Hobson in January 1841 that the Surveyor-General was to define lands 'essential' to Māori and that the Protector of Aborigines was to ensure that these areas were to be held inalienable for their future needs.[661] That obligation was not expressed in the Land Claims Ordinance 1841, which spoke only of the need to safeguard any land that was required for defence, townships, or any public purpose, and what compensation should be paid in such circumstances. Gipps anticipated that the work of the Lands Claims Commission would result in substantial expanses of land being placed in the hands of the Crown, out of which reserves could be made for Māori for their use or benefit, but his direction on the matter was to Hobson and did not affect the work of the commissioners themselves.[662] As we will discuss further, the commissioners deferred the matter of such protections to time of survey and to the Governor. They included very few reserves in the awards they recommended in the first instance, even when evidence indicated that settlers were claiming land that included cultivations, kāinga, fishing spots, or wāhi tapu. As a result, some settlers were able to acquire extensive landed estates, while little or no provision was made for Māori who – the commissioners were told – also lived on the land. Awards to Busby, Henry Williams, and James Kemp are cases in point, and will be examined in some detail later in this section and in sections 6.7, 6.8.[663]

658. Claimant closing submissions (#3.3.223), pp 7, 42, 44.
659. Crown closing submissions (#3.3.412), p 8.
660. Crown closing submissions (#3.3.412), p 2.
661. Russell to Hobson, 28 January 1841, BPP, vol 3, p 174.
662. Gipps to Hobson, 2 October 1840 (Armstrong, supporting papers (Wai 45, doc 14(a)), pp 213–214).
663. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 304–306, 383, 412.

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

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

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

664. Commissioner's recommendation, 8 April 1843 (Berghan, supporting papers (doc A39(m)), vol 13, p 7801); Daamen, Hamer, and Rigby, *Auckland District Report* (doc H2), p 86.

665. Commissioner's recommendation, 30 May 1843 (Berghan, supporting papers (doc A39(m)), vol 13, p 7977).

666. See Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 95.

667. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 152).

668. 'Supposed Contents' (Berghan, supporting papers (doc A39(m)), vol 14, p 8095).

669. Evidence of Charles Korokoro, 3 January 1842 (Berghan, supporting papers (doc A39(m)), vol 14, pp 8102–8103).

670. Evidence of William Powditch, 10 January 1842 (Berghan, supporting papers (doc A39(m)), vol 14, p 8105).

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

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

Almost invariably, informal accommodations by oral agreement were not reflected in the commission's recommendations. We have already given the example of Pahiko (OLC 127), where William Cook gave evidence of his agreement with Te Kapotai leaders to the effect that they would continue to cultivate the land but would not sell to others. The land (from his point of view) was his property and an inheritance for the children he had with Tiraha, his Māori wife, although their existence was not mentioned at the time. Cook considered himself free of obligation to the wider hapū.[674] Nor did the commission make any provision for continued Māori occupation or use of lands awarded to Henry Williams and the CMS, despite the existence of numerous trust arrangements and promises that Māori could occupy and use the land. At Karaka (OLC 669), south of Paihia, Williams gave evidence that he had 'left' Māori the right to cultivate and fish, as they continued to do 'from time to time', but not to sell the land to any other. But this arrangement was not reflected in the commission's recommendation that 60 acres be granted to the CMS, an award that was confirmed by Hobson and gazetted in August 1842.[675]

In fact, in all of Williams' sizeable personal claims, no reserves (other than four wāhi tapu) were referred to in the deeds signed, the hearings, or the commissioners'

671. Evidence of Polack, 10 June 1842 (Berghan, supporting papers (doc A39(m)), vol 14, p 8117).
672. Evidence of Rewa, 5 May 1842 (Berghan supporting papers (doc A39(m)), vol 14, p 8109).
673. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 152–153.
674. 'Mana I te Whenua. Te Kapotai Hapu Korero for Crown breaches of Te Tiriti o Waitangi' (doc F26), p 18; Daamen, Hamer, and Rigby, *Auckland District Report* (doc H2), p 104.
675. See Daamen, Hamer, and Rigby, *Auckland District Report* (doc H2), p 86; Berghan, 'Northland block research Narratives' (doc A39(a)), p 440.

reports. This is despite clear evidence of Williams and other missionaries accepting that Māori would continue to occupy and use the lands, as part of a shared legacy for missionary and Māori children. Even with the wāhi tapu, which lay on the boundaries of several blocks claimed by Williams, there was considerable inconsistency in the recommendations. Having received evidence (through deeds and Williams' testimony) that at least three were specifically excepted from his claims,[676] the commission responded by excluding them from some of its recommended awards but including them in others.[677]

Definition and protection of these areas thus depended on Williams' survey of his grants. He had made six personal claims (OLC 521–526), for which the first commission recommended a total grant of 7,010 acres, based on his expenditure as set out in the New Zealand Land Claims Ordinance 1842. When the ordinance was repealed, the grants had to be amended, and the commission imposed the statutory maximum of 2,560 acres. As we discuss in section 6.5, Governor FitzRoy then intervened, resulting in a total grant of 9,000 acres.[678] In 1852, Williams had Puketona (OLC 526) surveyed and finalised under the Quieting Titles Ordinance 1849 (also discussed in section 6.5), resulting in a grant of 2,000 acres and the Crown retaining 300 acres as 'surplus' from the area surveyed. This grant was not called in at the time of the Bell commission and remained valid. The plans (which noted three reserves) and the application for grants for OLC 521, 522, 523, and 525 (surveyed as a contiguous block encompassing just over 5,000 acres) and for OLC 524 (2,000 acres) were later submitted under the Land Claims Settlement Act 1856. No Māori opposition had been met on the ground at that later date, and Williams and various family members received grants for the 6,830 acres found to be contained in those claims on survey. Williams was also entitled to 1,025 acres survey allowance, which he selected out of Crown surplus derived from the claim of William Williams and from Crown-purchased land at Puketona and elsewhere.[679]

In total, only 239 acres were set aside in three reserves out of the extensive Williams' estate at Pakaraka, despite his assurances that Māori might remain on their lands. The reserves included two of the wāhi tapu that had been excluded by deed and subsequent award – Ngā Mahanga (29 acres) and Umutakiura (25 acres) – plus an area of cultivation, Ngahikunga (186 acres) along the fertile Waiaruhe valley. Rigby noted, however, that neither Pouērua (an area of considerable importance to Marupō and Te Kēmara's people, and to Ngāpuhi as a whole) nor the

676. Evidence of Henry Williams, 4 November 1841 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 108).

677. Specifically: Warehuinga and Ngā Mahanga were excluded from the recommended awards for OLC 521 but included in OLC 522 and 523; Te Umatakiura was also excluded from OLC 521 but included in OLC 523; Tomotomokia was excluded from OLC 521 and 523 but included in OLC 525. See Commission report, 2 February 1842 (Berghan, supporting papers (doc A39(m)), vol 10, p 5851); Commission report, 2 May 1842 (Berghan, supporting papers (doc A39(m)), vol 10, p 5905); Commission report on OLC 522 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1525).

678. See Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1526–1529.

679. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1530.

lakeshore kāinga at Ōwhareiti were included in the land remaining in Māori ownership.[680] This was because the deed for 'Pourewa' for an estimated 3,000 acres (OLC 522), signed on 21 January 1835, made no mention of any reserve. Neither were the wāhi tapu Tomotomokia and Warehuinga given protection, while the Crown set about purchasing Ngahikunga three years after it was reserved. This area was then bought by the Williams family for £93 or 10 shillings per acre, as provided for by the Land Claims Settlement Extension Act 1858 (discussed at section 6.7). We note that the Crown had paid Māori £50 for this so-called reserve the year before.[681]

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

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

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

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

680. See Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1531–1533; Daamen, Hamer, and Rigby, *Auckland District Report* (doc H2), p 139.

681. Daamen, Hamer, and Rigby, *Auckland District Report* (doc H2), p 139.

682. Stirling and Towers describe this case in detail: see 'Not with the Sword but with the Pen' (doc A9), pp 1487–1498.

683. Godfrey and Richmond to Colonial Secretary, 2 May 1842 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 179).

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

6.4.2.9 *Inter-racial marriages and the Crown's process for the validation of deeds*

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

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

684. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 184–185.

685. In the case of Fanny Wing, Tutu her uncle and other hapū leaders gave evidence of their 'free gift' to the girl. The commission recommended that a grant be issued if it was the Government's intention to recognise gifts. Fanny died, however, and Captain Wing's later attempt to have the title for himself was unsuccessful. See Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 616–617.

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

We note also the objections raised by Hua. His daughter was married to Christopher Harris who claimed land at Motukaraka (OLC 1016) on behalf of their son, 'a native of New Zealand', in 1843.[687] Harris maintained that the land was his if the boy died but that 'Hua shall have the full use of the lands during his native life.' Hua was adamant, to the contrary, that he 'did not give it entirely over' to his grandson; his 'wish [was] that he may possess it in common with our other descendants, but he cannot sell it to any person, not even to the Government, he has merely a right to live on it during his life time.'[688] No deed was presented and Harris's claim was disallowed. The daughter's name was unrecorded.[689]

Ihipera (Isabella), the daughter of Raumati, was married to Marmon, who had a number of liaisons with local Māori women. They included Hauauru, another of Raumati's daughters, with whom Marmon had a child, Mere, in 1826. Five different deeds for sites in the Hokianga had been signed with Marmon, who explained to the commission why he had been supposedly able to secure 200 acres at Kaiwhakarau (OLC 317) for only one pair of blankets: 'he [Raumati] gave it to me because his daughter is my married wife'. Raumati, however, denied anything other than having agreed not to alienate the land to someone else, and the claim, again, was disallowed. Finally, in 1880, the land was retained by the Crown.[690]

Likely there were other instances – as in the case of Peleg Wood – when settlers did not bother pursuing claims, knowing that their ex-in-laws would object.[691] It was only a generation later that the extent to which settlers were marrying into the land began to be revealed within the record of the Crown's validation procedures. As settlers with Māori wives sought to have grants issued in their names, or as the children themselves brought forward their claims, whānau were confronted by a choice to be made in a world increasingly controlled by settler values and laws. Sometimes, objections were raised. If a settler sought the grant in his own name, Māori might protest that they had intended the land to go to the children, their own grandchildren, and their nephews and nieces; that it had not been 'sold'

686. Evidence of Aperahama and Wiremu Kingi, 10 November 1842, OLC 1/777 (Berghan, supporting papers (doc A39(m)), vol 17, p 10144).

687. Schedule of land sold by a Native Chief of the River Hokianga (Berghan, supporting papers (doc A39(m)), vol 22, p 12480).

688. Evidence of Hua, 17 April 1843 (Berghan, supporting papers (doc A39(m)), vol 22, p 12478).

689. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 123, 373.

690. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 124, 372, 1331–1332.

691. See comment by Polack that '[g]ifts of land from the natives to Europeans are not valid, nor are the promises of a chief to a European who obtains land in consequence of his cohabitating with the daughter or female relative to the chief'. In such cases, the land was sold again to another European: Polack, *Manners and Customs of the New Zealanders*, vol 2, p 81.

to the settler in his own right to be disposed of as he wished. Sometimes, too, the hapū objected that the land was to be shared with them, not owned exclusively by any offspring. On the other hand, at this time rangatira also attempted to ensure that informal marriage gifts were confirmed by providing the documents so valued by Pākehā. Deeds were drawn up and written statements made to formalise gifts of land for the children, so that grants could be approved and issued in their names. This was done in the context of surveys and desperate attempts to have reserves recognised under the rules by which the Bell commission operated. We discuss this further at section 6.7.

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

6.4.3 Conclusions and treaty findings: the first Land Claims Commission

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

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

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

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

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

Counsel for Ngāti Manu argued on the strength of documents such as these that 'The Crown, based in New South Wales, assumed that a full, final, and exclusive "purchase" was sought by the Pākehā claimant and this was the only form of transaction envisaged by the Commission.'[695] We agree with that general conclusion. Leasing was incompatible with the Crown's land fund model, while settlers preferred the chance of gaining a freehold title. Only in a few instances did claimants bring a conveyance other than by deed of sale to the commission for investigation.

692. Crown closing submissions (#3.3.412), p 25.
693. Submission in reply for Wai 354 and others (#3.3.475), p 43; an example of the standard form may be found in Berghan, supporting papers (doc A39(m)), vol 15, pp 8651–8653.
694. See Daamen, Hamer, and Rigby, *Auckland District Report* (doc H2), p 82.
695. Submission in reply for Wai 354 and others (#3.3.475), p 43.

There was one claim for a validation of a gift and no claims for any leases, although there were clear instances where it was the timber that was desired by 'purchasers' rather than the land itself. No discussion of, or recommendation for, the validation of a lease rather than for a full, final, and exclusive grant has been identified within the commission process. In fact, the commission generally rejected the few claims brought before it that were based on a transaction that did not conform to the usual model of purchase – and notably failed to give effect to the trusts that underlay many of the missionary deeds.[696]

Despite Gipps' instruction that 'proof of conveyance according to the custom of the country' be established, there was no explicit direction within the Land Claims Ordinance 1841 to that effect – or indeed for the commissioners to 'consider . . . whether there was a contract in terms of mutual comprehension', as the Tribunal put it in the *Muriwhenua Land Report*.[697] Within the procedures established to investigate the validity of transactions, the instruction from the New South Wales Governor was indeed the only explicit official recognition that different customary practices may have operated. We do not agree with the Crown's reading of that direction that the commissioners were required to consider whether the transaction was in accordance with custom.[698] In our view, it was directed to the protection of settler interests rather than those of Māori; and what Gipps meant was that the commissioners could still deal with the claim if the deed of conveyance had been lost, destroyed, or even had never existed. Nor did the ordinance give any guidance about what was 'equitable', or how to settle questions of grantor title, fairness of price, or boundaries.

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

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

696. See submission in reply for Wai 354 and others (#3.3.475), p 54.
697. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 167.
698. Crown closing submissions (#3.3.412), p 27.

> to perceive how Maori could have testified to such, believing (as the Commissioners reported) that they could still live on and use it.[699]

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

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

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

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

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

We have no doubt that the Crown intended that fraudulent transactions would be overturned as a result of the investigation process. It is clear that the

699. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 154.
700. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 168.
701. Tamati Waka Nene, 20 July 1860, Proceeding of Kohimarama Conference (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 161).

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

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

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

702. See Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p125.

703. See Vincent O'Malley, *The Meeting Place: Maori and Pakeha Encounters, 1642–1840* (Auckland: Auckland University Press, 2012), p146.

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

While Clarke did raise the general issue of whether Māori and settlers understood each other, and whether Māori intended permanent alienation, he did not do so in specific cases. His reports to the commission suggest that his major concern was to secure the titles granted by the Crown to settlers and missionaries, and it was this that motivated him rather than justice for Māori in their pre-treaty land arrangements. It was necessary that customary interests be properly extinguished so that titles issued to settlers were unimpeachable. It is hardly surprising, then, that Clarke and the other protectors interpreted events and evidence in a way that supported their own view of what transactions meant for the good of the colony and of Māori themselves. Nor, as Dr Phillipson commented, was it 'necessary for men like Clarke, Kemp and FitzRoy to have been liars or cheats, for a false impression of the transactions to have been created'.[705]

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

Te Raki Māori generally retained other lands at this time, but we agree with the Muriwhenua Tribunal's conclusion that this is hardly the point.[708] The transfer of land at the Bay of Islands, in particular, was sizeable: some 123,113 acres or 29 per cent of that district (see section 6.1.3). For some hapū, such as Ngāti Torehina[709]

704. Crown closing submissions (#3.3.412), p 33.
705. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 144.
706. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 144–145.
707. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 144–145.
708. See Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 170.
709. Herbert Rihari (doc R7), pp 29–31.

and Te Kapotai,[710] this was almost the whole of their most valuable land, though the impact may not have been immediately apparent to them because of their personal relationships with the 'purchasers' and their continued ability to access their fishing spots and specific favoured sites. Nor was the scale of the land transfer apparent to officials: there was no inquiry into the numbers of Māori affected by pre-treaty transactions; or the extent of land and resources that had transferred out of Māori hands; or the nature, location, and amount that was left to different hapū. The Crown has conceded that this was a failure of duty and a breach of the treaty.

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

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

These cases involved compulsion and punishment (Hobson had been ready to send troops to enforce the cession in 1842). Can other Crown actions resulting in loss of land and autonomy be likewise described as an effective confiscation

710. Willow Jean Prime (doc F27(a)), p 3.
711. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 103.
712. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 3.
713. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 7.
714. Waitangi Tribunal, *The Kaipara Report*, Wai 674 (Wellington: Legislation Direct, 2006), p 96.
715. Waitangi Tribunal, *The Kaipara Report*, Wai 674, p 99.
716. Waitangi Tribunal, *The Kaipara Report*, Wai 674, pp 98, 100–101.
717. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua: The Report on the Turanganui a Kiwa claims*, Wai 814, 2 vols (Wellington, Legislation Direct, 2004), vol 2, p 744.

though they might lack this punitive character? The Tūranga Tribunal offers some guidance on this question in its assessment of the 1873 Native Land legislation and the related legislation that followed. While acknowledging that it 'may go too far' to call the system that had been imposed 'raupatu', the Tribunal concluded that it 'breached both the spirit and the intent of the Treaty's title guarantees'. The legislation was 'expropriatory':

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

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

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

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

718. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, Wai 814, vol 2, p 536.

placed by the early Land Claims Commission, which was conducted by officials in accordance with their own point of view and not that of Māori.

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

We find, therefore, that the Land Claims Ordinance 1841 was:

- inconsistent with the guarantees in article 2 of te Tiriti, in breach of te mātāpono o te tino rangatiratanga, te mātāpono o te houruatanga/the principle of partnership, and te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect.

It failed to:

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

These failures facilitated:

- the conversion of conditional occupation rights into absolute conveyances under British law.

The Land Claims Ordinance 1841 also failed to:

- give guidance as to fairness of price, specify the measures needed to give effect to joint Māori-Pākehā occupancy arrangements and underlying trusts, or require commissioners to protect kāinga and other sites in active Māori occupation, investigate equity of outcome, advise on the sufficiency

of land remaining in possession of hapū, and ensure that reserves were specified and protected in grants.

These shortcomings were not offset by the involvement of protectors, who were concerned more with securing the titles granted to settlers and the progress of the colony than with ensuring justice for Māori. The Crown was thus also:

- in breach of te mātāpono o te matapopore moroki/the principle of active protection and te mātāpono o mana taurite/the principle of equity.

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

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

6.5.1 Introduction

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

Claimants told us that FitzRoy sought to speed up the process of awarding title to settlers in spite of advice that Māori interests had not been fully extinguished,[721] and that his actions were an 'egregious' breach of treaty principles.[722] Counsel asserted that, under the ordinance, FitzRoy had neither the legal authority to make grants of unsurveyed land nor grants in excess of 2,560 acres.[723] Counsel for the Ngāti Rehua and Ngātiwai ki Aotea claimants said their tūpuna received no com-

719. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 412–413.
720. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 599–600, 639–642.
721. Claimant closing submissions (#3.3.223), p 25.
722. Closing submissions for Wai 2382 (#3.3.339), pp 33–34.
723. Claimant closing submissions (#3.3.223), pp 24, 40.

pensation under Grey's 1849 ordinance for the losses they had incurred as a result of FitzRoy's 'free-wheeling approach to Old Land Claims'.[724]

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

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

6.5.2 The Tribunal's analysis

6.5.2.1 *Why did Governor FitzRoy intervene in the commission process?*

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

FitzRoy wanted to accelerate matters. As noted, he appointed a new commissioner (Robert FitzGerald), brought into force legislation enabling cases to be decided by one commissioner rather than two as previously required, and waived the survey requirement. He announced that it would be impossible to survey the awards 'without causing such extreme delay as would be ruinous to the parties', and therefore instructed that walking the boundaries was no longer necessary. Grants were now to be issued on the basis of an 'eye-sketch' and on descriptions

724. Closing submissions for Wai 678 (#3.3.248), pp 15–17.
725. Crown memorandum (#3.2.2682), pp 3–5.
726. Crown closing submissions (#3.3.412), p 54.
727. Crown memorandum (#3.2.2682), pp 4–5.
728. Crown closing submissions (#3.3.412), pp 55–56.
729. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 178–179; Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 412–414. Richmond was appointed Chief Police Magistrate for the Southern District in July 1843, and early in 1844 became Superintendent.

contained in the commissioners' reports – although the commissioners had already acknowledged these as inadequate, based, as they were, on descriptions in deeds that they considered largely 'unintelligible'. FitzRoy's decision meant that no one knew exactly the location of an awarded acreage within a claim that had been deemed valid but had been reduced to comply with the scale set out in the ordinance. It also meant that any reserves were undefined and so were vulnerable to loss in the future. In 1856, the select committee appointed to examine the settler petitions regarding old land claims concluded that FitzRoy's grants were 'full of defects' and 'most of them contained no particular description of the specific portions of land intended to be conveyed.'[730]

Stirling and Towers commented that, at first, settlers were pleased with FitzRoy's decisions, but: 'In the long run it created an immense amount of uncertainty and delay in resolving what it was that had been transacted, claimed, awarded and granted and, more importantly for Maori, what had not.'[731]

Notably, FitzRoy began intervening in the work of the Land Claims Commission. Exercising the Royal prerogative under the Royal Charter of 1840, which delegated 'full power and authority . . . to make and execute . . . grants of waste land . . . to private persons', and believing that clause 6 of the Land Claims Ordinance 1841 gave him express permission to do so, FitzRoy also revisited numerous claims already investigated and reported on by the commissioners.[732] As noted earlier, in some instances awards were recommended for claims that had been previously disallowed. More commonly, the earlier awards were increased, often beyond the prescribed limit of 2,560 acres, for settlers whom FitzRoy deemed to be 'really deserving'.[733] This generally meant those he judged to have contributed to the 'public good' (such as missionaries) or to the colony's economy (such as long-established settlers who had invested in buildings, timber-milling machinery, jetties, and so on).[734]

Phillipson described the process instituted by FitzRoy, during which no new evidence was sought, as 'tortuous'.[735] The Governor first required Executive Council approval of these supposedly 'really deserving' cases, which were next sent to FitzGerald for re-examination on the basis of the written reports from the first commission hearings. FitzGerald then sent a new recommendation for FitzRoy's approval. FitzGerald's reports were usually 'brief and lacking in detailed reasoning', and Stirling and Towers suggested that he 'generally extended the awards as

730. Report of Select Committee, 16 July 1856, BPP, vol 10, p 623 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 190).

731. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 414.

732. Clause 6 stated that nothing in the ordinance obliged the Governor to make any grant. See Crown memorandum (#3.2.2682), pp 3–4.

733. FitzRoy (cited in Armstrong, 'The Land Claims Commission: Practice and Procedure' (Wai 45, doc I4), p 184); Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 415.

734. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 415.

735. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 180.

desired by the Governor', doing 'little more than rubber-stamp the claim'.[736] Nor have any cases of refusal by the Executive Council been brought to our attention; indeed, according to Stirling and Towers, members of the Executive Council, under pressure from settlers, had attempted to have the 2,560-acre limit repealed as disastrous, shortly after FitzRoy's arrival. The Governor had rebuffed that effort on the grounds that it could 'hardly be expected that individual interests . . . shall be made paramount to the general rights of the aboriginal inhabitants, and the British subjects, for whose reception these Islands are in course of preparation'.[737] He was prepared to make exceptions in certain cases, however.

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

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

Phillipson argued that

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

FitzGerald, despite his willingness to recommend increases in most of the awards brought to his attention, and despite what Stirling and Towers characterised

736. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p180; Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p415; for FitzRoy's interpretation of his prerogative, see Armstrong, 'The Land Claims Commission' (Wai 45, doc I4), p183; Crown memorandum (#3.2.2682), pp3–4.

737. FitzRoy quoted in 'Legislative Council', *New Zealand Gazette and Wellington Spectator*, 31 January 1844, p3 (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc I4), p186, and Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p414).

738. Godfrey to Colonial Secretary, 8 June 1844, BPP, vol 5, p584 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p180).

739. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p180.

as his 'notoriously' pro-settler approach to pre-treaty transactions, also at times refused to do the Governor's bidding, with the result that he was removed from office on 31 March 1845.[740] What seems to have triggered the dispute between the two men was FitzRoy's handling of awards at Kawau Island. Against all of the land commissioners' advice that there was no valid claim, FitzRoy granted the entirety of the island to the settler Taylor (in a derivative claim from Beattie), and a smaller area of the Kawau foreshore, containing the entrance to a valuable copper mine, to another influential settler, Whitaker. After his sacking, the former commissioner accused FitzRoy of making false declarations that had resulted in Māori being 'knowingly and wilfully defrauded' of their property rights. The Governor, FitzGerald alleged, had asked him to 'overstep the bounds of [his] duty as a Land [Claims] Commissioner', which he had refused to do.[741]

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

> When once the land is validly transferred by its aboriginal owners to European purchasers and surveyed, the main difficulties are overcome [a future state, after survey]. It is a mistake on the part of Governor Grey to suppose that native pahs, cultivations and burial grounds were not generally excepted from the sales of land to early settlers. This is just one of the points on which the authoritative interference of British ideas of landed property may be most prejudicial. The old settler, on friendly terms with his aboriginal neighbours, makes his way by degrees, and gradually obtains a willing and permanent cession of even those places, after he has succeeded in establishing a general right to a certain piece of land. But he never attempts to take land by force. To do so would be his ruin, by raising a host of enemies.

740. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 429–430; see also p 1091.

741. For discussion of this case, see Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 635, and Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 200. According to those sources, Richmond and Godfrey recommended against a grant to Beattie, and FitzGerald later repeated that advice, though FitzRoy did not follow it. FitzGerald appears to have challenged the Governor on two other occasions. One concerned Mair's second Whāngārei claim (OLC 1047), which Te Tirarau disputed. On this occasion, FitzGerald warned the Governor about ignoring Te Tirarau's concerns: Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1697–1698, 1713–1719. The other occasion concerned land in Kororāreka that was claimed by two settlers, Polack and Baker: Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 637.

> The pahs, sacred places, and favourite resorts, for whatever purposes, were either reserved by the natives verbally when they sold the land, in most instances, or they were specially mentioned in the deed or agreement.
>
> The adjustment of all these matters should be left chiefly to private arrangement and the mutual self-interest of the parties concerned.[742]

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

Knowing that not all Māori rights had been extinguished, FitzRoy maintained that he had worded the grants 'very carefully'. In his view, the grants did not confer a freehold title and nor did they protect the settler against Māori claims to the land; rather, they conferred protection against any claim by the Crown or other settlers.[744] With respect to Māori, FitzRoy's view was that the settlers did not need the protection of Crown title, since they could continue to rely on the 'good faith and traditional usages' of the Māori occupants until such time as those occupants either accepted the settler's ownership or declined in number. As Phillipson observed, this 'was a remarkable policy, and one that was ultimately to the severe detriment of Bay of Islands Maori'.[745] In our view, the basis for it was also remarkable – a cynical response to the protection offered to Pākehā under tikanga. Its legal subtleties were certainly lost on settlers, who considered themselves to possess an unfettered freehold title, notwithstanding any ongoing relationships with Māori.

The Crown has argued that FitzRoy, when acknowledging there remained unextinguished interests, was discussing reserves only, rather than saying that he

742. FitzRoy memorandum, 20 March 1847 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 182).

743. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 182; Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 413.

744. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 182–183.

745. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 183.

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

6.5.2.2 *Who benefited from FitzRoy's extended grants?*

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

The CMS missionaries were the most prominent beneficiaries of the Governor's willingness to increase the acreages granted. The award for Henry Williams' family was, for example, increased to 9,000 acres, in part because Williams was considered to have paid for much more land than the maximum grant allowed, and in part because he had 'done far more for the advancement and improvement of the aboriginal race, and in fact for the general interests of the colony at large, than any other individual member of the missionary body'.[748] In other instances, the deserving character of the missionary claimant was simply assumed; for example, there was no reason recorded for the increase in James Kemp's grants.[749] Briefly stated, Kemp was initially awarded 1,354 acres at Kerikeri (OLC 595) and a further 2,284 acres at Whangaroa (OLC 599–602) so as to comply with the 2,560-acre limit. FitzRoy increased the grant for OLC 595 to 5,276 acres and those for Whangaroa to an estimated 4,000 acres; an aggregated total of 9,276 acres.[750] Although Kemp's entitlement came under sustained attack from Grey, and his grants were declared void, ultimately he (and family members) received grants totalling 6,954 acres in the Bay of Islands and another 2,722 acres at Whangaroa.[751] (We discuss this matter in more detail at section 6.7.2.3).

Several other CMS missionaries also received extended grants. John King, Richard Davis, and George Clarke had initially been granted the statutory maximums for their claims. FitzRoy increased all: King's to 5,150 acres (for OLC

746. Crown memorandum (#3.2.2682), pp 4–6.
747. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 423.
748. Minutes of the Executive Council, 12 June 1844 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 180).
749. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 636.
750. Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 387–388, 393–394; Berghan, supporting papers A39(m) vol 12, p 7283.
751. Bell memorandum, 4 July 1860 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7460–7465).

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

FitzRoy reversed the first commission's disallowance of John Orsmond's claim (OLC 809) for land near Waimate. Organised by his brother-in-law and fellow missionary, James Shepherd, the claim had been disallowed because Shepherd, as the original purchaser, had already been granted the maximum acreage allowed by the ordinance. As a result of FitzRoy's intervention, a grant was issued to Orsmond for 2,560 acres. Shepherd himself had been awarded land well in excess of the statutory maximum for his seven claims at Whangaroa and the Bay of Islands as a result of the commission's recommendation (5,330 acres, after the recalculations required by the disallowance of the 1842 ordinance), and this was approved – but not extended – by the Governor.[756] According to the Surveyor-General, Charles Ligar, Samuel Ford's award in the Bay of Islands was increased to 3,492 acres, and he received a £1,725 scrip credit out of that total.[757] Charles Baker's awards also were increased beyond the statutory maximum to over 6,000 acres for his various claims at Waikare, Kororāreka, and Mangakāhia. At Waikare, the award was increased from the original recommendation of 872 acres to the full extent claimed of 1,212 acres (later increased to 1,260 acres by the Bell commission); and at Mangakāhia from 1,316 acres to 5,000 acres, despite the opposition of senior Te Parawhau chief, Te Tirarau.[758]

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

752. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 309. Also see Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 395–399.

753. Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 481–482.

754. Berghan, supporting papers (doc A39(m)), vol 13, p 7957.

755. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 627. According to Stirling and Towers, the final award subsumed Hamangi's portion at Waiohanga, while it is not clear what became of Hake's.

756. This distinction escaped Grey's notice, and they were included in his legal challenge. Since this was conducted largely on the basis that the missionary grants were contrary to the commission's recommendations, a new warrant had to be sworn out, on the advice of Attorney-General Swainson. See Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1376–1380; Berghan, "Northland Block Research Narratives' (doc A39(a)), pp 500–506.

757. Ligar, 'List of Land Claimants who have received grants exceeding 2560 acres', no date, BPP, vol 5, p 583.

758. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 353, 423–424; Berghan, supporting papers (doc A39(m)), vol 11, pp 6582–6583.

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

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

Despite this dispensation, Mair had not been pleased, objecting that he was entitled to far more, given what he had spent. Godfrey and Richmond reminded the Colonial Secretary that Mair, strictly speaking, was entitled to no grant, since his transaction had not been completed before the January 1840 proclamation and

759. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1690–1692.

760. According to the evidence of claimant witness Marina Fletcher, the understanding of their tūpuna was that an agricultural school based on the Waimate model would be established there: Marina Fletcher (doc I35), p 5.

761. Land Claims Commission report, 29 April 1843 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1695).

762. See Tangi Rudolph (doc U6(a)), p 8; Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1690–1691,1695.

763. Land Claims Commission report, 29 April 1843 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1695); Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 189.

764. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1689, 1695.

765. Land Claims Commission report, 29 April 1843 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1696).

what was more, 'it was owing to our knowledge that various works had been completed on the land . . . more than the evidence he produced' that a grant had been recommended at all.[766] The award was upheld but then had to be recalculated (and reduced to 782½ acres) when the 1842 ordinance was disallowed. Mair again protested, filed two new claims, and asked that the award be put before the Governor for reconsideration. FitzRoy agreed to 'examine the subject more fully and write to him again'.[767]

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

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

> It was us who bestowed the land yet later on in these days you have invited some strange Europeans to go and occupy. This is not right . . . Now concerning a certain block of land which you did not complete payment of formerly, You have bestowed upon it a strange European. That also is improper. And the sacred place where you have been stripping bark off the tree is wrong. Eru Pohe will arrange for you to get

766. Commissioners Godfrey and Richmond to Colonial Secretary, 10 July 1843 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p1696).

767. FitzRoy minute, 10 May 1844 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p1697).

768. FitzGerald minute, 27 May 1844 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p1698).

769. FitzGerald minute, 27 May 1844 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p1698).

> the necessary trees on unconsecrated land. Do not you people misunderstand the position of my younger brother [i.e. taina] Eru, whom I have placed in authority to deal with all matters whether good or bad. Concerning the cows for the payment of your land. You have disposed of them to a strange European at Wairoa. You have also acted wrongly in this . . . Cease therefore to invite the European indiscriminately to come to that place. Only allow a few to settle there. Otherwise I shall be very angry – very wroth indeed – leave me a portion, a half of my kainga – do not appropriate the whole.[770]

That plea went largely unheard, and the Northern War broke out soon afterwards. Ultimately, in 1853, Mair's OLC 307 claim was surveyed at 1,798 acres, with the question of what reserves should remain in Māori hands not fully resolved. In a later investigation of the boundaries of the grant, Wiremu Pohe said that three of the reserves were outside the surveyed area, but there was some confusion about the fourth (Kote Pareka), which Pohe could not identify. He lived at a place called Parekai within the deed boundaries, but stated before the commissioner that 'neither he nor any other of the native sellers [laid] claim to it as one of the reserves in question'.[771] The commissioner declined to approve Mair's grant until the location of Pareka was clarified, but Surveyor-General Ligar disagreed, ruling that it was up to Mair himself to determine whether the reserve was surveyed.[772] Ligar accordingly approved Mair's grant, still naming the four original reserves as excluded even though three were outside the boundary and the other was unlocated. The kāinga occupied by Wiremu Pohe was not considered at all. As Stirling and Towers commented:

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

Why some other settlers were likewise considered deserving of generous consideration was even less explicable. Stirling and Towers questioned, for example, why Powditch was awarded £1,500 in scrip for a claim (OLC 383–385) to 3,000

770. Hone Wiremu Heke Pokaia, Tautoro, to Mair, 16 October 1844 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1699–1700).

771. Commissioner for Quieting Titles to Colonial Secretary, 7 March 1853 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1701).

772. Surveyor-General Ligar to Colonial Secretary, 16 March 1853 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 598, 1701–1702).

773. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 598–599.

acres at Whangaroa. The first Land Claims Commission had disallowed the claim when Powditch failed to appear. There was, Stirling and Towers wrote, 'also clear evidence of extensive Maori opposition, which the first Commission was made aware of but which was not recorded . . . as the claim was never heard'.[774] In 1844, Powditch appealed to FitzRoy for a grant as compensation for his 'distress' at having been 'driven from Whangaroa'. FitzRoy concluded, without any apparent foundation, that Powditch could have 'without doubt' proved the validity of his claims.[775] From the Crown's point of view, the award of scrip would have to be recovered from Māori. Even though Powditch's Paripari claim had never been investigated, in the 1870s the Crown would take 2,253 acres to satisfy the scrip it had issued.[776] This was in addition to 907 acres awarded by the Bell commission to derivative claimants, Snowden and Shepherd, and surveyed within Powditch's claim between 1861 and 1862.[777] We return to Powditch's claim at section 6.7.2.6.

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

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

6.5.2.3.1 Grey's understanding of the pre-treaty land transactions

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

774. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 416–417, 766.
775. FitzRoy minute, June 1845 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 379).
776. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 376, 417.
777. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 417.

and on the missionaries may have been politically motivated, but his objections require serious consideration.

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

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

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

778. Grey marginal comments on Clarke to Colonial Secretary, 30 March 1846, BPP, vol 5, p 563 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 193).

779. Grey to Gladstone, 23 June 1846, BPP, vol 5, pp 581–582 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 193).

780. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 193.

781. Grey to Gladstone, 24 June 1846, BPP, vol 5, p 591 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 193).

782. Grey to Gladstone, 25 June 1846, BPP, vol 6, pp 78–79 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 194).

783. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 194.

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

By this stage, Grey had come to the view that Māori had intended to grant only lifetime interests to the missionaries and their children. A few months before the court hearing, he wrote to new Secretary of State for War and the Colonies, Earl Grey, informing him that Clarke's deed of sale (which he enclosed) suggested that

> the natives frequently only sold the land to the missionary and his children for ever, and that it is by no means clear that they understood that they gave an absolute title to the land such a Crown title conveys, and that as these lands were, in many instances, not sold until it was known that emigration to New Zealand was about to commence, it was to be anticipated that so soon as the natives had expended the trifling and comparatively useless property they had acquired, they would repent the bargains they had made . . .[787]

The Governor also informed Earl Grey that the land grants were 'opposed to the rights of the natives' who, he believed, might yet be 'in some cases . . . the rightful owners of the land'. Tāmati Waka Nene had raised this issue with the Governor, informing him that Māori wanted to occupy lands in the Bay of Islands that had been 'included within the boundaries of one of the Church Missionary land claimants'.[788] Grey had referred the matter to the Surveyor-General, who had reported

784. Grey to Selwyn, 30 August 1847, BPP, vol 6, p 209 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 194).

785. Grey to secretary, CMS, 6 August 1847, BPP, vol 6 [1002], p 116.

786. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 194.

787. Grey to Earl Grey, 2 August 1847, BPP, vol 6, p 110 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 195).

788. Grey to Earl Grey, 1 September 1847, BPP, vol 6, p 117 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 195).

back that the 'whole of the grants had been drawn in such a form that none of the officers of the Government knew what lands had been conveyed by the Crown.'[789]

The Supreme Court heard *Queen v Clarke* in January 1848, and delivered its decision in June, ruling that a Crown grant was the best title that a subject could possess and that it could not be set aside except by specific legislation. In the court's opinion, since FitzRoy had made the grant using his powers of Royal prerogative, he had not been obliged to adhere to the recommendations of the first Land Claims Commission.[790] Grey immediately indicated his intention to appeal the decision to the Privy Council. According to Clarke's lawyer, Grey believed that the Supreme Court had 'overlooked the most essential points in the case!!!' and that his client had 'only purchased a life interest from the Natives and not the fee simple'.[791] Williams, on hearing of this, wrote to Earl Grey, outraged that the Governor was now raising a 'new objection'. The original deeds had been 'thoroughly examined' by the commissioners, who had found no fault, Williams said. What was more, the deeds were in the Māori language and clearly stated that the signatories had 'let go' and sold the land to the missionaries and their children 'for ever, for ever, for ever', to dwell upon, to work, to sell, or to do with what they will.[792]

Grey did not think, however, that Māori were reading these words in the way represented by the missionaries; in his view, the missionaries were being adopted into the hapū and holding lands on that basis. In a letter to Earl Grey on 17 October 1848, Grey explained why he thought that FitzRoy's expanded grants had to be set aside. Put simply, he said, the transactions on which the grants rested had not been absolute alienations based on English property law, but conditional arrangements based on custom. Grey informed Earl Grey that he considered it

> probably a duty upon behalf of the Crown, towards the Aboriginal population of this Country, to do its utmost to support their rights in this case, which will establish a precedent for the disposal of a very large amount of property which, in as far as my own power of understanding the subject goes, the Crown ought to take from one class of its subjects to give to another.[793]

This was an important acknowledgement.

Governor Grey then set out the reasons for this conclusion:

789. Grey to Earl Grey, 1 September 1847, BPP, vol 6, p 117 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 195).

790. Crown memorandum (#3.2.2682), pp 3–4.

791. Merriman to Clarke, 10 July 1848 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 195).

792. Williams to Earl Grey, 1 November 1848, BPP, vol 6, p 86 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 196).

793. Grey to Earl Grey, 17 October 1848 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 196).

Queen v Clarke

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

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

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

The court accepted the argument of the Attorney-General (Swainson) that Commissioner FitzGerald's recommendation that the grant be extended was 'illegally made' and his report 'vitiated', since the Land Claims Ordinance 1841 stated in clause 6 that 'no Grant of land' should be recommended in excess of 2,560 acres 'unless specially authorised thereto by the governor with the advice of the executive council'. In this case, the commissioner at the time of making the recommendation had not received any such authority.

However, the Supreme Court found that the illegal nature of Commissioner FitzGerald's report had no effect upon the grant to Clarke. This was because the 'chain of principles' governing the case was as follows:

- The New Zealand Charter 1840 placed in the hands of the Governor 'full power and authority', in the Queen's name and on her behalf, subject to 'any instructions which may from time to time be addressed to him . . . to make and execute . . . Grants of waste land . . .';
- such prerogative could only be 'taken away or restrained within the colony, by the express words of an Ordinance (or statute)';
- the Land Claims Ordinance not only contained 'no such express words, restraining the exercise of the prerogative, so vested in the Governor, but contained a clause expressly saving the prerogative'; and therefore
- 'Governor FitzRoy, even if he departed from the spirit of the Ordinance in making a Grant of more than 2,560 acres' still could do so legally.

1. *New Zealander*, 28 June 1848.

The Privy Council overturned that decision in 1851 on the following reasoning:

- Commissioners Godfrey and Richmond had recommended in 1843 that only a portion of the land claimed – namely, 2,560 acres – should be granted.
- Commissioner FitzGerald had not been authorised by the Governor in Council to recommend a grant exceeding that amount.

FitzGerald's report had been admitted by the Supreme Court to be 'inconsistent with the Ordinance under which it was made', and therefore, 'as the grant professed to be in confirmation of that report, it would necessarily fall to the ground'. However, since the judges considered there was a provision in the New Zealand Government Act 1840, under which the Charter of 1840 was granted, that the prerogative of the Crown would not be affected, the Governor had the authority to make such a grant.[2]

The Privy Council, in contrast, was clearly of opinion that, whatever the authority of the Governor might be, 'this is not a grant professing or intended to be made, as a matter of bounty or grace, from the Crown, but it is only intended as a confirmation of that report, which was made under the authority of the Ordinance. The grant is founded upon the report, and the report is founded upon the Ordinance. It is clearly contrary to the terms of the Ordinance, and, therefore, the grant must fall.'[3]

More recently in *Proprietors of Wakatu v Attorney General*, the Supreme Court has found that the Crown's prerogative conferred upon the Governor in connection with Crown grants was 'confined to grants made from the waste lands "belonging" to the Crown and was subject to regulation, including as to price, contained in the Royal Instructions. There seems no scope for an expansive view of a power to make grants under the prerogative, such as that taken in the Supreme Court in *The Queen v Clarke*.'[4]

Despite the Privy Council decision in 1851, Clarke (and family members) would ultimately receive grants totalling 7,010 acres as a result of the process undertaken by the second Land Claims Commission. This was because Commissioner Bell considered that the Quieting Titles Ordinance 1849 had 'given validity to all grants, and it was sufficient that [he] should deal with these [Clarke's grants] according to the provisions of the Land Claims Settlement Act [1856] notwithstanding the fact that in reality the grants had by the Judgment of the Privy Council been already absolutely made null and void'.[5]

2. *New Zealander*, 28 June 1848.
3. *R v Clarke* [1851] NZPC 1.
4. *Proprietors of Wakatu v Attorney General* [2017] NZSC 17 at [298].
5. Bell report, 15 April 1859 (Berghan, supporting papers (doc A39(m)), vol 13, pp 7975–7977, 8043–8044).

> That previously to New Zealand being declared a British Colony, many persons had made purchases or pretended purchases of lands from the Natives, which were conveyed by Deeds of various forms, the deeds frequently conveying the lands named only to the original purchasers, his children and their relatives.
>
> The Titles so obtained were in all cases wholly distinct from a Crown Title in a British Country; the lands purchased were, I believe, in no instance surveyed, the seller produced no Title deeds, and in no way proved that he was the real owner of the property.
>
> No person protected the rights of minors or absentees. The purchaser had no guarantee that he would be supported in possession of the property, and in the vast majority of the cases, the purchases or pretended purchases so made were mere speculative bargains, and even in the best cases for the purchaser, the title could not I think be regarded as more than simply an adoption into the tribe, and a right of holding the land upon the same terms as the Natives themselves hold lands. Clearly a barbarous people in their condition, could have no notion of a tenure of land, other than that recognized in the Country.
>
> The contracting parties to these bargains were also but imperfectly acquainted with their respective languages, and the Natives possessed that reckless desire of immediately acquiring European Goods, with that perfect disregard for the future which is common to all barbarous minds.[794]

Grey then turned to the matter of the Crown's responsibilities, arguing that it had 'stepped in between two classes of its subjects to interfere arbitrarily for the settlement of certain questions'. The law establishing the commission had set out 'various requirements . . . which were to be fulfilled before a grant could be issued . . . intended in a great degree to prevent the Crown from unjustly, or without due consideration, taking the Natives' property from them, and giving it to an European'. Yet in his view, those safeguards had been overturned when FitzRoy had expanded the grants. A finding by the commission that a purchase was bona fide only meant that the transaction had not been fraudulent, and in no instance had it recommended a grant for more than 2,560 acres.[795] (Grey was wrong in that assertion, but recommendations by the first commission exceeding the statutory limit were rare.)

Grey referred again to Godfrey's 1844 letter in which the commissioner had acknowledged that his recommendations reflected the existence of unextinguished interests; and that he 'frequently regulated the amount of the grants he had recommended, by the quantity of land, which making fair allowance for the claims of opposing native rights, it had appeared probable to him that the Native Sellers were free to dispose of'. He had warned the Government that its 'proposed course could not be pursued without great injustice to the Natives; as the tracts of land

794. Grey to Earl Grey, 17 October 1848 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 196–197).

795. Grey to Earl Grey, 17 October 1848 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 197).

claimed were also extremely extensive, had never been surveyed, [and] were only defined by imaginary boundaries'. In nearly all instances, these were 'wholly unknown to the Commissioners'. Grey drew the obvious conclusion: it was 'clearly impossible therefore that they could ascertain whether or not a valid purchase had been made of such tracts'. Nor did they 'pretend to have done so'.[796] We agree with Phillipson that this was a 'damning indictment of the Crown's handling of the pre-Treaty transactions, and a recognition that something must be done to avert injustice to Maori'.[797]

Another despatch followed, in November 1848, prompted by a threat of conflict in the Bay of Islands arising from the opposition of Hōne Heke and William Hau to a proposed expansion of settlement to the northern side of the bay, and from incidents of wāhi tapu being violated. Grey concluded that the Crown had not acquired the kind of interest in the land that would allow it to grant it, and was critical of the inclusion of cultivations, kāinga, and wāhi tapu in lands granted to settlers (in this case, Busby) as contrary to Crown policy. Grey considered the situation unjust to Māori, but he had no immediate solution and ended up doing nothing other than use it as ammunition in his attack on FitzRoy.

Grey told the Colonial Office that these incidents lent weight to fears of conflict emerging as settlement progressed. He reiterated Godfrey's views, arguing again that Māori had not intended to alienate their wāhi tapu and pā, and that the commissioners had known this. Had surveys been carried out at the time, the wish of Māori to retain such areas would have been made apparent. An appeal against the Supreme Court's ruling was therefore urgent as 'an Act of Justice to the Native Race'.[798] He suggested that, had the missionaries voluntarily surrendered their grants, he could have 'arranged with the natives for the occupation of the rest of their lands by Europeans', albeit this would have required a purchase by the Crown. In his view, the Crown had made absolute grants of land which 'in no respect belonged' to it, and nor did the Crown have any claim to any 'surplus' from these transactions.[799]

In July 1849, Grey brought another case to the Supreme Court. The process of grant he challenged this time appeared to be even more defective than that pursued in the case of Clarke. James Beattie's claim for Kawau Island had been disallowed by the first commission because the arrangement had taken place after the 1840 proclamation, but FitzRoy overturned that decision in 1844, initially making a grant for 2,560 acres and then increasing the area to encompass the whole island (4,630 acres), awarding it to John Taylor, who had bought Beattie's interests.[800] The Supreme Court refused to overturn a Crown grant issued by the Governor, even

796. Grey to Earl Grey, 17 October 1848 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 198).

797. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 199.

798. Grey to Earl Grey, 3 November 1848 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 200).

799. See Grey to Earl Grey, 10 February 1849, BPP, vol 6 [1120], pp 73–74.

800. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 633; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 200.

though (Grey objected) 'it conveyed nearly double the quantity of land . . . it had been ascertained the grantee was entitled to' and 'greatly exceeded the quantity . . . prescribed by the Ordinance'.[801] Protesting that the court's decision left the majority of grants in an uncertain state, and urging the importance of a 'speedy general and conclusive settlement of the whole question', Grey decided to legislate rather than appeal the finding.[802] He did so despite the seemingly 'insuperable difficulties to be overcome', the first of which he had characterised in his October despatch to Earl Grey as 'taking land from one class of the Queen's subjects to give to another'. That was from Māori to settlers, but there were third-party interests to consider as well – settlers who had purchased original grants or portions of them.[803] The result of this attempt to locate and define the grants that had been issued, while taking account of competing rights, was the Ordinance for Quieting Titles to Land in the Province of New Ulster (Crown Titles Ordinance) 1849.

6.5.2.3.2 What was the effect of the Crown Quieting Titles Ordinance 1849 and did it assist Māori?

Grey's ordinance declared all grants approved on behalf of the Crown in the North Island to be valid, thereby putting an end to doubts about the legality (under English law) of FitzRoy's expanded and unsurveyed grants (and indeed, to any lingering doubts about other grants issued under the ordinance and as a result of FitzRoy's waiver exemption proclamations).[804]

Introducing his measure to the Legislative Council in August 1849, Grey stated that many grants had been issued that had not been made 'in conformity with the laws and regulations' in force at the time; and the 'greater number' of such instances involved grants issued under the Land Claims Ordinance. Grey had failed in his effort to bring finality to purchases under FitzRoy's waiver exemption policy (see section 6.6), and these needed 'quieting' too. They came under his proposed legislation, but he said nothing of these claims.

Grey told the Council that the 'great majority' of grants were 'irregular in a variety of ways', and the resulting 'uncertainty' of title was a serious detriment to the interests of New Ulster. Among those irregularities was the issue of grants in which native title had not been fully extinguished and likely to result in 'mischief' to settlers or 'injustice' to Māori.[805]

The recent decisions of the Supreme Court in *Queen v Clarke* (June 1848) and *Queen v Taylor* (July 1849) had upheld the legality of FitzRoy's two grants; yet, in Grey's opinion, there remained many points unresolved which made such grants practically valueless if not 'void from uncertainty'. Given the difficulty of the local government declaring such grants illegal in the absence of judicial opinion in support, and the delay entailed in obtaining an Act of the British Parliament

801. Grey to Earl Grey, 24 July 1849, BPP, vol 6, [1280], p 1.
802. Grey to Earl Grey, 24 July 1849, BPP, vol 6 [1280], p 1.
803. Grey to Earl Grey, 24 July 1849, BPP, vol 6 [1280], p 1.
804. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 639–640; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 200–201.
805. Governor Grey's opening address, 15 August 1849, BPP, vol 6 [1280], pp 28–29.

or pursuing a challenge through the Privy Council, Grey had decided instead to declare all grants made by Her Majesty's representative under the public Seal of the Colony as valid. He told the Legislative Council that he proposed this course of action in the interests of a 'speedy, general, and conclusive removal of . . . doubts', but that he did so without expressing his opinion upon the court's decisions in case it proved necessary to appeal them at a future date.[806]

Governor Grey acknowledged to Earl Grey that his measure did not, and could not, do justice to Māori.[807] Rather, his intention was to 'affirm the validity of the Crown grants which had been issued to Europeans while 'inflict[ing] the least possible amount of injustice on the native'.[808] A basic legal protection was offered. Māori could challenge the commission's decisions and FitzRoy's subsequent extensions in the Supreme Court on the basis that their customary title had not been extinguished. In such cases, a judge could order the payment of compensation or, if Māori refused to leave their lands, the Crown could offer the settler land of equivalent value elsewhere. But Grey admitted that Māori could have little confidence in the courts on such a sensitive subject as customary title.[809] The ordinance also offered limited advance on the question of reserves; these could be set aside within settler claims, but only if the reserves were already mentioned in the deed and subsequent grant. In those cases, a commissioner would be appointed to inquire into the matter and ensure that such reserves were properly defined. There was still no requirement for settlers to undertake surveys; in effect, they could enjoy all the benefits of a freehold property while Māori-occupied sites remained undefined and vulnerable.[810]

Phillipson's opinion was that '[o]n paper' the ordinance appeared to offer some prospect of Māori and settlers arriving at settlements that protected customary rights, but only if Māori could raise the funds to go to court and then were fortunate enough to have their case heard by a judge with the requisite 'ability, knowledge, and cultural empathy'. Ultimately, in Phillipson's view, the ordinance 'achieved nothing', at least for Māori.[811] Stirling and Towers agreed that the Quieting Titles Ordinance 'appeared to be a reasonable solution' but also concluded that it had little impact in terms of Māori interests.[812]

The Crown is incorrect in its statement that the ordinance restricted the 'land conveyed in FitzRoy's unsurveyed grants . . . to 1/6 of the land described in the grant'.[813] Rather, the ordinance specified that the quantity of land to be conveyed by grant (when surveyed) was not to 'exceed *by more* than one-sixth part thereof

806. Governor Grey's opening address, 15 August 1849, BPP, vol 6 [1280], pp 29–30.
807. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 201.
808. See Grey to Earl Grey, 3 October 1849, BPP, vol 6, p 67 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 198).
809. See Grey to Earl Grey, 17 October 1848 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 198).
810. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 640–641.
811. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 201, 202.
812. See Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 641.
813. Crown memorandum (#3.2.2682), p 4.

An Ordinance for Quieting Titles to Land in the Province of New Ulster, 1849

Preamble

Whereas since the Proclamation of Her Majesty's sovereignty in and over the Islands of New Zealand various Laws Ordinances Royal Letters Patent and Instructions have from time to time been in force relating to the disposal by the Crown of lands within the Colony, prescribing the terms and conditions on which such lands should be alienated and disposed of, and limiting and appointing the power and authority of the Governor for the time being to make grants of the same in the name and on behalf of the Crown: And whereas during such period . . . numerous grants of land within the Province of New Ulster have been made, in the name and on behalf of Her Majesty . . . And whereas in many cases doubts are entertained whether such Governor or other officer was duly authorised and empowered to make such grants . . . on behalf of the Crown, and whether such grants were otherwise made in conformity with the regulations . . . And whereas numerous grants of land claimed under the provisions of the Land Claims Ordinance . . . have also been made, wherein the land of which the grantee is recited to be entitled to a grant forms a part only of the whole quantity claimed to have been purchased by him from the aboriginal native owners . . . And whereas certain cases have already been submitted to the judgement of the Supreme Court, and it is essential to the prosperity of the colony that such doubts should in all cases be removed with the least possible delay: Now, therefore, for the more speedy removal of such doubts, and for the effectual quieting of Crown titles:

Be it Enacted and Declared . . .

1. Every grant of land within the Province of New Ulster sealed . . . on the behalf of the Crown . . . shall be deemed and taken to be a good, valid, and effectual conveyance of the land purported to be conveyed by such grant . . . Provided always that in case the land comprised in any such grant shall not be set forth and described by definite metes and bounds, the quantity of land deemed to be conveyed by such grant shall not exceed by more than one-sixth part thereof the quantity of land to which the grantee shall be therein recited to be entitled.

2. Provided . . . that if it shall be proved to the satisfaction of a Judge of the Supreme Court that the native title to the land . . . hath not been fully extinguished, it shall be lawful for any such Judge to award to the native claimant or claimants proving title to the same, such sum or sums of money in satisfaction of the claim . . . as shall appear to such Judge to stand with equity and good conscience . . . provided that proceedings before such Judge shall be commenced on or before the 1st day of January, 1853.

. . . . .

4. Every sum of money so paid shall be chargeable and charged upon the land in respect of which the same shall have been awarded . . .

5. . . . every such grant . . . shall . . . confer upon the said grantee, his heirs and assigns, the right of selecting out of the whole of the land included within the boundaries named in the grant the quantity of land to which he may be so recited to be entitled

. . . . .

9. . . . in case the person or persons entitled to such right of selection shall meet with any serious obstruction . . . from any native claimant, it shall be lawful for the Governor, or other the officer . . . on being satisfied that it would be expedient so to do, to grant to the persons entitled to such right of selection other land within the province of equal value

. . . . .

12. And whereas in certain of the said Crown grants an exception is made from the land comprised therein of 'sacred places,' or land claimed by a certain native or natives therein mentioned, but the particular piece or parcel of land so excepted is not particularly set forth and described: Be it enacted that it shall be lawful for the Governor . . . to ascertain, by means of an inquiry to be made in that behalf by a Commissioner to be appointed for that purpose, the particular piece or parcel of land so excepted . . . and at the request of the grantee named in any such grant . . . to cause a description of such piece . . . to be endorsed upon such grant. And every such description shall be deemed and taken to define the land so excepted from such grant as aforesaid

1849, 13 Victoriae / No 4

the quantity of land'(emphasis added) to which the grantee was entitled.[814] This was an incentive for settlers to survey the grants, not an effort to limit the impact on Māori.[815] Ultimately, the full awards recommended by the first commission and the expansions of FitzRoy were endorsed and increased (as an incentive to survey), and the Crown got to keep any surplus, which in Clarke's case, amounted to 1,914 acres.[816]

814. Crown Quieting Titles Ordinance 1849, cl 1.
815. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 640.
816. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 692.

According to Stirling and Towers, only 20 claimants throughout the whole of New Ulster had utilised the Quieting Titles Ordinance by the time the Land Settlement Act 1856 was passed, bringing in a new process for confirming the grants.[817] Berghan's block narratives identified three occasions on which the ordinance was employed by Pākehā claimants to clarify the boundaries of their grants:

- OLC 453: by Sparke at Mahurangi, concerning the 3,334 acres awarded to him as a result of FitzRoy's intervention;[818]
- OLC 526: by Williams at Pakaraka, in which his grant was 'corrected', discussed at sections 6.7 and 6.8; and
- OLC 728: by Carruth at Whāngārei, resulting in an adjustment from 950 acres awarded to 938 acres on survey in 1851.[819]

Only one instance has been identified of the Commissioner for Quieting Titles performing his duties with respect to the definition of reserves (in the case of Mair's grant at Whāngārei, OLC 307, discussed at section 6.7.2.3); and here the commissioner failed to locate and survey the reserves mentioned in the deed, with the result that Mair got his grant without any being defined.[820]

No example has been found of Māori themselves bringing a case under the ordinance, which can have hardly surprised Grey who had suggested that Māori were 'too poor to contest their rights in a Court of Law'; had 'no knowledge that they possess[ed] such rights, against the Crown, nor of the steps by which they would enforce them'; and likely had no confidence in an institution that lacked the expertise on such a subject.[821] Māori contemplated using the ordinance to contest a grant to Abercrombie, Nagle, and Webster for Aotea (Great Barrier Island, OLC 36), but despite Grey's support, their efforts to gain compensation via that means came to nothing. On the contrary, the main beneficiary of the old land claims process in respect of Aotea was the Crown itself, as we outline later.

Webster, Nagle, and Abercrombie had claimed the whole of Aotea through a deed signed in March 1838 by 17 Hauraki rangatira and two from Ngāti Wai. The first Land Claims Commission found that most of these rangatira had rights only on the northern part of the island (from a line north of 'Akatarere', Hirakimata (Mount Hobson), and the Whangapoua Stream). The only rangatira with rights south of this had received insufficient payment and did not accept the transaction. The deed also reserved 'Pukeroa' and all Māori settlements and cultivations. Godfrey recommended that no grant be issued, on grounds that the payment was incomplete, Māori were opposed, and Webster had already been granted his 2,560

817. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 649.

818. Taylor was awarded 1,666 acres as his share of the transaction but on-sold. Bell eventually awarded the new 'owner' 2,235 acres. See Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 291.

819. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1524–1528; Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 460. Berghan comments that there are no details on the claim record as to the circumstances of this decrease.

820. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 641.

821. Grey to Earl Grey, 17 October 1848 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 198).

acres elsewhere.[822] FitzRoy reversed this decision, as in his view it was 'a case of extreme hardship', and 'great benefit would accrue to the colony' if the settlers were able to take up their claim, particularly if they were able to achieve their goal of operating a copper mine on the island. He therefore resolved to treat this as 'a special case'.[823]

Having referred the claim to the Executive Council and Commissioner FitzGerald, FitzRoy awarded each of the claimants unsurveyed grants exceeding 8,000 acres, for a total award of 24,269 acres, about one-third of the island's land area, including the copper and the island's best kauri resources.[824] This seems to have been decided over FitzGerald's objection that there was insufficient information for him to recommend a grant, and that, based on the payments they had made, the three men were entitled to a total of just 8,611 acres.[825] The grants did not make any exclusions for settlements and cultivations.[826] The land was subsequently mortgaged, and when the mortgagee attempted a survey in 1850, the Māori occupants – led by Tara and Tāmati Waka Rewa – objected. The mortgagees protested that they had advanced large sums on the security of Crown grants, 'a part of which land it now appear[ed] . . . to be disputed; in fact, . . . it never had been alienated'.[827] Tāmati Waka Rewa (of Hauraki) in turn complained that the payment was incomplete.[828] Grey enclosed this correspondence plus (again) Godfrey's 1844 criticism of FitzRoy's policy with his despatch to the Colonial Office, drawing Earl Grey's attention to the case 'as one which fairly illustrates the difficulties experienced in the adjustment of these claims'. He informed the Secretary of State that the only course available was to refer the claimants to the Supreme Court under the Quieting Titles Ordinance.[829]

Tāmati Waka Rewa was advised to come to Auckland to discuss the matter with Crown officials, but without result. A year after the matter was first raised, the Acting Native Secretary, Major Nugent, was instructed to send Rewa to the Native Counsel (Donnelly), who had been appointed to assist Māori in the Supreme Court. Donnelly was informed that Rewa was 'naturally anxious' that 'his present visit should not be nugatory' and was directed to 'instruct him in the proper method of preferring his claim'.[830] Apparently, nothing concrete happened, because

822. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 643; Paul Monin, 'The Islands lying between Slipper Island in the South-East, Great Barrier Island in the North and Tiritiri-Matangi in the North-West' (commissioned research report, Wellington: Waitangi Tribunal, 1996) (Wai 406, doc C7), p 34.

823. Monin, 'The Islands lying between' (Wai 406, doc C7), p 34).

824. Monin, 'The Islands lying between' (Wai 406, doc C7), p 34.

825. Grey to Earl Grey, 18 July 1850, BPP, vol 7 [1420], p 26.

826. Monin 'The Islands lying between' (Wai 406, doc C7), p 34.

827. Grahame to Colonial Secretary, 1 July 1850 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 643–644).

828. Tamati Waka [Rewa] to Native Secretary, no date (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 644–645).

829. Grey to Earl Grey, 18 July 1850, BPP, vol 7 [1420], p 27.

830. Nugent to Donnelly, 8 July 1851 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 645).

Rewa was to visit a third time. Acting Attorney-General, Thomas Outhwaite, now recommended that the chiefs negotiate directly with the mortgagees for compensation in order to avoid the cost of litigation, Nugent noting that he had not himself suggested such a course 'as by doing so, I might be suggesting a breach of the Native Land Purchase Ordinance'.[831] Rewa's third visit, at the Governor's invitation, was equally unproductive. Nugent recorded that 'nothing has yet been done towards the settlement of his claim'. He instructed Donnelly to 'forthwith take steps in accordance with His Excellency's command to have the matter brought before the Chief Justice in the way pointed out by the Quieting Titles to land, in New Ulster'.[832]

It is not clear whether any further steps were taken, but it is apparent the grievances of Tāmati Waka Rewa, Tara, and their hapū were not addressed. As we describe in chapter 8, by the 1850s practically the entire island would be alienated from Māori ownership through a combination of validated pre-emption waiver transactions and Crown purchasing. The 1849 ordinance was not fit for purpose. Māori were entitled to compensation at best, not the return of land, except in extreme cases. Nor had the reserves recommended by the commissioner been noted in the grants that were ultimately issued, so the special commissioner had no role. In the end, Māori had been advised by the Crown's own officer to avoid the court and ultimately, Grey seems to have dropped the matter.[833]

Phillipson, and Stirling and Towers (in our inquiry), and Armstrong (in the Muriwhenua inquiry) all agreed that Grey's attempted solution had achieved nothing, despite the Governor's acknowledgement of the significant flaws in the old land claims process. They concluded that the ordinance failed because it was permissive rather than compulsory. There was no penalty for failing to survey by a given date and no real incentive for grantees to do so. The inducement in the ordinance – land equivalent to one-sixth of the grant – was not sufficiently attractive since using it would also carry risks. Potentially, grantees would be exposed to inquiry as to whether Māori title had been fully extinguished, and they would lose the surplus land to the Crown in any case.[834]

Therefore, almost no one came forward to quieten their titles, preferring to keep their old grants which had now been declared valid, and exercise, instead, what Stirling and Towers referred to as a kind of 'roving right' over the larger undefined area. Other Europeans were prevented from taking timber and resources in the meantime, and entrepreneurs such as William White in the Hokianga, and Mair's successors – Brown and Campbell – at Manaia, used their undefined grants to profitable effect.[835]

831. Nugent memorandum, 21 August 1851 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 646).

832. Nugent to Donnelly, 24 October 1851 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 646).

833. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 646–647.

834. See Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 202; Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 647–648.

835. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 647–648.

The ineffectiveness of Grey's solution stands in stark contrast to his many statements on the failure of the Crown to protect Māori rights. It protected settler rights and was designed to bring order to colonial land titles – an object of importance to the Crown – rather than providing Māori with a path to protection of their ownership.

In 1851, Earl Grey referred the decision of *Queen v Clarke* to the Privy Council, where the case was determined on narrow legal points rather than the more fundamental issues about the transactions and whether Māori had intended an absolute alienation, as Grey had proposed. Nor did the law lords directly address the question of the Royal prerogative and its limits.[836] Nevertheless, they overturned the earlier decision, agreeing with Grey that Clarke's grant was invalid. They found that the grant had not been made as a 'matter of bounty or grace, from the Crown', but rather was intended only to confirm the commission's report and recommendation under the Land Claims Ordinance. FitzRoy's extended grant was 'clearly contrary' to the terms of the ordinance and therefore, 'the grant must fall'.[837] By this stage, Grey had enacted the Quieting Titles Ordinance, pre-empting the Privy Council's decision.

Though Clarke's grant had been deemed inoperative, his claim still remained and would proceed through the Bell commission. Stirling and Towers argued:

> Once he [Clarke] surrendered his overturned grant (just as other claimants surrendered grants deemed to not hold good) and surveyed his claim, he received even more land than before. Hundreds of other claimants were treated with similar generosity. Maori received next to nothing.[838]

We return to these allegations later in the chapter.

6.5.3 Conclusions and treaty findings: the old land claim policies of FitzRoy and Grey

The Crown accepts that the decision of Governor FitzRoy 'to proceed with unsurveyed grants [of land] was wrong and caused prejudice to Māori'.[839] We consider this an important concession. However, Crown counsel also argued that any prejudice that arose only occurred in the late 1850s and 1860s because Māori continued to occupy their lands in the interim. We reject that view, because we consider the prejudice was more far-reaching than the loss of land; Māori also lost the opportunity to ensure that their view of these transactions and the obligations they entailed was embedded in law.

Although Māori might continue to utilise the lands they had thought to share, as far as introduced law was concerned, they now did so on sufferance of the

836. See Mark Hickford, 'Settling some very Important Principles of Colonial Law: Three 'Forgotten' Cases of the 1840s', *Victoria University of Wellington Law Review*, vol 35, no 1 (2004), p 25.
837. Heinrich Ferdinand von Haast, ed, *New Zealand Privy Council Cases, 1840–1932* (Wellington: Butterworths, 1938), p 520.
838. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 639.
839. Crown closing submissions (#3.3.412), p 54.

Pākehā owner unless a reserve was specifically mentioned in the deed and the recommended award and ensuing Crown grant. As we have seen, this was rarely the case, because often such arrangements had been orally agreed and not recorded in the commissioners' recommendations. While the commissioners were aware of ongoing Māori occupation, they relied on the Governor to ensure that every Crown grant contained a general exception for pā, kāinga, and cultivations. That general protection did not materialise, and in terms of colonial law, Māori had been dispossessed of those areas, along with the rest of the lands they had allocated to settlers.

FitzRoy's decision to increase and issue grants before they were surveyed therefore compounded the damage to Māori rights already caused by the commissioners' practice of validating transactions they knew to be incomplete. His policy established a basis for settlers to proceed to complete their purchases over the years that followed. It was soon clear to them that the Crown would not intervene to protect remaining Māori interests, and that they could 'by degrees' remove any such impediments to the full enjoyment of their freehold title. Even when exceptions had been stated within the grant, they were now vulnerable to private arrangement – such as in 1844, when Polack was able to 'complete the purchase' of the tapu land in his Kororāreka claim (OLC 638) on payment of a 'present' to the chiefs who had undertaken the original transaction.[840] FitzRoy saw no problem with this way of proceeding, despite the clear instructions of Normanby and his successors that all areas of occupation, cultivation, and wāhi tapu should be preserved in Māori possession. Accordingly, FitzRoy informed the Colonial Secretary that he had no objection to settlers 'purchasing of the "tapu"',[841] and the Surveyor-General confirmed that lands acquired in such a manner could transfer to the settlers concerned so long as Māori agreed.[842]

In all, FitzRoy's policies aimed at addressing delay and confusion in the granting of titles only produced more of both. More importantly for our purposes, his policies failed to protect Māori and instead denied them their rights. FitzRoy knew and acknowledged that Māori had not intended their rights to be extinguished, yet he proceeded on the basis that they would inevitably accept this to be the case, and that in the meantime their rights deserved no more than the informal recognition that settlers might be prepared to give. We agree with Phillipson's assessment that FitzRoy's policy was 'remarkably cynical'. Despite urgings by others that Māori should be protected in possession of their lands, and although protection was a cornerstone of the treaty and British policy, the Governor 'did the opposite'.[843]

FitzRoy went ahead with his expanded and unsurveyed grants (and at least one that was unlawful) despite commissioners' warnings that Māori had not alienated

840. Polack to Colonial Secretary, 5 January 1844 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 183).

841. FitzRoy to Sinclair, 13 January 1844 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 183).

842. Ligar report on Mr Polack's claim, 28 June 1849 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 184); see also Berghan, supporting papers (doc A39(m)), vol 14, p 8117.

843. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 190.

their kāinga and other valued sites, despite warnings that Māori would be 'displaced' unless the Crown provided some protection, and despite information that in some cases the settlers had not even completed a valid transaction. Even though the grants FitzRoy made came under legal challenge and were not surveyed for many years, his policy ultimately separated hapū from lands they had intended to share with settlers, not sell entirely. When FitzRoy's grants were later endorsed by the Bell commission, Māori found their informal arrangements abrogated, and lands not explicitly reserved to them were transferred out of their hands. The long delay between FitzRoy awarding the grants and the Crown or settlers surveying the land was not to their advantage. Instead, as we will see in a later discussion, a new generation found themselves having to defend any hapū rights that remained, within a legal framework that had been unknown to their parents and grandparents when the original transaction had taken place. Exacerbating the prejudice, Crown officials invariably discounted their efforts on the grounds that they had been mere children at that time and could not now repudiate a sale undertaken by their forefathers.

Furthermore, FitzRoy had exceeded his powers, although this thorny constitutional issue took many years for the courts to decide. The conferral on the Governor of Crown prerogative powers was limited by the Charter of 1840 and the Royal Instructions; and the Charter explicitly withheld the power to affect Māori rights of occupation and succession to land. The Privy Council overturned the Supreme Court decision in *The Queen v Clarke*, finding that the prerogative 'could not be resorted to in cases where the grant in issue was based on the report of a Commissioner made under the Land Claims Ordinance'.[844] There was some ambiguity in the Privy Council decision which did not explicitly address the larger issue of whether the Crown could expand grants as an 'act of grace', but in the words of the Supreme Court in the more recent *Wakatu* decision, there was 'no scope for an expansive view of a power to make grants under the prerogative'.[845]

At a crucial time for the development of the treaty relationship, the courts (colonial and imperial) remained preoccupied with Grey's sustained efforts to discredit the policies of Governor FitzRoy and the purchases of the missionaries, while Maori interests in the midst of all this were entirely overlooked. Grey's Quieting Titles Ordinance was a 'dead letter'. Despite his repeated identification of the significant injustice to Māori that had been caused by the Crown's handling of pre-1840 land transactions, and the need for a 'speedy general and conclusive settlement' of the issue, he took no steps to strengthen the Quieting Ordinance when it was shown to be of very limited assistance to Māori, or to introduce another more effective measure before his departure in 1853.[846]

844. *R v Clarke* [1851] NZPC 1.

845. *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17 [298].

846. Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 40; W H Oliver, 'The Crown and Muriwhenua Lands: An Overview' (commissioned research report, Wellington: Crown Forestry Rental Trust, 1994) (Wai 45, doc L7), p 15; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 200, 202–203.

Both FitzRoy and Grey knew that Māori interests remained unextinguished in lands over which grants had been issued; both realised that the failure to define the boundaries of those grants and any reserves they might contain left the whole matter in an uncertain state. But neither Governor had a solution that did not entail the sacrifice of Māori rights so as not to interfere with private settler interests. Grey was well aware that Māori did not fully appreciate what their transactions would mean in the long run and did not have any real means of achieving redress except by force; he frequently expressed criticism of the extension of awards and made repeated reference to Commissioner Godfrey's objections to that policy; and he denounced the failure to protect Māori in their kāinga, cultivations, and wāhi tapu – and yet nothing substantive happened during his watch. The wāhi tapu about which he had seemed so concerned were not protected; there would be no more reserves defined on survey beyond those specifically recorded in the original deed; extended grants were not finalised but neither were they effectively overturned. In the end, missionaries and several prominent settlers would retain the full extent of the properties that had been allowed by FitzRoy's extensions. Phillipson summarised, in our view correctly, that: 'An important opportunity for justice had been missed, and Nga Puhi suffered the consequences.'[847]

Accordingly, we find that:

- the Crown through Governor FitzRoy's actions in expanding grants beyond commissioners' initial recommendations, issuing grants where the commissioners had recommended none, and issuing unsurveyed grants for the benefit of settlers breached te mātāpono o te tino rangatiratanga and te mātāpono o mana taurite me te mātāpono o te matapopore moroki/the principles of equity and of active protection.
- despite acknowledging the injustice to Māori on the one hand and the Crown's duty to support their rights on the other, Governor Grey failed to do anything effective to ensure that those rights were protected. The Crown Titles Quieting Ordinance 1849 aimed to remove uncertainty about settlers' title in Crown granted lands, but provided inadequate protections for enduring Māori customary interests. By enacting the ordinance, the Crown was therefore in breach of te mātāpono o mana taurite me te mātāpono o te matapopore moroki/the principles of equity and of active protection.
- Grey offered little more to Māori in terms of ensuring occupied sites and wāhi tapu were reserved in grants to settlers despite his clear acknowledgement of the Crown's duty in this regard. That failure was in breach of te mātāpono o te matapopore moroki/the principle of active protection.

847. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 203.

6.6 Was the Crown's Pre-Emption Waiver Policy in Breach of the Treaty?

6.6.1 Introduction

In chapter 4, we discussed the basis of the Crown's pre-emptive right – that is, to be the only purchaser of Māori land – and FitzRoy's decision to waive that right in 1844. In taking this step, FitzRoy issued two proclamations. In his 26 March proclamation, the Governor stated that he would 'consent, on behalf of Her Majesty the Queen, to waive the right of pre-emption over certain limited portions of land in New Zealand'. A number of safeguards were put in place for Māori. A waiver would not be issued for pā, urupā, or as a general rule, 'any land required by Maori for their present use'. There was provision for 'tenths' to be set aside and held by the Crown 'for public purposes, especially the future benefit of the aborigines'. The Governor was required to consult with the Chief Protector of Aborigines before agreeing to waive pre-emption in any instance. Lands had to be surveyed. No grants were to be issued if regulations had not been observed.[848] If a grant was confirmed by the Crown, the settler concerned would be required to pay a fee of 10 shillings per acre as their contribution to the land fund and for general government purposes. The proclamation of 10 October 1844 reduced that fee to one penny per acre.

FitzRoy also tried, a few months later, to limit the total acreage to be purchased under a waiver. Prompted in part by the large areas being claimed in the vicinity of Auckland once the per-acre fee had been reduced, he issued a notice (6 December 1844) declaring that 'certain limited portions' meant a 'few hundred acres'.[849]

At first, 'purchases' under waiver certificates were dealt with under separate legislation and different procedures from those for pre-treaty transactions, although there were similarities between the two systems. After 1849 and the passing of the Quieting Titles Ordinance and subsequent legislation, the Crown's handling of purchases that had been made under FitzRoy's two proclamations was brought into line with its procedures for validation of pre-treaty transactions.

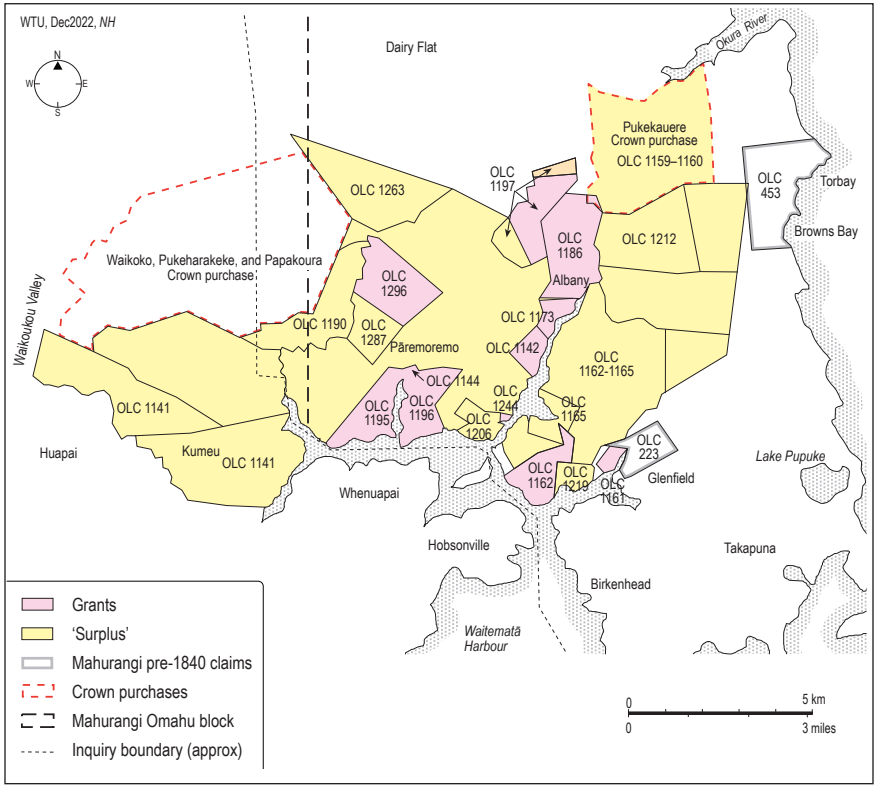
Claimants alleged that the Crown failed to fulfil the obligations that came with pre-emption. In the claimants' view, the potential benefits of FitzRoy's policy were negated by the failure to fully and consistently apply regulations intended to protect Māori – including reservation of pā, urupā, and cultivations; the setting aside of 'tenths' for public purposes, in particular to support Māori; and limitations on the area that could be purchased to a 'few hundred acres'.[850] Even though conditions intended to protect Māori had not been met, waiver transactions were nonetheless confirmed.[851] This resulted in a substantial loss of land and resources.

848. FitzRoy, proclamation, 26 March 1844, BPP, vol 4, p 202; proclamation, 10 October 1844, BPP, vol 4, pp 401–402; Rose Daamen, *The Crown's Right of Pre-emption and FitzRoy's Waiver Purchases*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1998), pp 73, 84.

849. Select committee report on outstanding land claims, 16 July 1856, BPP, vol 11, p 593.

850. Claimant closing submissions (#3.3.208(a)), pp 17–19.

851. Claimant closing submissions (#3.3.208(a), p 19.



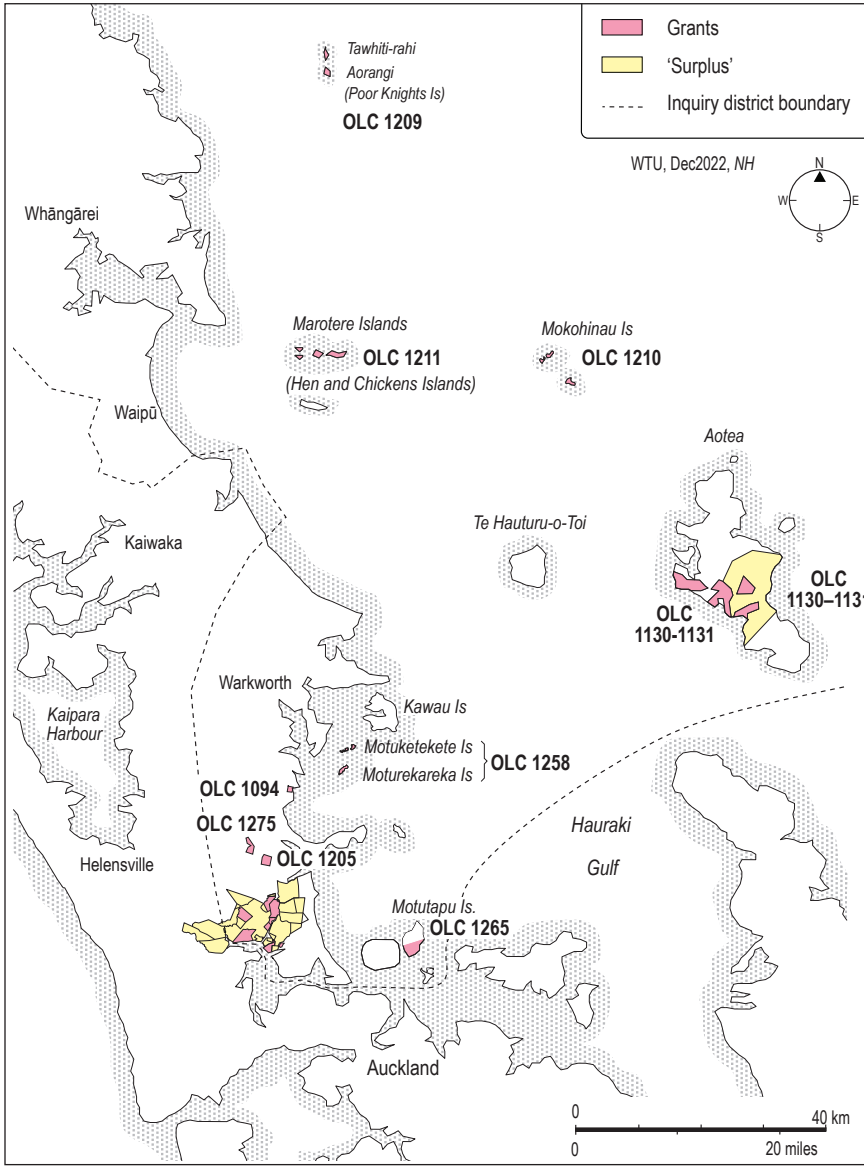
Map 6.4: Pre-emption waiver claims and 'surplus' land

In total, claimants say 24,149.87 acres transferred out of the hands of Te Raki Māori under this policy.[852] Particularly affected were hapū with rights in Mahurangi and the gulf islands where the waiver proclamations gave settlers the 'opportunity to formalise their illicit arrangements to their advantage' and, in some cases, acquire land through a range of 'dubious tactics'.[853] Hapū who submitted that their interests and lands had been adversely affected by the implementation of one or both of the pre-emption waiver proclamations include Ngāti Rehua/Ngātiwai ki Aotea, Ngāti Manu, and Ngāti Rongo.[854]

852. Barry Rigby, 'Pre-1865 Te Raki Crown purchase validation report' (commissioned research report, Wellington: Waitangi Tribunal, 2015) (doc A53), p 11 (cited inclaimant closing submissions (#3.3.208(a)), p 16).

853. Claimant closing submissions (#3.3.208(a)), p 19.

854. Closing submissions for Wai 678#3.3.248(a); closing submissions for Wai 354 and Wai 1535 (#3.3.392); closing submissions for Wai 354 and others (#3.3.399). See Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1860–1863, for a listing of the rangatira who were vendors of land in Mahurangi over which pre-emption waivers were secured.



Map 6.5: Pre-emption waiver claims and 'surplus' land

The significance of the Supreme Court decision in *Proprietors of Wakatu v Attorney-General* and its application to old land claims and pre-emption waiver purchases was an important aspect of the generic closing submissions concerning these issues. Claimant counsel acknowledged the clear differences between the *Wakatu* case and the situation in the Te Raki inquiry district as to scale of

land alienation and specific promises made, but submitted that the finding of the court had application in two respects: that the Crown had a fiduciary duty deriving from its right of pre-emption and that this applied to the setting aside of reserves. Counsel argued that the failure of the Crown to identify and protect occupied lands subject to old land claims in Te Raki was 'a breach of the fiduciary duty that arose from the Crown monopoly on land.'[855] With reference to pre-emption waivers and the promise to set aside reserves, claimant counsel also argued that 'where lands were transacted under pre-emption waivers in this Inquiry district the Crown had a fiduciary duty to ensure that the tenths were set aside, and maintained for the future benefit of Māori as promised.'[856]

In light of these arguments and the complexity of the Supreme Court decision we sought further submissions from parties on whether *Wakatu* has relevance to issues in our inquiry.[857] A number of the claimant submissions were received in support of the proposition that the decision did indeed have relevance to the historical circumstances of Te Raki.

Several claimant counsel argued that the Tribunal is itself the most appropriate forum to determine whether the *Wakatu* decision is applicable to the Te Raki claims and what, if any, relevance it may have on findings related to breaches of the Treaty. Lyall and Thornton submitted that: 'The *Wakatu* decision is important to Tiriti jurisprudence because it identifies the scope of duty that was imposed on the Crown under the Treaty".[858] This would include fiduciary duties where they are raised as in the instance of protection of Māori lands such as kainga and wāhi tapu, in use at the time that purchases were being validated. A number of claimant groups made submissions that while 'private law fiduciary duties are outside the jurisdiction of the Waitangi Tribunal' the decision in *Wakatu* is useful to determine where a duty may arise in the Treaty claim context and that the decision may assist the Tribunal in its inquiry into whether any alleged breaches can be made out.[859] Our conclusion that Te Raki Māori did not cede sovereignty is not seen as precluding a fiduciary duty as 'in *Wakatu*, cession of sovereignty is not the starting point nor is it a mandatory factor for establishing a fiduciary duty".[860] Counsel emphasised that it is the assumption of responsibility and not cession of sovereignty that gives rise to fiduciary duties in common law.[861]

Other claimants argued that the treaty creates a fiduciary relationship (or something in the nature of a fiduciary relationship) imposing orthodox fiduciary duties

855. Claimant closing submission (#3.3.223), p 38.
856. Claimant closing submissions (#3.3.208), p 40.
857. Memorandum-direction 2.6.255, p 3.
858. Claimant submissions in reply (#3.3.430), p 31.
859. Memorandum of Counsel for Wai 1531, Wai 2005, Wai 2206, Wai 1957, Wai 1477, Wai 2061, Wai 2362, Wai 2382, Wai 1716, Wai 2063, Wai 2377 and Wai 2394 (#3.3.235) pp 8–9; see also claimant closing submissions (#3.3.336) and Claimant closing submissions (#3.3.400) at p 202.
860. Closing submissions for Wai 1531, Wai 2005, Wai 2206, Wai 1957, Wai 1477, Wai 2061, Wai 2362, Wai 2382, Wai 1716, Wai 2063, Wai 2377 and Wai 2394 (#3.3.235), p 5.
861. Memorandum of Counsel for Wai 1531, Wai 2005, Wai 2206, Wai 1957, Wai 1477, Wai 2061, Wai 2362, Wai 2382, Wai 1716, Wai 2063, Wai 2377 and Wai 2394 (#3.3.235) p 7.

(single-minded duty of loyalty, to act in good faith, not to make a profit, avoidance of conflicts of interest, and not to act for own benefit). They cited the *Lands* case and other pre-*Wakatu* decisions to describe these elements as 'well-established'.[862] The general tenor of their submissions was to recognise the Crown's general fiduciary obligation to Māori. Counsel for Ngāti Rahiri ki Waitangi and Ngāpuhi Nui Tonu adopted an 'expansive' approach, arguing that 'a possible implication [of *Wakatu*] is that the fiduciary duty has a general application and could relate to the Crown's conduct with respect to Māori in all matters pursuant to the Treaty'.[863]

Counsel for the Mangakāhia Claims Collective and Te Tai Tokerau District Māori Council submitted that trust or trust-like arrangements can be identified in Te Raki and that:

> The Crown breached enforceable obligations to reserve land in trust for the benefit of the Maori customary owners where the land had been taken under Old Land Claims and a surplus remained after investigation by the Old Land Claims Commission. It is to be noted that in Maori discussing the prospect of commissioners sitting pre 1840 land transactions 'all they agreed to was that there would be a proper investigation and that lands 'unjustly held' would be returned to them The Crown had no right to take that remainder land for itself.[864]

Counsel identified three elements of 'certainty necessary to the creation of a trust' in the context of old land claims in Te Raki. Firstly, the Crown assumed responsibility under the Land Claims Ordinance to ensure any sale was just and equitable.[865] Leaving aside the question of whether the process of inquiry under the Ordinance in fact extinguished customary title creating Crown demesne, counsel submitted that the Crown 'effectively took assignment of the remainder land' ('surplus' lands from old land claims and pre-emption waiver purchases).[866] Secondly, the Crown was obliged to hold that land which it was not itself legally entitled to, in trust for the original Māori owners or at least offer it back to them.[867] It was also argued, on the basis of its right of pre-emption, that the breach arises because the consideration was not equitable and the Crown did not return the land but continued with its alienation.[868] Counsel argued that a resulting trust should arise in the case of old land claims following the intention of the parties.[869] They cited *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* to argue

862. Closing submissions for Wai 320, Wai 736, Wai 1307, Wai 2026, Wai 2476 and Wai 1958 (#3.3.234), pp 10–11; *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641.
863. Closing submissions for Wai 121, Wai 230 and other (#3.3.262), p 31.
864. Memorandum of counsel for Wai 861, Wai 914, Wai 224, and Wai 2071 (#3.3.233), p [2].
865. Memorandum of counsel for Wai 861, Wai 914, Wai 224, and Wai 2071 (#3.3.233), p [3]. We note that on its own, the equitable duties assumed under the Ordinance are in the nature of a political trust only.
866. Memorandum of counsel for Wai 861, Wai 914, Wai 224, and Wai 2071 (#3.3.233), p [3].
867. Memorandum of counsel for Wai 861, Wai 914, Wai 224, and Wai 2071 (#3.3.233, p [4].
868. Memorandum of counsel for Wai 861, Wai 914, Wai 224, and Wai 2071 (#3.233), p [4].
869. Memorandum of counsel for Wai 861, Wai 914, Wai 224, and Wai 2071 (#3.233), p [5].

that an extinguishment of native title 'by less than fair conduct or on less than fair terms' was 'likely to be a breach of the fiduciary duty widely and increasingly recognised as falling on the colonising power'.[870]

The Crown has conceded that its policy of taking surplus land derived from pre-emption waiver transactions breached the treaty and its principles 'when it failed to ensure any assessment of whether affected Māori retained adequate lands for their needs'.[871] This failure was 'compounded by flaws in the way the Crown implemented the policy'.[872] However, the Crown did not accept that the *Wakatu* decision applies in the circumstances of the Te Raki inquiry district, or that the question of whether a trust similarly existed falls within the jurisdiction of the Tribunal. The issue before the Supreme Court in the *Wakatu* proceedings was 'whether the Crown is liable in private law today in respect of legally enforceable equitable duties to the successors of those who sold land to the New Zealand Company prior to the treaty' whereas the Tribunal's jurisdiction is concerned with whether the Crown breached the treaty and its principles in respect of its investigation of pre-Treaty transactions. Crown counsel submitted: 'The Tribunal can find the Crown to be in breach of Treaty principles in this inquiry irrespective of the outcome of the legal issues determined in the Supreme Court's *Wakatu* decision.'[873] In other words, the Crown argued in favour of a restrictive approach to matters that can be cognisable in the Tribunal.

Further, in the Crown's view, 'the case is to be distinguished on certain key facts, notably with regard to the promise of 'tenths' which in the Supreme Court decision was found to give rise to 'certain equitable obligations by virtue of the Crown's part in the legal process', resulting in a very extensive grant to the New Zealand Company. The old land claims in Te Raki were far more numerous, much smaller in scale and did not entail promises of 'tenths' making the two situations 'materially different'.[874] Counsel made no specific comment on the matter of pre-emption waivers and the promise of 'tenths' in that context.

In the following section, we focus on the impact of the Crown's waiver policy in our inquiry district, how the policy was applied, and what steps were taken to ensure that Māori rights were respected and actively protected. We also consider whether the Supreme Court's decision in *Proprietors of Wakatu v Attorney-General* has application to the issues in this inquiry arising from old land claims and pre-emption waiver purchases. We turn first to the question of why FitzRoy introduced and then modified the policy before examining how far settlers and Māori in Te Raki took up either of the options offered by FitzRoy.

870. *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA) at 24; memorandum of counsel for Wai 861, Wai 914, Wai 224, and Wai 2071 (#3.3.233), pp [5]–[6].
871. Crown statement of position and concessions (#1.3.2), p 2.
872. Crown statement of position and concessions (#1.3.2), pp 2, 52.
873. Crown closing submissions (#3.3.412), pp 62–63.
874. Crown closing submissions (3.3.412), p 63.

6.6.2 The Tribunal's analysis

6.6.2.1 *Why did FitzRoy decide to waive the Crown's right of pre-emption in March 1844?*

In chapter 4, we discussed the basis of the Crown's pre-emptive right – that is, to be the only purchaser of Māori land – and FitzRoy's decision to waive that right in 1844. By this point, most settlers in New Zealand resented the Crown's exercise of pre-emption or monopoly of purchase of Māori land. They lobbied against the first New Zealand Land Claims Ordinance and sought to win Māori support for a reversal of Crown policy by telling them that they were being denied their rights as British subjects to deal with their lands as they saw fit. The Hauraki Tribunal has pointed out that by 1844, there was also growing support for direct purchase in official circles. No 'surplus' lands had been yet identified and there were only limited successful Crown purchases for on-sale; nor were there sufficient funds to finance government and further land purchase for colonisation. In fiscal crisis and faced with mounting criticism from both Māori and Pākeha 'allowing direct purchase of Maori land by settlers seemed to offer a way out' (see chapter 4, section 4.3.4.2.2, for our discussion of the Colonial Office instructions to FitzRoy on Crown pre-emption and its waiver).[875]

On the day of his official arrival, FitzRoy was met by delegations of Māori and Pākeha. The assembled Ngāti Whātua and Waikato chiefs addressed the Governor, expressing their 'attachment to the British Government; a respect for British laws and British institutions'; but they complained, too, that they had thought pre-emption meant only that they were to offer the land first to the Queen. Instead the Government was denying them the rights of British subjects that they had been promised at Waitangi.[876] After offering Māori assurances regarding surplus lands (as the *Southern Cross* reported, promising 'most unequivocally and with the utmost sincerity' that they would be returned)[877] FitzRoy told the chiefs that he had been 'instructed to enquire into the working of the system of Pre-emption, which had been originated solely with a view to their benefit, and that, if upon enquiry it was found to be to their disadvantage, it should be discontinued'.[878] He indicated further that 'that their protectors were no longer to purchase any lands from them on account of Government, they would act as their protectors solely'. It might be that the Government would cease purchasing land altogther but it would take time to effect 'so great a change'. In the meantime, it would be of 'immediate and mutual benefit to the Europeans and Natives' if they were permitted to enter into short-term leases of land.[879]

At a public meeting held on the same day, FitzRoy also received an address from 'The Inhabitants of Auckland' complaining about the effects of pre-emption; by denying Māori their right as British subjects to sell land to whomsoever they

875. Waitangi Tribunal, *The Hauraki Report*, vol 1, pp 109–110.
876. 'Levee', *Daily Southern Cross*, 30 December 1843, p 2 .
877. 'Levee', *Daily Southern Cross*, 30 December 1943, p 2 (cited in Waitangu Tribunal, *The Hauraki Report*, vol 1, p 111).
878. 'Levee', *Daily Southern Cross*, 30 December 1843, p 2.
879. 'Levee', *Daily Southern Cross*, 30 December 1843, p 2.

pleased, settler lives and property were being jeopardised. The colony would never prosper unless Māori 'goodwill and friendship' were ensured and this would not be achieved while the Government continued its 'objectionable' practice of buying land from them at the lowest possible price and reselling it to Europeans at the highest.[880] In his response, FitzRoy again indicated his intention to waive the Crown's pre-emptive right:

> No one is more desirous than I am myself, that the natives of New Zealand should enjoy the full rights of British subjects as soon as they are sufficiently advanced in civilisation.
>
> The power of selling their land to whom they please, was withheld from them by the Crown for their own benefit. I am authorized to prepare for other arrangements more suitable to their improved, and daily improving condition.[881]

Soon afterwards, FitzRoy received two written addresses from Ngāti Whātua and Waikato rangatira again expressing their dissatisfaction with pre-emption, and their wish to be able to 'sell' small areas of land directly to settlers.[882] Several weeks later, in February 1844, Hokianga rangatira identified as Moses Mahe and William Barton (Wiremu Pātene) published a letter with simliar statements. The letter was dated 5 February 1844, and referred to the treaty debates at Waitangi stating, 'it was not then intimated to us that the Queen should have the exclusive right to purchase our waste lands'. They claimed that they had understood 'that the Queen should have the first offer; but should we not come to terms, we should sell our waste lands to whomsoever would purchase them'. The rangatira complained that they were unable to pay their debts because of the collapse of the timber and land trade.[883]

On 22 March 1844 (after returning from Wellington where he had made a limited waiver in favour of the New Zealand Company), FitzRoy presented his more general proposal to the Executive Council where it was debated over the course of two days before being approved. On 26 March 1844, he issued his '10 shillings an acre' proclamation waiving Crown pre-emption where settlers wished to acquire 'limited portions of land' directly from Māori and provided certain conditions were met (discussed below). The same day, he called a 'Meeting of Native Chiefs' at Government House to explain the new rules. He told those gathered that the 'chief reason' for the earlier restrictions had been to 'prevent Europeans from buying great quantities [of land] at once' so that Māori had 'none left to cultivate for raising food'. The new rules would enable them 'to sell those parts of your lands which

880. Samuel McDonald Martin, 'Address from the Inhabitants of Auckland to Governor FitzRoy', 26 December 1843 (cited in Daamen, *The Crown's Right of Pre-emption*, p 66.

881. 'His Excellency's Reply', *Daily Southern Cross*, 6 January 1844, p 3.

882. The first was signed by Āpihai Te Kawau, Te Tinana, and others of Ngāti Whātua and the second by Pōtatau Te Wherowhero, and Takiwaru Kati, Epiha Putini, Tamati, and Paora: see *Daily Southern Cross*, 'Levee', 30 December 1843, p 3.

883. *Daily Southern Cross*, 17 February 1844 (cited in Loveridge, 'An Object of First Importance' (Wai 862, doc A81), p 182).

you wish to sell, without injuring yourselves now, or causing injury and injustice to your children hereafter'. FitzRoy continued,

> There is no longer any objection to your selling such portions to Europeans, provided that my permission is previously asked, in order that I may inquire into the nature of the case, and ascertain from the protectors whether you can really spare it, without injury to yourselves now, or being likely to cause difficulties hereafter.[884]

Te Matua approved the Governor's intentions as 'very good' but also cautioned: 'it will be necessary for you to have a watchful eye over your people as well as the chiefs over their people'.[885]

It was not until mid-April that FitzRoy informed the Secretary of State for War and the Colonies, Lord Stanley, of the steps he had already taken. He had been obliged to act without his 'express sanction,' he told Stanley, because the matter was urgent; if he had delayed, 'the character of the Government would have been so irretrievably injured in the native estimation, and such open opposition to authority would have been the consequence, that our moral influence, by which alone we stand firmly in New Zealand, would have been lost'.[886]

'FitzRoy's enthusiam,' the Hauraki Tribunal remarked, 'was taking him further [and we might add, faster] than the intentions of his masters in the Colonial Office.'[887] The Secretary of State responded to FitzRoy's despatch that the Governor had 'taken the serious responsibility of waiving, on the part of the Crown, an important stipulation of the original treaty', but Stanley's main concern remained for the finances of the colony rather than the Crown's responsibiliy for the welfare of Māori. He predicted that the waiver would make the Crown's acquisition of land more difficult and 'encourage the disposition on the part of the natives to make exorbitant demands'. However, he acknowledged 'the cogency of the motives' by which FitzRoy had been influenced and was 'not prepared at this distance to condemn, or disclaim the arrangement' which his man on-the-ground had made – and so, gave it his approval.[888]

Governor FitzRoy's intention was to promote settlement and, as he saw it, satisfy both colonists and Māori in doing so. Māori, however, should not be permitted to denude themselves of all their lands, or as Normanby had expressed it in his 1839 instructions, be the unintentional authors of injuries to themselves. The regulations set out in the March 1844 proclamation stated that the Crown's right of pre-emption would be waived 'over a certain number of acres of land at or immediately adjoining a place distinctly specified' to be defined by applicants 'as accurately as may be practicable'. FitzRoy's multiple concerns were illustrated by regulation 2 of the proclamation. The Governor would agree or refuse to waive

884. FitzRoy, 26 March 1844, BPP, vol 4, p 197.
885. Daamen, *The Crown's Right of Preemption*, p 77.
886. FitzRoy to Stanley, 15 April 1844, BPP, vol 4, p 179.
887. Waitangi Tribunal, *The Hauraki Report*, vol 1, p 111.
888. Stanley to FitzRoy, 30 November 1844, BPP, vol 4, pp 209, 210.

the Crown's right as he considered 'best for the public welfare, rather than for the private interest of the applicant.' In making that judgement, he would 'fully consider the nature of the locality, the state of the neighbouring and resident natives, their abundance or deficiency of land, their disposition towards Europeans and towards Her Majesty's Government' (a discretion he later exercised in refusing a waiver for lands 'belonging to the Kawakawa or Wangarei tribes' who had committed a muru);[889] and the Protector of Aborigines would be consulted 'before consenting in any case' to a waiver. There was a firm commitment under regulation 3 that no title would be granted for any pā or urupa, nor for land required by Māori 'for their present use; although they themselves may now be desirous that it be alienated'. In other words, these lands were excepted from the purchases to be undertaken rather than reserved within them. However, regualtion 5 also provided that 'one tenth part, of fair average value, as to position and quality' was to be set aside out of all land purchased under certificates of waiver and conveyed to the Queen for public purposes, 'especially the future benefit of the aborigines'. In addition to the purchase price, the applicant was to pay 10 shillings per acre to the Government as a contribution to the land fund and government purposes. Deeds of transfer were to be filed at the Surveyor-General's office so that the necessary inquiries could be made and 'notice given in the Maori as well as in the English Gazette that a Crown title will be issued, unless sufficient cause should be shown for its being withheld for a time or altogether refused.' There was to be a minimum period of 12 months between the applicant receiving the Governor's consent and the issue of a Crown grant.[890]

6.6.2.2 *Why did FitzRoy change the regulations in October 1844?*

While settlers welcomed the Governor's acknowledgement of the right of Māori to sell to whomever they wished and their own right to make direct purchases, they denounced the regulations as hastily devised and objected strenuously to the high fees and the need to set aside a tenth of the land for reserves. The charge of 10s per acre was discouraging settler interest outside Auckland and only five waiver certificates had been issued in the Te Raki region under the March regulations.[891] The *Southern Cross* – a leading advocate for direct purchase – complained that it was 'scarcely fair on the part of Government to demand the payment of a sum of money and reserve a portion of the land besides'.[892] It suggested also that 'The Native is . . . the best Title in New Zealand, and that which will ensure the most peaceable possession.'[893] The implication was that a Crown grant might not be necessary at all.

In the key two-day meeting held at Waimate in early September 1844, rangatira raised the question of 'the right of selling to Europeans', along with that of customs

889. 'Proclamation', *Daily Southern Cross*, 11 January 1845, p 2.
890. FitzRoy, 26 March 1844, BPP, vol 4, p 202.
891. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 460.
892. 'The Purchases of Land from the Natives', *Daily Southern Cross*, 3 August 1844, p 2.
893. 'The Late Proclamation', *Daily Southern Cross*, 6 April 1844, p 2.

duties, and other matters of pressing concern.[894] Rose Daamen observed that the fact that rangatira were reported to be anxious for information about whether they would be given the right to transact their lands with settlers indicated 'that information regarding the proclamation had not been widely distributed'.[895] The following month, Clarke, who had initially praised the new system as resulting in 'tranquillity' in every distict,[896] advised the Governor of the 'increasing disquietude of the natives at the Bay of Islands, Hokianga and Auckland' over a range of matters including pre-emption.[897] In an about-face, Clarke now suggested that the peace of the country could not be secured without 'something being done to admit of their alienating such portions of their land as they can very well spare, without injury to themselves and their children'.[898]

By this time, it had become apparent that many purchases were being concluded without waivers having first been secured, thwarting competitive bidding. The area purported to have been purchased under waiver certificates was also often understated in order to minimise the Crown's charge of 10s per acre.[899] On 1 October 1844, FitzRoy issued a further proclamation stating that the Crown's right of pre-emption would 'in no case' be waived if applicants had failed to 'strictly' comply with the regulations and that all titles claimed by 'virtue of purchases, or pretended purchases from the Natives' were 'absolutely null and void' unless confirmed by a Crown grant. Nor would a grant be issued for more than 25 per cent for 'any mistake in the estimate of the quantity applied for' and would incur a penalty of 'double fees for the excess'.[900] In effect, the Proclamation constituted an acknowledgement on the part of the Crown that the March regulations lacked the sanctions necessary to ensure their observance.

A further proclamation bringing in new regulations followed on 10 October 1844. Governor FitzRoy called a meeting of the Executive Council, read out Clarke's letter (mentioned above) as evidence of 'the very great dissatisfaction of the natives with respect to the restrictions placed on the sale of their land' and proposed amending the pre-emption waiver regulations.[901] The idea was discussed by the Executive Council with Clarke in attendance and promptly approved. Questions were raised about proceeding without sanction from the Colonial Office, unless there was some 'pressing emergency', but the council was willing to defer to FitzRoy's greater knowledge of the state of discontent among Māori, in

894. 'Extracts from "The Southern Cross, 'of 7 September 1844', BPP, vol 4, pp 366–370.
895. Daamen, *The Crown's Right of Pre-emption*, p 124.
896. Clarke to Colonial Secretary, 31 July 1844, BPP, vol 4, p 457.
897. Clarke to FitzRoy, 9 October 1844, BPP, vol 4, p 406.
898. Clarke to FitzRoy, 9 October 1844, BPP, vol 4, p 406. For discussion of purchases under the March 1844 regulations see Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 462–467.
899. Daamen, *The Crown's Right of Pre-emption*, p 126.
900. 'The Government Gazette,' *Auckland Chronicle and New Zealand Colonist*, 10 October 1844, p 3.
901. 'Extract from Minutes of the Executive Council', 10 October 1844, BPP, vol 4, pp 404–405.

Governor FitzRoy's 'Penny-an-Acre Proclamation', 10 October 1844

Proclamation. By His Excellency Robert FitzRoy, Esquire, Captain in Her Majesty's Royal Navy, and Governor and Commander-in-Chief in and over Her Majesty's Colony of New Zealand and its Dependencies, and Vice Admiral of the same, &c., &c., &c. Whereas by a proclamation bearing date the 26th day of March, 1844, it was notified to the Public that the Crown's right of Pre-emption would be waived over certain portions of Land in New Zealand; – and whereas the terms and conditions set forth in such Proclamations on which the right of pre-emption would be so waived, have in some cases been disregarded, either by persons making purchases of land from the Natives without first applying for, and obtaining, the Governor's consent to waive the right of pre-emption, or by much understating the quantity of land proposed to be purchased from the Natives: – and whereas, certain persons have misrepresented the objects and intentions of Government in requiring that a fee should be paid on obtaining the Governor's consent to waive the right of pre-emption – on behalf of Her Majesty – who, by the Treaty of Waitangi, undertook to protect the Natives of New Zealand – and, in order to do so, has checked the purchase of their lands while their value was insufficiently known to their owners.

And whereas, the evil consequences of misrepresenting the motives of Government, and asserting that to be a mark of oppression – even of slavery – which is in reality an effect of parental care – are already manifest; – and are certain to increase seriously if the cause be not removed.

And whereas, the Natives of New Zealand have become perfectly aware of the full value of their lands – and are quite alive to their own present interests – however indifferent at times to those of their children.

Now, therefore, I, the Governor, acting on behalf of Her Majesty the Queen, – do hereby proclaim and declare, that from this day no fees will be demanded on consenting to waive the right of pre-emption: – that the fees payable on the issue of Crown Grants, under the following regulations, will be at the rate of one penny per acre; and that – until otherwise ordered – I will consent, on behalf of Her Majesty, to waive the right of pre-emption over certain limited portions of land in New Zealand – on the following [12] conditions.[1]

1. FitzRoy, 'Proclamation', 10 October 1844, *New Zealand Gazette*, 1844, no 23, pp 138–139.

which he was supported by Clarke.[902] The new proclamation was issued the same day.

The October proclamation made only minor changes to how the existing system operated but significantly reduced the fees to one penny per acre. Under

902. Daamen, *The Crown's Right of Pre-emption*, p 128.

the new regulations a Crown grant would not be issued until a year after certified deeds of sale and survey plans had been lodged with the Colonial Secretary (rather than on receipt of the waiver certificate as formerly required). Daamen considered this an important change since it gave a better opportunity for objectors to appear.[903] The preamble is also particularly noteworthy; it set out the various ways in which settlers had flouted the previous proclamation, but then, having blamed them for spreading rumours about the Government's intentions, in effect gave them what they wanted. Defending the decision to expand the scheme, FitzRoy advised Stanley that ending the pre-emptive waiver system would lead to a revolt by Māori.[904]

Two months later, by way of a notice in the *Daily Sourthern Cross*, the Government again found it necessary to remind those seeking a waiver of the Crown's pre-emptive right of purchase that it was 'indispensable to comply, most scrupulously, with all the said conditions'. Since many applications had been rejected 'in consequence of inattention to these conditions', a very short form of application had been devised. It required purchasers to provide 'the name or names of the chief or chiefs, and tribe, or tribes, interested in the sale, who have a right to dispose of the said land, as accurately as may be practicable'. Pre-emption would not be waived 'in respect of land of which a purchase . . . has been made previous to the consent of the Governor having been formally obtained'. It also specified that by 'a limited portion of land, not more than a few hundred acres is the quantity implied'; a grant of the Crown alone gave a legal title; the waiving of pre-emption 'without distinct specification in favour of any body, has the effect only of opening that portion of land to public competition'; and lists of applications for pre-emption waivers would be published in the *New Zealand Gazette*.[905]

6.6.2.3 *Waiver regulations in practice in Te Raki*

The 10-shilling proclamation of March proved of limited interest to both Māori and settlers in Te Raki as elsewhere in the colony. According to historian Rose Daamen, only 57 pre-emptive waiver certificates were issued for about 2,337 acres across the country; the areas involved ranged from 9.5 perches to 200 acres, and most were located in the Auckland area.[906] In Te Raki, there were only five instances identified by Stirling and Towers. There was far greater uptake of the penny-per-acre proclamation announced in October: a national total of 192 certificates were issued over 99,528 acres. Most were for areas of between 100 and 1,000 acres (although multiple applications by some purchasers increased their individual entitlements up to 4,500 acres), and again they were concentrated in the wider Auckland area.[907] The outbreak of the Northern War interrupted the scheme in the Bay of Islands and adjoining districts, but there remained strong

903. Daamen, *The Crown's Right of Pre-emption*, p 129.
904. FitzRoy to Stanley, 14 October 1844, BPP, vol 4, p 401.
905. 'Government Notices,' *Southern Cross* 14 December 1844, vol 2, Issue 87, p 3.
906. Daamen, *The Crown's Right of Pre-emption*, pp 89, 91.
907. Daamen, The Crown's Right of Pre-emption, pp 131–132.

interest in Mahurangi and the gulf islands, largely driven by Auckland settlement and the possibility of exploiting mineral resources. According to our calculations, the Crown – after the Matson and Bell inquiries (which we discuss in section 6.7) – would ultimately award settlers grants for 14,400 acres across Te Raki under the October penny-per-acre regulations, plus an additional 4,245 acres of scrip land; and would claim another 20,877 acres for itself as 'surplus' in the Mahurangi district (including Aotea and other gulf islands).

In practice, in issuing waiver certificates FitzRoy relied heavily on the advice of Chief Protector Clarke. Yet Clarke offered only limited comments on waiver applications, such as 'know of no objection' or knew of 'nothing to prevent'.[908] Such carefully circumscribed assessments appear to have been offered without investigation into whether the vendors were the sole and rightful owners or as to 'their abundance or deficiency' of land.[909] In a few instances, Clarke did seek additional information or clarification or consents, but as the need arose rather than in accordance with a defined consultative or investigative procedure. Mostly he (and the Crown) relied on his existing grasp of customary rights in the region.[910] Stirling and Towers found only one occasion on which Clarke insisted upon the vendors giving a written indication of their willingness to 'sell'.[911]

The regulations also were silent on the matter of adequacy of consideration, and there is no evidence to indicate that either FitzRoy or Clarke investigated prices.[912] Yet, clearly, the assumption had been made that Māori would benefit from the 'market' that the pre-emption waiver would supposedly create. That intention was further undermined by the issue of waiver certificates for arrangements already in place despite regulations to the contrary, meaning that the competition and economic benefit for Māori intended by FitzRoy largely failed to materialise.[913]

An examination of the procedures for obtaining a pre-emptive waiver in Te Raki reveals several questionable practices on the part of both purchasers and officials. For example, an application lodged by William Twohey for a waiver over 2,000 acres in the Whāngārei district was approved following intervention by and support from the Colonial Secretary, Clarke had initially raised concerns that the Māori owners had been involved in a recent muru at Matakana and fighting in the Bay of Islands. However, after Sinclair advised FitzRoy that he had known Twohey for three years and that he was 'deserving of a waiver', Clarke changed his mind,

908. Daamen suggested that Clarke may have regarded the 26 March 1844 Proclamation as a temporary expedient intended to avert the perceived threat of insurrection. See Daamen, *The Crown's right of pre-emption*, p 192.

909. Daamen, *The Crown's right of pre-emption*, p 104.

910. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 498.

911. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 501–502.

912. Daamen, *The Crown's right of pre-emption*, p 110.

913. Grey to Stanley, 9 June 1846, BPP, vol 5, pp 555–557; Grey to Gladstone, 21 June 1846, BPP, vol 5, pp 575–577.Examples of certificates being issued for Mahurangi lands already purchased include those for Fulton and Elliot (OLC 1141), White and Wilson (OLC 1158), Harris and Hatfield (OLC 1156 and 1157), Langford and Gardiner (OLC 1187), Chisholm and Langford (OLC 1165), and the three Smithson claims at Waiwerawera (OLC 1136,1137, and 1138). See Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 499–500.

stating that he did not now see 'the same objections'.[914] In the case of Tawhiti Rahi, Mokohinau, and Marotere (discussed further at section 6.6.2.6), one applicant was able to lodge and secure pre-emption waivers over each island group, while another family was able to secure four waivers that embraced 3,100 acres.[915] What was more, evidence indicates that the Governor approved applications in the full knowledge that purchase arrangements, in clear violation of the regulations, had already been completed. In some instances, settlers had even stated on their application forms that they sought waivers in order to allow them to complete such arrangements.[916]

Attempts to tighten the regulations under the proclamation of 10 October 1844, and a clarification that 'certain limited portions' meant a 'few hundred acres' in the Governor's notice of 6 December 1844 did not result in any improvement in the manner in which the regulations were implemented or in more effective protection of Māori. According to Daamen, purchasers continued to enter into and conclude purchase arrangements in advance of applying for waiver certificates; applications frequently failed to specify accurately the location and boundaries of the lands involved; the areas for which waiver certificates were sought were often under-stated; efforts to establish all the rightful owners were sporadic at best; the Chief Protector of Aborigines continued to rely on his personal knowledge of the vendors and lands involved; no defined limit was placed on the areas that could be acquired, while the informal 'few hundred acres' limit was readily circumvented; and – contrary to FitzRoy's explicit assurances – neither pā, urupā, lands required for present and expected future use, nor tenth reserves were formally identified and reserved.[917]

We note, in particular, Aotea (Great Barrier Island), where regulations were evaded yet purchases were ratified, resulting in the transfer of a large proportion of the island out of the hands of local Māori. There had been one major old land claim on the island, that of Abercrombie, Nagle, and Webster, discussed at section 6.5.2.3. Of the waiver certificates issued for Aotea lands, the most significant were to Frederick Whitaker and John Peter du Moulin under the one-penny-per-acre regulations for the purchase of 1,500 acres (OLC 1130) and a further area 'not exceeding 2,000 acres' (OLC 1131).[918] By putting in separate applications in this way, Whitaker and du Moulin avoided the limitations on the size of purchases, but even as separate transactions, they exceeded the 'few hundred acres' mentioned in the 6 December notice.[919] There was only one deed of purchase for the total land sought by the two men. This had been signed with Tāmati Waka, his wife Te Arikirangi, and Poenga, and bore the marks of Poenga, Rangitiaka, and Pirangi. The consideration paid to Māori had comprised goods, including 'a

914. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 481–483.
915. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 483, 493.
916. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 499.
917. See Daamen, The Crown's right of pre-emption, pp 134–143.
918. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1777.
919. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1779–1780.

Cutter complete with Dingy', items of clothing, blankets, tobacco, two oars, and guns and ammunition.[920]

The area sought by Whitaker was described as 'commencing about half a mile to the northward of Wangapurapura and running across the island and extending to the southward within a quarter of a mile of Okupi', an area that exceeded 10,000 acres, or in other words 'the bulk of the southern two-thirds of Aotea' and a much larger area than indicated on Whitaker's sketch map.[921] The land sought by du Moulin was also vaguely defined. After receiving the waiver, he informed the Colonial Secretary that the purchase area had been incorrectly described and should not have included the southern portion of the island, which belonged to a hapū uninvolved in his original transaction.[922] Additionally, an inaccurate sketch map had been used. He therefore requested an amendment. Despite this confusion, du Moulin estimated that the newly defined area of land remained 2,000 acres and as a consequence, he was not required to seek a renewed waiver. As Stirling and Towers remarked, 'It appears a little too coincidental for the area actually included in the transaction to be exactly that covered by his pre-emption waiver.'[923] Whitaker and Moulin ultimately got 6,463 acres between them and the Crown over 15,000 acres of surplus land for purchases under waiver certificates issued for just 3,500 acres. Māori got goods and cash valued at £172, or one shilling per acre for the area estimated in the waivers, but a woeful rate of less than twopence per acre for the huge area that was ultimately taken.[924] No ten per cent reservations were set aside.[925]

Other settlers, too, applied for pre-emption waivers for lands in Aotea: Anderson and Chalmers, separately, for lands to the north of Whitaker and du Moulin's claim; and McDonald and Hunter for lands in the southern part of the island, excluded by du Moulin's earlier amendment.[926] While these settlers do not appear to have pursued pre-emption waivers further, others applied; namely, Warbrick, Coates, and the three Mitford brothers. Warbrick's application was easily rejected by FitzRoy for the size of the proposed transaction, but the others were remarkably uniform – each for an area of an estimated 1,000 acres. And in all of them, FitzRoy crossed out the words 'one thousand' and awarded 900 acres, for a total of 3,600 acres, or the whole estimated size of the remaining portion of southern Aotea. Stirling and Towers suggested that though 900 acres was pushing the boundaries of FitzRoy's criterion of 'a few hundred acres', the revision at least brought the figure back into the 'hundreds'.[927] In the end, neither Coates nor the Mitfords completed their transactions, so they were disallowed; however, it is

920. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1781.
921. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1780.
922. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 510.
923. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 515.
924. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 567–568.
925. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 567–568.
926. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 511–514.
927. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 516–517.

clear the regulations were being interpreted and applied in a way that benefited the colony or the settlers, but not Māori.[928]

The speculative intent of the applicants alarmed the Colonial Secretary. Commenting on the application by McDonald and Hunter, he asked FitzRoy whether granting out so much land in the island to a few individuals would be beneficial to the colony. Influenced by this advice and announcing himself as concerned about 'so much impropriety of conduct' with regard to the island, FitzRoy decided not to grant further waiver certificates for Aotea until he had received advice from England.[929]

6.6.2.4 *What Grey did: the creation of three options for settlers*

Although no grants had been actually issued by FitzRoy for any of the areas claimed to have been purchased throughout the colony under the waiver proclamations, Lord Stanley reluctantly accepted what the Governor had instituted on the ground. In a despatch dated 30 November 1844, he gave 'distinct but reluctant consent' to FitzRoy's March proclamation, which he considered to be confined to a particular district. He subsequently ordered Sir George Grey to recognise any purchases under the second proclamation as well but strictly prohibited any such waivers in the future.[930]

On his arrival in November 1845, Grey immediately denounced the pre-emptive waiver purchases as 'at once unjust to Her Majesty's subjects of both races, and improvident in the extreme'. In reports to the Colonial Office, he strongly condemned FitzRoy's exercise of power as Governor in these (and other) matters, which he believed would be challenged through the courts. He informed the Secretary of State that 'various complicated disputes [had] already arisen between the natives and various persons who have purchased lands from them under the terms of my predecessor's proclamation', and that the Crown's pre-emptive right of purchase provided a means of 'controlling' Māori.[931] Formally ending the scheme in June 1846, Grey acknowledged that Māori had not benefited from the competition that the pre-emption waiver policy had been intended to provide. Many of the purchases had been conducted in 'the most careless manner'. Buyers had evaded the regulations with official connivance; the limit of 'a few hundred acres' had scarcely been observed; public notification of the issue of waiver certificates had not taken place; transactions had been concluded in advance of applications for waiver certificates; and where payment had been made in part or in whole in goods, their value had been overstated to the disadvantage of the Māori vendors. And he was 'not satisfied that the Governor was authorised in law to waive the

928. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 517.
929. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 514.
930. Select committee report on outstanding land claims, 16 July 1856, BPP, vol 11, p 589.
931. Grey to Stanley, 10 December 1845, BPP, vol 5, p 358; Grey to Stanley, 9 June 1846, BPP, vol 5, p 555; see also James Rutherford, *Sir George Grey KCB, 1812–1898: A Study in Colonial Government* (London: Cassell, 1961), p 119.

Crown's right of pre-emption over a small, specified tract of land in favour of one individual'.[932]

There would be no more waivers, but Grey considered it necessary also to settle the claims of legitimate purchasers who had abided by the regulations. In a notice dated 15 June 1846, he announced that all claimants under the proclamations were required to submit to the Government 'all papers' – deeds, documents, and surveys – connected with their purchases for investigation. Failure to present papers, such as waiver certificates, within the specified period of three months would result in a claim being disallowed.[933] It was further declared that 'as evasions of the regulations and conditions under which the certificates of waiver were issued had in many places taken place, the Home Government would be consulted before any final decision was come to respecting such cases'.[934]

This 'exterminating process' was accompanied by a measure intended to induce the claimants under waiver certificates to abandon or compromise their claims.[935] The Land Claims Ordinance 1846 authorised the payment of compensation in debentures to 'certain Claimants'; that is, settlers who had made purchases under FitzRoy's waiver system and were willing to come under the provisions. The preamble of the ordinance stated that no Crown grant could be

> safely issued until it shall be ascertained that such alleged purchases have been made from the true Native owners of such land, and that the rights of all persons thereto have been extinguished, and that the terms and conditions prescribed by the . . . Proclamation [of 10 October 1844] have been duly complied with.

A commissioner was to be appointed to examine and report upon all claims to compensation from settlers who had bought lands under pre-emption waivers. The ordinance repeated the instruction to the old land claims commissioners that they were to be 'guided by the real justice and good conscience of the case', but the body of the legislation was concerned solely with the claims of settlers. The commissioner was directed to ascertain the price paid to Māori, the transaction costs involved, and the cost of any improvements placed upon the land in question. He was not otherwise required to establish whether the original transactions had been conducted in full accord with the pre-emption waiver regulations. Nothing further was said about whether the vendors were the rightful owners, and neither was the question considered of whether their rights and interests had been fully and fairly extinguished, nor whether they had received the protections intended by FitzRoy. In all, the ordinance failed to make any express provision relating to the 'complicated disputes' that Grey claimed had arisen.

932. Grey to Stanley, 9 June 1846, BPP, vol 5, pp 555–556; Grey to Gladstone, 21 June 1846, BPP, vol 5, pp 575–576.
933. Encl in Grey to Gladstone, 18 June 1846, BPP, vol 5, p 570.
934. Select committee report on outstanding land claims, 16 July 1856, BPP, vol 11, p 593.
935. Select committee report on outstanding land claims, 16 July 1856, BPP, vol 11, p 593.

In essence, Grey's 1846 ordinance assumed that the initial issue of a certificate and the production of a deed and survey showed that a legitimate purchase had been made and that any outstanding questions of native title could be dealt with later. Once the claim had been confirmed and compensation awarded in the form of debentures, clause 10 provided that the land concerned would be 'deemed and taken to become part of the demesne land of the Crown, saving always the rights which may hereafter be substantiated thereto by any person of the Native race'. The onus was on Māori to establish whether any customary rights remained, but the ordinance made no provision for a mechanism enabling them to do so. Provision was then made in clause 11 for settlers to repurchase from the Government any land they were actually occupying at the rate of £1 per acre (with credit for expenditure on improvements). Clause 14 further undermined the position of Māori. It stated that since tenths reservations 'cannot in many cases be conveniently made', settlers whose purchases were confirmed could purchase those lands as well. The ordinance described the tenths as 'set apart for public purposes', not, as FitzRoy had originally specified, for the 'future use' and 'special benefit' of Māori. Any tenths not purchased in this way were also to be absorbed into the surplus land.[936]

Land Claims Commissioner Henry Matson, who was appointed under the 1846 ordinance, commenced his investigations in December 1846.[937] At first, he had little to do. Grey considered his measure to be 'extremely fair and liberal',[938] but settlers proved reluctant to bring their claims under its provisions, preferring to hold out for a grant rather than compensation, and unwilling to pay the Crown for lands they thought they had already purchased.

Meantime, the new Secretary of State, Earl Grey, reinforced Stanley's instructions. On 10 February 1847, he approved the steps Governor Grey had undertaken in June the preceding year, including calling in claims within a specified period. He agreed that FitzRoy had been 'plainly exceeding his lawful authority'; but while the waiver arrangements were 'most impolitic', the 'faith of the Crown' must be kept insofar as it was 'pledged to the purchasers'. He noted that Crown grants should be issued only to those who could 'prove in the strictest manner' that they had 'completely and literally satisfied the requisitions of the proclamations in every particular they contain'. However, the instructions had been issued in ignorance of the steps that the Governor had already instituted under his 1846 ordinance, and there were significant divergences between what Earl Grey directed and what Governor Grey had already done. In particular, Earl Grey instructed that the settler claimants should be required to prove to the Attorney-General that 'the natives . . . were . . . the real and sole owners of the land which they undertook to sell'; and that the grant, if issued, must expressly state that it barred Her Majesty's

936. FitzRoy, address to chiefs, 26 March 1844, BPP, vol 4, p 198 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 457); FitzRoy, proclamation, 15 April 1844, BPP, vol 4, p 202.

937. Matson commanded the first detachment of the 58th Regiment, which arrived in Auckland in March 1845.

938. Grey to Earl Grey, 19 April 1847, BPP, vol 6 [892], p 30 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 541).

title and only transferred to the grantee 'any right to the lands which at, or previously to the date of the grant, may have been vested in the Queen.'[939]

Governor Grey had also initiated a further legal challenge to FitzRoy's actions as Governor in April 1847. In Grey's view, the right of pre-emption had been acquired by reason of the treaty, but this did not include the right to waive it. He argued:

> it is a power which must entail injustice and suffering upon the natives, which must lead to abuses, which could not be exercised with such discretion as to render it beneficial, and which is so palpably opposed to the interest of the native race, that Great Britain, in accepting it, must have incurred much obloquy from foreign nations and from future times. Moreover, it is believed that there is no instance on record in which Great Britain has obtained by treaty a like power from any uncivilised nation.[940]

He sought, successfully, a ruling from the Supreme Court (*Queen v Symonds*) to the effect that those who had purchased land directly from Māori under a pre-emption waiver certificate had no legal rights, but that such rights could only be secured from the Crown. In its ruling issued on 9 June 1847, the court confirmed that pre-emptive waiver certificates did not convey a title: only the Crown could issue valid titles. It was therefore to the Government that certificate holders had to turn to secure a legal title to lands that they had acquired from Māori.[941] In fact, this had been clearly stated in both of FitzRoy's proclamations, which had 'reminded' the public that 'no title to land in this colony, held or claimed by any person not an aboriginal native of the same, is valid in the eye of the law, or otherwise than null and void, unless confirmed by a grant from the Crown.'[942]

Based on this ruling and having received Earl Grey's instructions, the Governor decided to offer three different options for the settlement of the waiver claims. He informed the Legislative Council that he did so reluctantly and, it seemed, at the expense of Māori interests:

> I have for many reasons experienced great difficulty in arriving at this determination, for I cannot but remark, that Her Majesty's Government have recorded it as their opinion, that many of the claims which are about to be adjusted, are unsupported by equity, justice, or public policy . . . On the other hand, however, I must admit, that the claims of the bonâ fide and industrious settler require, under all the circumstances of the case, a most indulgent consideration from the Government, and that this may be afforded to them, I am prepared to adopt a plan, which, whilst it will secure to the real settler the greatest possible facilities, will extend to all the

939. Grey to Grey, 10 February 1847, BPP, vol 5, pp 578–580.

940. Grey to Earl Grey, 19 April 1847, BPP, vol 6 [892], p 32 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 542).

941. Grey to Earl Grey, 5 July 1847, BPP, vol 6 [892], p 64; 'Judgment of Mr Justice Chapman', nodate, BPP, vol 6 [892], pp 64–71.

942. FitzRoy, proclamation, 26 March 1844, BPP, vol 4, p 202; proclamation, 10 October 1844, BPP, vol 4, p 402.

land claimants far greater advantages than they would have been entitled to under the instructions I have received.[943]

Under the first option (following Secretary of State Earl Grey's instructions), the Attorney-General was required to certify that the applicants had complied fully with the regulations and that the Māori vendors were 'according to native laws and customs, the real and the sole owners of the land which they undertook to sell'.[944]

The second option entailed the process that had been established by the Lands Claims Ordinance 1846 – either for compensation, or if in actual possession, for repurchase from the Crown including tenths, provided the entire claim did not exceed 200 acres.

Alternatively, they could follow a third course: new regulations to be introduced by the Governor. These stated that that an absolute Crown grant would be issued to claimants under the 10-shilling-an-acre ruling if they had strictly complied with the terms of the government notice of 15 July 1846; if their claims were investigated and reported on favourably by the commissioner; and if they paid the remainder of the fees due within one month of such report. If the total quantity of a claim did not exceed 200 acres, the reserve tenths could be included at £1 per acre. The same option was also extended to the one-penny-per-acre waiver purchasers but was limited to blocks of up to 500 acres if the land was located within 20 miles of Auckland. The option was not available in case of any land the title of which was disputed by Māori. Surplus lands – areas which had been obtained under a waiver but over the limit of 500 acres – would 'revert' to the Crown (or in our view, would be taken by it).[945]

None of these options would offer effective protection to Māori, as we explore next.

6.6.2.5 *Investigation of pre-emption waiver claims under Grey's options*

Notwithstanding Grey's assertion that 'numerous instances' had been brought before him in which Māori had been 'most cruelly and unfairly dealt with' by waiver certificate holders, only limited inquiries were made. In practice, the investigations conducted by Matson and Attorney-General Swainson were as limited as those conducted by Godfrey and Richmond into the pre-treaty transactions.

Matson, a military officer who had fought in the Northern War,[946] evinced little interest in or understanding of Māori land tenure and was instead focused on technicalities, such as whether deeds and maps had been submitted on the date specified. Following the ordinance under which he was acting, his inquiries

943. Minute of His Excellency the Governor to the Legislative Council, 7 August 1847, BPP, vol 6 [1002], pp 47–48.

944. Earl Grey to Grey, 10 February 1847, BPP, vol 5, p 579; Minute of His Excellency the Governor to the Legislative Council, 7 August 1847, BPP, vol 6 [1002], p 47.

945. Minute of His Excellency the Governor to the Legislative Council, 7 August 1847, BPP, vol 6 [1002], p 47.

946. Matson had served under Colonel Despard in the Northern War and was promoted to brevet-major for his services. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 541.

were aimed towards settling the claims of the holders of waiver certificates and not towards establishing whether Māori vendors had been in any way disadvantaged by the way the purchase negotiations had been conducted or the regulations applied. His investigations were unsystematic when assessing whether those Māori who had 'sold' the lands were the sole and rightful owners, whether all customary rights had been extinguished, whether the consideration had been adequate, and whether the transactions 'completely and literally satisfied' FitzRoy's regulations. Matson did attempt to establish that vendors had been paid as agreed, but this had everything to do with establishing the entitlement of a settler claimant to compensation and not the adequacy of the consideration.

The clear instructions of the Secretary of State had been to establish the legitimacy of transactions with Māori, but procedures under Grey's three options shared many of the flaws we have already identified with regard to the investigations of the old land claims. Once more, only those named in deeds were called as witnesses. As to their evidence, it was again limited to confirmation that they had indeed been involved in the sales represented by the deeds and had received payment. Matson's line of questioning, which relied on what had been accepted already when the exemption certificate had been first issued, elicited nothing of unextinguished rights in the lands – whether of named or unnamed Māori – nor of rights surrendered by agreement. Such circumscription 'could only ascertain that those named on the deed had been paid the amount stated on the deed'.[947] Daamen argues that in ensuring the validity of claims, Matson used brief notes from Clarke, himself given to perfunctory investigations.[948] And again, there were potential questions of conflict of interest: Matson frequently relied on evidence from ex-interpreters Davis and Meurant, despite their involvement as agents in some of the transactions. It is little wonder (Stirling and Tower suggest) that 'In the end, no claim was rejected on the basis that the vendors were not the sole or true owners of the land.'[949]

Investigation by the Attorney-General, as Earl Grey had specified, proved no more effective. Swainson, too, was reliant on Clarke's doubtful assessments. Again, the process involved no examination of whether Māori rights to lands had been properly extinguished, nor of unextinguished rights, let alone the rights of hapū not involved in original deeds. For all practical purposes, Swainson 'simply accepted the granting of a pre-emption waiver as proof of validity of the vendors' exclusive rights to the land.'[950]

6.6.2.6 *Two case studies: Waiwera and Mokohinau (and nearby islands)*

Robert Graham's claim at Waiwera, heard under the terms of the Land Claims Ordinance 1846, was an example of the rubber-stamping nature of the Matson commission. In 1844, the Auckland merchant had applied for a pre-emption waiver

947. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 549.
948. Daamen, The Crown's right of pre-emption, p 167.
949. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 549.
950. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 557.

certificate for Waiwerawera, a small block of about 20 acres that included the geothermal springs. Its status was a matter of debate. Whereas the Colonial Secretary had thought the land to lie within the boundary of the 1841 Mahurangi purchase, FitzRoy had understood the block to be 'a spot belonging to the Natives *within* the Government Land but not *belonging* to the Government though *surrounded* by public property'(emphasis in original), suggesting he believed it reserved for Te Hemara and Ngāti Rongo.[951] The purchase had proceeded nonetheless.

By the time the claim came before Matson for investigation, Graham had fulfilled the survey requirement. Te Hemara, Roa, and Peta, as parties named on the deed, appeared. Rote questioning confirmed that they were party to the agreement (Te Hemara declared that the land had 'belonged to me and my Tribe'),[952] had received goods in return, and there was no other claim to the land. On this basis, Matson awarded Graham all 20 acres claimed, after his payment of £2 for the reserve tenths. Māori rights were not considered further, despite customary usage of the springs which were 'a *wai tuku ora o te iwi*, a place of healing waters for the peoples of Ngāti Rongo and therefore a highly important site.'[953] Nor was it interrogated that firearms had comprised part of the transaction goods, even though Earl Grey had directed that such claims be disallowed. Stirling and Towers noted that Graham's claim 'reflected Governor Grey's modified view on the subject, that rejected "too strict an adherence" to Earl Grey's instructions.'[954] Guns and ammunition were as irrelevant to the Matson inquiry as ongoing or unextinguished Māori rights in the land.

The case of Joel Polack's pre-emption waiver claims to Tawhiti Rahi (Poor Knights Islets), Mokohinau (Fanal Islets), and Marotere (Chicken Islets) also raised the question about the use of munitions as transaction goods. Polack submitted three separate waiver claims for the island groups, although only one purchase deed was involved. On 20 December 1844, he filed for a waiver of pre-emption over 'Tawiti rai' (Tawhiti Rahi), proposing a purchase from the chief, Hokianga, and others from the 'Whangaruru' tribe, although he did not particularise which hapū. Clarke saw no objection but advised that consent should be obtained from all Whangaruru Māori since everyone had a 'partial claim' (the interests of any other Māori were not considered). On 14 January 1845, with Polack's assurance given on this matter for FitzRoy's attention, a waiver certificate was issued for a maximum of 400 acres.[955]

Polack's second waiver application, made on 14 January, was for the 'Pokohinu and Mototiri (Chickens) groups of islets', which he sought to purchase from 'the Chiefs of the Ngati te wai tribe'. FitzRoy agreed to a waiver for 'Poko-hinou, or Moto-hinou (the Fanal Islets), but not over Morotiri (or Chickens)'. The latter was

951. Barry Rigby, 'The Crown, Maori and Mahurangi 1840–1881' (commissioned research report, Wellington: Waitangi Tribunal, 1998) (doc E18), p 87.

952. Rigby, 'The Crown, Maori and Mahurangi' (doc E18), pp 87–8; Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 550.

953. Closing submissions for Wai 354 and Wai 1535 (#3.3.392), p 66.

954. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 550.

955. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1801–1802.

at first refused as Whāngārei hapū involved in a muru dubbed the 'Matakana affair' had made claim to it. On 27 January, Polack received a waiver certificate covering 'Pokohinou or Motu Hinou (the Fanal Islets)' for a maximum of 400 acres, but shortly after, believing the Matakana difficulty to be then overcome, he continued to pursue a waiver of pre-emption for Marotere (Chickens). His second – and successful – application was expanded to name not only Ngātiwai but also Te Kapotai vendors. Polack was issued his third waiver certificate on 10 March.[956]

The single purchase deed, dated 16 January 1845, covered all the island groups of Polack's pre-emption waiver claims. It was problematical on several fronts: it pre-dated the issuance of two of Polack's waiver certificates; only a copy was extant (according to Polack, the original was lost to an explosion during the Northern War); and there were complexities to the names of the islands beyond spelling variations (as an example, Mokohinau is both the name of the group as well as its largest island),[957] which would play out subsequently. Payment (valued at £122 14s, by Polack's later calculation) involving goods, debentures, cash, and guns was made to the two different Māori groups. Measured against Polack's gain of an estimated 1,400 acres by means of pre-emption waivers, the Māori transactors received approximately one shilling ninepence per acre.[958]

With the aim of commencing mining and agricultural activities, Polack next began pressing the Government for Crown grants to the islands, although he had not complied with a number of regulations. His application of 1 May 1846 included two sketch maps and a request for the survey requirement to be waived as, he claimed, there was no safe beach for landing (although how this squared with his mining ambitions was a moot point). Polack had advertised his purchases in te reo in the *Kahiti o Niu Tireni* but he had failed to name the island groups accurately and, in fact, published it after completion of the transaction.[959] Despite the provision of neither deed nor survey, and although the regulations prohibited grants until 12 months after their submission, Governor Grey referred Polack's application to an Executive Council committee for consideration. The committee, consisting of the Colonial Secretary, the Attorney-General, and the Colonial Treasurer, lacked even the advice of the protectorate, which Grey had abolished. It soon produced a report described by counsel for Ngāti Rehua and Ngātiwai ki Aotea as 'wholly inadequate' and a reflection of the committee's 'lack of capacity to deal with land, customary rights, and Māori affairs'.[960] However, it put Polack's claim on hold. The report confirmed that the islands had not been purchased already by the Crown, but in the absence of a deed, the committee could not say whether Polack's purchase had been made fairly and properly.[961] It recommended no Crown grant be issued until Polack had met all the requirements of the second waiver proclamation for filing of deeds and survey.

956. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1802–1803.
957. Closing submissions for Wai 678 (#3.3.248), p 25.
958. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1804–1805.
959. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1805–1806.
960. Closing submissions for Wai 678 (#3.3.248), p 26.
961. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1807.

Polack again insisted that survey was impossible but did send in a copy of his deed, prompting Governor Grey, having informed the settler that his was a peculiar case unprovided for by the Government, to seek advice from the Secretary of State. Grey's main concern was that Polack had seemingly been allowed to purchase for speculative purposes islands likely to be required for reasons of public utility. Among Grey's other stated concerns was the use – though not illegal per se – of 'munitions of war' as transaction goods. Of Māori interests, he wrote: 'I do not feel satisfied that the vendors ever really intended to part with these Islands, nor do I know that they had either any or the sole right to dispose of them.'[962] Earl Grey responded that no Crown grant could be issued that involved firearms as payment if they were to be used unlawfully or against the Government – of relevance to Polack because, according to the Governor, the munitions in his transaction goods were linked to the Northern War, as seven of the eight recipients were of the 'rebel party'.[963] Whether Polack knew the fate of the guns and was complicit was unknown but at the least, Grey thought him 'guilty of an act of very great imprudence'. As to the consideration paid, Grey advised it was 'manifestly insufficient',[964] although in monetary terms, 1s 9d per acre was on par with many other waivers of pre-emption.

The claims to the island groups came before the Matson commission, but Stirling and Towers noted: 'It is unclear whether any investigation of the deed produced by Polack took place and thus whether any Maori evidence was produced by him in support of his claim.'[965] It seems that the fairness of the claims was assumed, resting 'solely upon the willingness of Maori to enter into the transaction' in the first place.[966] The claims were disallowed – for failure to survey, predictably, not for deficiencies in consent or the consideration paid.[967]

Polack's deed was questionable as were his activities under the waiver of pre-emption in his favour; yet as the law stated under the 1846 ordinance, the Crown considered itself to own the islands once Matson had disallowed the claims for lack of survey. Contributing to the Crown's interest in this instance was the tantalising possibility of mineral wealth. After consideration of a letter from prospectors Whitaker and Heale about an island in the Chicken group, in 1849 the Executive Council concluded that their request to mine for copper should be granted, provided the islands were Crown property. The Surveyor-General investigated and declared they were indeed so. The claim of the Crown rested wholly on the supposed extinguishment of Māori customary rights in Polack's deed. No further referral to Māori was considered necessary, nor were Grey's qualms about the validity and completeness of the transaction raised. In the end, Whitaker and

962. Governor Grey to Secretary of State, 24 June 1846 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1808).
963. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1809.
964. Governor Grey to Secretary of State, 9 August 1847 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1809).
965. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1810.
966. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1809.
967. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1810.

Heale did not proceed with their mining endeavours, as an exploratory foray failed to find deposits. Another prospector, Merrick, was given permission to operate on Marotere but he, too, was unsuccessful, and his lease was terminated by the Crown in July 1850.[968]

Polack continued in his attempts to acquire the islands but was told he could not. Grey laid out the reasons: FitzRoy's pre-emption waiver proclamations had been ruled illegal by the Supreme Court, making Polack's transaction illegal also; and (somewhat illogically) the purchase pre-dated the waiver being issued. Additionally, the potential mineral wealth was to be of benefit to all subjects, not monopolised by one.[969] When the persistent Polack advised he would take his claim to England, Grey reiterated his views.

That same year, in 1849, other Māori claims to the islands began to surface. Tawatawa, Kapotai, and other Bay of Islands chiefs protested Polack's deed, offering to sell the islands themselves. Another claim was lodged by Wakatiro of Te Waiariki at Ngunguru, prompting the Government to place an advertisement in *The Maori Messenger – Te Karere Maori* calling on all parties concerned to come and make their claims before the Resident Magistrate at Kororāreka.[970] In October 1851, Resident Magistrate W B White informed the Surveyor-General that Wakatiro 'would accept the offer made to him by the Governor of £20 for Motiti (Hen and Chicken Islands)',[971] which elicited a circumspect request from Ligar for 'all the correspondence on the subject of the islands', as he noted there were 'many other claimants besides the chief named'.[972] But no further consideration on the matter occurred until Polack's claims to the islands were submitted to the Bell commission as the settler Government revisited the disallowances under Grey's options (see section 6.7.2.3).

6.6.2.7 *Overall results of investigation of pre-emption waiver purchases under Grey's options*

The results of Matson's commission were later assessed by a select committee under the chair of Alfred Domett set up to investigate settler complaints about old land claims and pre-emption waiver purchases in 1856. The committee found that across the nation, of the 62 claims tendered under the 10-shilling-per-acre proclamation, 49 received Crown grants, nine were disallowed for non-payment of fees, and two for lack of survey plans, while two more remained unsettled. Most pre-emption waivers related to the Auckland and Northland regions. No figure was given for the acreage that had 'reverted' to the Crown.[973]

968. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1811.
969. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1811.
970. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1813.
971. Resident Magistrate White, Mangonui, to Colonial Secretary, 13 October 1851 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1813).
972. Ligar to Colonial Secretary, 9 December 1851 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1813).
973. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 549–550.

Under the penny-an-acre proclamation, a further 189 claims had been lodged nationwide, but only 53 resulted in Crown grants. Of the remainder, 21 were settled through compensation; 80 were disallowed for non-compliance with Grey's notice of June 1846, and 28 for non-compliance with FitzRoy's pre-emption waiver proclamation of October 1844; while seven were disallowed or abandoned with no explanation given.[974]

According to the committee, investigation under Grey's system had resulted in awards for only 14 claims in Northland, after expenditure of £467 17s in debentures. This netted a total of 7,074 acres for the Crown at a cost of approximately 1s 4d per acre; but in the case of the many disallowed claims, the returns were better still, with 21,829 acres gained by the Crown for an outlay of £196 3s 4d in compensation.[975]

So, despite the Matson inquiry being 'largely a process of settlement between Crown and claimants alone, with little heed paid to Maori interests', most settler claimants met with no success.[976] As the Crown began to assert rights of lease and sale in the disallowed (and still unsurveyed) claims, many settlers continued to petition the Government for redress. From a Māori perspective, their ownership of the land had gone, and the only question was whether it had gone to the settlers or to the Crown.

In 1856, the Domett committee concluded that the disallowance of waiver claims because of failure to comply with Grey's regulation to send in survey plans had been unjust (only three months had been allowed). The committee also observed that while the Attorney-General had not disclosed the reasons for refusal of claims, his application of regulations 'may in some cases have been somewhat stringent'.[977] It therefore recommended another investigation and 'any proved injustice be remedied'.[978] By this, the committee meant any proved injustice to the settlers whose claims had been disallowed, not Māori to whom protections had been offered but which had not eventuated, nor Māori whose rights remained unextinguished.

As we discuss further at section 6.7, special provisions for the settlement of waiver claims were included in the Land Claims Settlement Act 1856 and the investigations undertaken by Bell.

6.6.2.8 *Does the Supreme Court's decision in* Wakatu *have any application to old land claims or pre-emption waivers?*

6.6.2.8.1 What the Supreme Court said

In its decision in *Proprietors of Wakatu v Attorney-General*, the Supreme Court of New Zealand considered the Crown's fiduciary obligations in relation to an award of land made under the Crown's right of pre-emption, and the promised creation

974. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 551.
975. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 552–553.
976. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 557.
977. Report of the Select Committee on Outstanding Land Claims, 16 July 1856, BPP, vol 10, p 628.
978. Report of the Select Committee on Outstanding Land Claims, 16 July 1856, BPP, vol 10, p 628.

of reserves, in the Northern South Island. The case concerned land that was initially the subject of deeds of purchase between the New Zealand Company and Te Ātiawa and Ngāti Toa rangatira in 1839 ('the Nelson purchase'). These deeds included an agreement that one-tenth of the land within the purchase area would be reserved and held in trust for the Māori customary owners while 'occupation reserves' were also created later by agreement with the Crown.

Following the signing of the Treaty of Waitangi, including article 2 expressing the Crown right of pre-emption, these deeds of purchase were rendered of no effect by reason of the Land Claims Ordinance 1841 unless confirmed as having been conducted 'on equitable terms' after investigation by Crown commissioners.[979] An agreement was reached between the imperial government and the Company in November 1840 under which the reserves promised by the Company for the benefit of Māori were to be vested in the Crown. The Crown also reserved the power to make further provision for Māori that seemed 'just and expedient for the benefit of the Natives'.[980] This enabled the Crown to insist on the exclusion of lands that were occupied or deemed necessary for Māori support ('occupation reserves') from its grant to the Company.

An investigation of the Nelson purchase was conducted under the Land Claims Ordinance 1841 by Commissioner William Spain in 1844. He found that the purchase had been made on equitable terms, clearing the land of native title and enabling it to be vested it in the Crown as demense lands to be granted to the Company under the authority provided to the Governor by the 1840 Charter and Instructions to Hobson.[981] The Spain award was the basis of a Crown grant to the Company of 151,000 acres in July 1845, but also required it to reserve one-tenth of the land granted to it for the benefit of the Māori owners of the district, excluded existing pā, urupā and cultivations. Town and suburban sections of the tenths reserves, amounting to 5,100 acres, had already been surveyed, and were shown on plans annexed to the award. This left 10,000 acres of rural land to be incorporated into the tenths reserves.[982] However, the Crown grant was subsequently changed in 1848 after protests from the Company, and the promised reserves and exclusions were not given full effect, and were further diminished subsequently by exchanges and grants undertaken by the officials managing them.[983]

Before the Supreme Court in 2015, Rore Pat Stafford (alongside the Wakatū Incorporation and trustees of Te Kahui Ngahuru Trust) argued that the Crown breached trustee and/or fiduciary obligations that it owed to the particular hapū and whānau who held aboriginal title to the land acquired by the New Zealand Company, by failing to ensure the creation of the full reserves set out in the 1845 grant, and to ensure the exclusion of pā, urupā, and cultivation grounds.

979. *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17 at [11].
980. *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17 at [12].
981. *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17 at [17].
982. *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17 at [18]–[19].
983. *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17 at [31].

The Supreme Court found, by majority, that the Crown owed fiduciary duties to reserve 15,100 acres for the benefit of the customary owners and, in addition, to exclude their pā, urupā and cultivations from the land obtained by the Crown following the 1845 Spain award.[984] In her reasoning, Chief Justice Elias found that the fiduciary obligations owed to Northern South Island Māori were the obligations of a trust.[985] Justice Glazebrook agreed that the dealings between Māori, the Company and the Crown had created a trust, finding that the Company had intended to set up a trust as a part of the Nelson purchase, and the Crown by virtue of the 1840 agreement had then taken on the Company's trust obligations.[986] Justices Arnold and O'Regan, while agreeing that the Crown assumed fiduciary obligations in relation to the Nelson purchase, found that it was unnecessary in the circumstances of the case to determine whether these obligations were in the nature of a trust.[987] Justice William Young, in a minority decision, found that no fiduciary duties arose in the circumstances of the case.[988]

The Supreme Court's decision referred extensively to the reasoning of the Canadian Supreme Court in *Guerin v The Queen* [1984] 2 SCR 335. In her reasons, Chief Justice Elias wrote:

> The obligation to act in the interests of the Indian band in *Guerin* is entirely comparable with the obligation which arose through alienation under the Land Claims Ordinance through the terms approved in Spain's award. As in *Guerin*, fiduciary obligations arose because the Crown acted in relation to 'independent legal interests' (in *Guerin*, as in the present case, existing property interests) and on behalf of Maori. The Crown's obligations in the present case are, if anything, amplified by the nature and extent of Maori property and its recognition in New Zealand from the first engagements of the Crown in the Treaty of Waitangi.[989]

The Court noted that it made its finding of fiduciary duties on the particular facts of the Nelson purchase and 1845 Spain award. In her reasoning, Chief Justice Elias observed that '[n]one of this is to suggest that there is a general fiduciary duty at large owed by the Crown to Maori. It is to say that where there are pre-existing and independent property interests of Maori which can be surrendered only to the Crown (as under the right of pre-emption) a relationship of power and dependency may exist in which fiduciary obligations properly arise.'[990] It was recognised by Arnold and O'Regan that the principles set out in the *Guerin* decision could have a broader application in New Zealand than the particular facts of the *Wakatu* decision, while leaving any determination of such an application to be considered if and when it arose:

984. *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17 at [1].
985. *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17 at [392]–[416].
986. *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17 at [572].
987. *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17 at [726].
988. *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17 at [908]–[924].
989. *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17 at [385].
990. *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17 at [391].

> We acknowledge that, on the basis of *Guerin*, it can be argued that the Crown has fiduciary duties to Maori arising from the Treaty of Waitangi and/or from the Crown's right of pre-emption. We base the duty in this case on the particular dealings between the Company and Maori and the Crown and the Company and to express no view about a broader basis for such a duty.[991]

6.6.2.8.2 The Tribunal's analysis

The Supreme Court found in *Wakatu* that, where there has been an assumption of responsibility, fiduciary duties may arise notwithstanding any questions about sovereignty. A trust may be imposed even though that had not been the intention and may still arise by operation of the law. However, sovereignty in and of itself did not lead to fiduciary obligations in the common law, so whether it was ceded or not is irrelevant to the issue under consideration. We agree with claimant counsel that it is the assumption of responsibility that gives rise to circumstances that may bring about a 'sui generis fiduciary duty', which is independent of any question of sovereignty itself.

The notion of fiduciary duties being recognised in the context of historical transactions between the Crown and Māori is an outcome of *Wakatu* that is relevant to the Te Raki Inquiry even though the material facts and context may be different. However, *Wakatu* does not state that a fiduciary relationship arises solely from the Treaty but rather because of a particular set of circumstances.[992] Similarly, pre-emption alone does not confer a fiduciary obligation as articulated in *Wakatu*, nor does vulnerability, dependence and imbalance in power. These may be relevant considerations but are not enough in themselves to generate a fiduciary duty in common law; something additional is required. In the case of *Wakatu*, the Crown had entered into specific engagements by reason of the November 1840 agreement and the 1845 grant to the Company following Spain's award and it took direct responsible for the administration of the tenths and occupation reserves thereafter. The question is whether similar circumstances exist here.

We begin by noting that the Tribunal has long recognised a fiduciary duty owed by the Crown in what might be described as a political sense, deriving from the idea that such an obligation may arise as a consequence of a social contract.[993] One of the strongest statements of this kind is to be found in the Te Maunga Railways Land Report with reference to public works takings and offer backs. The Tribunal in that context discussed the 'fiduciary obligation of the Crown under the Treaty of Waitangi' and identified 'the fiduciary obligation of the Crown actively to protect Maori ownership of land unless Maori owners are willing to sell it at an agreed price.'[994] *The Muriwhenua Land Report* also cast the Crown's obligations in terms of a fiduciary relationship in the higher sense as part of its governance:

991. *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17 at [784], fn 1012.
992. *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17 at [377].
993. L. Breach 'Fiducia in Public Law' (2017) 48 *Victoria University of Wellington Law Review*, vol 48, no 3, p 421.
994. Waitangi Tribunal, *Te Maunga Railways Land Report*, Wai 315, 1994, p iii.

'It was basic in the assumption of rights of settlement and governance that Maori interest would be protected, and Maori would be treated fairly, equitably. And in accordance with the high standards of justice that a fiduciary relationship entails.' Such responsibilities arose in part from the 'marked imbalance in knowledge and power' between the two parties.[995]

The Tribunal looked specifically at the nature of any fiduciary duties owed by the Crown in the Turanga Township inquiry. Claimant counsel sought to show that the Crown had fiduciary obligations arising both from, and independently of, the treaty. At that time, 1995, the New Zealand Courts had not considered 'the existence of an aboriginal fiduciary obligation independently of statutory reference to the principles of the Treaty'. Accordingly, and '[i]n deference to the courts whose function it is to declare the common law' the Tribunal found that it 'must wait for an authoritative decision from them on the question.' The Tribunal went on to quote Sir Robin Cooke in the New Zealand Maori Council case that the 'relationship between the Treaty partners creates responsibilities analogous to fiduciary duties' and in *Te Runanga o Wharekauri Rekohu Incorporation v Attorney-General*: 'the Treaty created an enduring relationship of a fiduciary nature akin to a partnership' [emphasis added].[996] There was no suggestion that the Crown's fiduciary duties arose independently of the treaty or had their source in the common law; but, the Tribunal noted, this did 'not foreclose the possibility at some future time the New Zealand Court of Appeal might so hold.'

The Supreme Court did not go so far in *Wakatu*. It drew a clear distinction between the sort of political trust whereby the Crown may be said to be a trustee as part of its governance and fiduciary obligations in a legal sense.[997] As we noted above, the Court was not required to, and expressly did not consider, the question of whether there was any general fiduciary duty owed by the Crown to Māori under the Treaty; it did, however, open the legal door to a fiduciary duty being recognised in other historical transactions between Māori and the Crown. We think it unlikely that the circumstances that gave rise to *Wakatu* will be confined to that case.[998]

A number of possible situations in which the *Wakatu* decision may have relevance have been argued by claimant counsel. Thornton and Lyall submitted that the Royal Instructions limited the Crown to the purchase of wastelands and required the protection of occupied lands. In their words: 'This fiduciary duty would have required that in connection with the taking of surplus lands, the Crown was obliged to determine what lands were not being used by Māori and reserve those lands, protecting them by making them inalienable.'[999] Naden,

995. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, 1997, pp 283, 389.
996. Waitangi Tribunal, *Turanga Township Report*, Wai 84, 1995, pp 289–290.
997. *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17 at [336].
998. Carwyn Jones, 'Analysis: *Proprietors of Wakatū and Others v Attorney-General* [2017] NZSC 17', 13 May 2017, International Association of Constitutional Law, https://blog-iacl-aidc.org/test-3/2018/5/26/analysis-proprietors-of-wakat-and-others-v-attorney-general-2017-nzsc-17, accessed 13 December 2022.
999. Claimant closing submissions for Wai 1666 and Wai 2149 (#3.3.323), p 10.

Roughton and Shankar also identified legislative sources of the assumption of responsibility element found in *Wakatu*.[1000] Counsel argued that the Crown assumed responsibility towards Māori by way of: the Tiriti o Waitangi, the 1840 Charter for New Zealand, the instructions contained in the despatch of the Lord Russell, and the Land Claims Ordinance 1841 which was supposed to ensure that all pre-1840 transactions were conducted equitably and without injustice.[1001] In our view, however, these were all political undertakings creating a trust in the higher sense. While these were important statements that equitable obligations had been assumed, they did not give rise to a recognisable fiduciary duty in common law. Unless something additional was done in the private law sense – an active step to assume responsibility in respect of a particular transaction such as vesting and setting aside lands – the decision in *Wakatu* is not applicable.

We consider the elements of trust raised in the submission of Hirschfeld, Sinclair and Tūpara to be more directly applicable to the decision of *Wakatu*. However, in order for the case to apply, it must be shown that there was an assumption of responsibility sufficient to give rise to a trust or trust-like arrangement followed by a breach of that trust. As we see it, the equitable obligations that are undertaken in the Land Claims Ordinance are, by themselves, insufficient, but they do provide a necessary context for the Crown's assumption of responsibility towards Māori and to behave equitably.[1002] The claimants must then demonstrate an assumption of responsibility particular to a transaction in order to show an intention to create a trust or trust-like arrangement, that the land (in this case the 'surplus') was held for the benefit of the claimants, and that the Crown committed a breach of trust by appropriating it for its own benefit. While the Crown did briefly contemplate creating reserves out of surplus lands and FitzRoy made a verbal promise of their return we do not think that a fiduciary duty had been created and then breached in the sense contemplated in *Wakatu*. This is not to say that the Crown's taking of the surplus was not unconscionable in treaty terms, simply the circumstances are too different from those considered in *Wakatu* for that decision to be clearly applicable.

The strongest case for the application of *Wakatu* would seem to us to be the failure to set aside reserves when specifically promised. Such promises or obligations were expressed in a number of circumstances.

We agree with the Crown that the situation in Te Raki was 'materially different' from that at *Wakatu*. Notably, the scale of many old land claims in Te Raki involved small acreages – and as claimant counsel acknowledged – in such circumstances it is unlikely that existing occupation rights were affected by the validation of the 'purchase.'[1003] However, there were other instances in which old land claims involved thousands of acres. In any event, the differences in the facts

1000. Claimant closing submissions for Wai 1957 (#3.3.235), p 3; see also claimant closing submissions for Wai 2382 (#3.3.339) and claimant closing submissions for Wai 1522 and Wai 1716 (#3.3.341).
1001. Claimant closing submissions for Wai 1957 (#3.3.235), p 3.
1002. *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17 at [380].
1003. Claimant closing submissions (#3.3.223), p 37.

and the surrounding circumstances do not mean that the reasoning of *Wakatu* may not have application elsewhere. The fiduciary duties found in *Wakatu* are not dependent on the pre-1840 transaction but on the Crown's assumption of responsibility through the Land Claims Ordinance, the November 1840 agreement, Spain's award and the specific conditions of grant which required the Company to reserve tenths and except occupied sites.

An analogous situation may be seen to exist in certain instances in Te Raki where awards set aside reserves but they were not put into effect; however, it should be observed that the failure to reserve 'occupied' land may not give rise to a fiduciary duty in every instance. It was certainly a duty in the higher sense, a cornerstone of Crown policy as set out in Normanby's 1839 instructions which failed to be realised, or adequately protected within the awards of the land claim commissioners. The question to be answered is whether the Crown's assumption of responsibility was of such a nature to attract fiduciary duties in common law. It could be argued that the reservation of occupied land was an incidence of an exercise of a right of pre-emption which was justified in the treaty context by its protective elements but the issue is complex and yet to be further tested in the courts. There may also be instances in which the Crown agreed to set aside reserves as part of its own direct purchases in an inducement to sell and then failed to keep that promise which might rise to a fiduciary duty on the basis of its pre-emptive powers under article 2 of the treaty. We will explore such instances in chapter 8 of this report.

In the following we look more particularly at a third set of circumstances; the case of the 'tenths' that were supposed to be set aside as part of pre-emption waiver purchases. The structure of FitzRoy's pre-emption scheme raises questions about the Crown's fiduciary duties in a way that was not explored in *Wakatu* but in which that decision may still apply. As noted earlier, the Supreme Court finding did not presuppose a blanket assumption of fiduciary obligations. As we observed earlier, more is required. Relevant circumstances might include the following: the assumption of responsibility; an inducement to enter a transaction accompanied by a broken promise or a failure to perform a condition, appropriation of lands; unfair or unconscionable conduct; and where there is conduct or facts that demand further explanation. All of these conditions were present to some degree in the case of pre-emption waivers.

It might be argued that the waiver of pre-emption was in itself a breach of fiduciary duty. But we think that this is unlikely to be tenable, since the Crown was acting not as a trustee under common law but in governance only. Also the scheme arose as a solution to the dissatisfaction that Māori as well as settlers felt with slowing Crown purchases in the region. FitzRoy's decision to waive pre-emption under certain conditions was guided, if not compelled, by the wish of Māori to sell land directly to private purchasers. They disliked pre-emption as interfering in their relationships with settlers and depressing the price of land, Thus there was apparent consent for FitzRoy's measure although we consider this to have fallen short of the gathered hui when te Tiriti had been signed at Waitangi and Māngungu.

It was expected that prices would be dictated by market forces and FitzRoy advised Māori to seek the best price rather than accept the first offer made for their land. Nonetheless the Governor and Crown officials were aware that the wrongs the powers of pre-emption were supposed to prevent might arise in the context of private transactions. The protective measures found in the scheme and announced in his proclamations of 26 March and 10 October 1844 indicate that the Crown had not disclaimed its responsibility to protect Māori. Instead, FitzRoy attempted to balance multiple interests reframing the overarching objectives of the right of pre-emption in a manner that preserved the Crown's duty of protection.

As outlined earlier, the proclamations required the Governor to consider a range of factors when exercising a discretion to approve or reject an application for a waiver made to his office. He had to consult with the Protector of Aborigines in each case before agreeing to waive pre-emption. No waiver would be granted that resulted in the alienation of pā, urupā or lands in 'present use'. The implementation of the scheme was to be overseen by protectors who would also ensure that tenths would be reserved and that there was sufficient land left for Māori use after the purchase. Non-compliance with the regulations set in place was a constant issue throughout the operation of the pre-emption waiver scheme. Often officials, including the Governor, turned a blind eye to their infringement and where they did not, often the Crown kept the lands concerned as 'surplus'.

This brings us to the matter of the tenths in particular where we think there are analogous circumstances to those of *Wakatu*. Regulation 5 of FitzRoy's March 1844 proclamation required purchasers to convey one-tenth of their purchase to the Crown for 'public purposes, especially the future benefit of the Aborigines'. The management of such reserves, it was conceived, would be entrusted to a committee that consisted of the Governor, the Bishop, the Attorney-General, the Commissioner of Crown Lands, and the Chief Protector of the Aborigines.

The language of regulation 5 was imprecise, but we do not think that this detracts from the undertaking of the Crown to hold the land in trust. FitzRoy had also given explicit assurances to Māori rangatira that the land would be set aside for their benefit, announcing at the gathering in front of Government House:

> one-tenth of all land so purchased is to be set apart for, and chiefly applied to, your future use, or for the special benefit of yourselves, your children, and your children's children. The produce [income] of that tenth will be applied by Government to building schools and hospitals, to paying persons to attend there.[1004]

Such assurances created a reasonable expectation that the land would be set aside for the long-term and enduring benefit of Māori who should have been able to rely on those statements. Governor Grey dismantled the scheme, however, and with it the tenths. Section 14 of the Land Claims Act 1846, provided that since in

1004. Copy of Minutes of a Meeting of Native Chiefs, 26 March 1844, encl in FitzRoy to Stanley, 15 April 1844, BPP, vol 4, p 198.

many cases the tenths could not be 'conveniently made' they could be purchased from the government by private individuals at the rate of £1 per acre instead.

It is our view, that a fiduciary duty might be considered to exist in common law in the case of the tenths. Although the waiver had removed the Crown's exclusive monopoly right, FitzRoy's scheme had introduced fiduciary duties in new ways. The Crown was still in a position of overall responsibility. The proclamation and the Governor's assurances expressed a duty Māori could reasonably rely on. The promise of tenths served as an inducement for sale and (along with exclusion of pa and other sites of occupation) was a condition of purchase under the scheme, Grey was not at liberty to dispose of or appropriate the tenths through the subsequent passage of legislation. *Guerin v Queen* to which the Supreme Court referred extensively in its *Wakatu* decision concerned a failure to fulfil a condition and that was the case here. We know of no instance in which Te Raki Māori received either tenths or the income for their benefit. Insofar as tenths reserves were to be set aside and held in trust for Māori, fiduciary duties would seem to arise in respect to their creation and management and the Crown appears to have breached this duty when it appropriated land and money out of the subject matter, its trust-like arrangement.

We think there is, then, a foundation for the Crown to consider whether it owes these duties under the ruling in *Wakatu* and should take steps to address its responsibilities as a fiduciary; or for cases to be brought before the courts by claimant groups affected by the disposal of the tenths reserves supposed to be set aside under the pre-emption waiver scheme. However, as stated in *Wakatu*, this must be determined on a case-by-case basis.

6.6.3 Conclusions and treaty finding; the waiver of pre-emption

FitzRoy believed that waiving the Crown's pre-emptive right of purchase would allay growing resentment and discontent on the part of both Māori and settlers and would also foster the economic development of the colony by reducing the role of the state in the economy.[1005] He acknowledged that Māori had thought that the Queen was to have only the first choice of land. He also consistently emphasised that pre-emption had been intended to protect Māori and the importance of retaining the 'moral authority' of the government; a difficult matter when it was using its monopoly position to its own advantage. FitzRoy's policy was an attempt to resolve that contradiction by removing the Crown's direct involvement in land purchase while retaining a supervisory role and a means of generating income for government purposes.

British settlers had been increasingly impressing upon Māori that a Crown monopoly on land-buying was inconsistent with the Treaty's guarantee to them of all the rights and privileges of British subjects and his own frequent allusions to article 3 and of his desire to see that promise fulfilled highlighted the inherent contradictions in the treaty as interpreted by the Crown. Pre-emption waivers were intended to resolve that tension as well.

1005. FitzRoy to Stanley 14 October 1844, BPP, vol 4, pp 400–401.

Māori and settler dissatisfaction with the '10s an acre' system introduced in March 1844, the growing tensions in the north and the realisation that the new regulations had failed to have their intended effect or were being deliberately avoided were all factors leading to FitzRoy's '1d per acre' proclamation in October. According to Crown historian Dr Donald Loveridge, the decision reflected FitzRoy's disenchantment with the land fund system of colonisation on the grounds that it was failing 'to attract either capital or the right kinds of settlers'.[1006] In our view it also was a surrender to the demands of settlers who were actively undermining Crown efforts to protect Māori from the pressures of colonisation.

FitzRoy did not disavow the Crown's duty of protection when he waived its right of pre-emption but that step – and Stanley's response to it – threw further doubt on the importance of this aspect of the policy. In modifying pre-emption, he attempted a number of safeguards, prohibitons against the purchase of pā and urupā and land required for their use, the setting aside of tenths blocks – intended to ensure that they retained sufficient lands for their future welfare – and a delay in the issue of grants intended to allow time for objections and also to encourage long-term relationships between settlers and Māori. Later, FitzRoy also attempted belatedly to put a limit of a 'few hundred acres' on the land that could be acquired under waiver certificates.

However there were shortcomings in both sets of regulations. They did not require a preliminary survey to be made, nor were purchasers specifically required (until FitzRoy's notice of December 1844) to establish that they had identified all the rightful owners of the land concerned. There was no mechanism to ensure that the vendors would retain sufficient land for their needs other than scrutiny by an over-extended Protector of Aborigines. Further, the regulations did not require the owner of the lands concerned to consent to a waiver of the Crown's pre-emptive right, only for the actual transaction of the land in question. Often – contrary to the regulations in place – this had been arranged before a waiver had even been granted.[1007] Nevertheless, the proposition that the Crown was free, without Māori involvement, to grant waivers to settlers, reflected the Crown's presumption of its own sovereignty in New Zealand and the sidelining of Māori authority over their own lands. Avoidance of this regulation undermined the economic benefits of waiver purchases for Māori. The effectivenes of intended protections was similalry undermined by failures in their implementation.

Taken as a whole, the Crown assumed that it could unilaterally alter or depart from the provisions of the treaty, based on its own interpretation of article 2 of the English text, which differed from what Māori had been given to understand. There is no doubt that officials in the Colonial Office understood that the pre-emptive waiver scheme would constitute a unilateral amendment of its treaty guarantees though it would not be absolved of its duty of protection.[1008] There is no doubt, too, that Māori were dissatisfied with the Crown's pre-emption policy, which

1006. Loveridge, 'An Object of First Importance' (Wai 862, doc A81), pp 248–250.
1007. Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), pp 452, 481, 483, 499.
1008. Daamen, The Crown's Right of Pre-emption, pp 59–61.

they condemned for depressing prices; but beyond the initial reception of delegates from a different tribe and the later hui at Waimate, Te Raki Māori were not consulted regarding the changes or any new protections. Certainly they were not consulted with as an assembly in the same way as they had been in February 1840.

Our final conclusions as to the Crown's actions in waiving its pre-emptive right in favour of individual purchasers must wait upon our assessment of the later legislation passed in 1856, the commission it established, and the extent to which Māori rights were considered and protected. It was still possible at this point that Māori who had not participated in a transaction might have their rights addressed, but there was no clear avenue for them to do so.

What is clear to us, however, is that the Crown considered the title of Māori participating in 'sales' under waiver certificates to be extinguished, notwithstanding that purchasers often had failed to follow regulations, as discussed later. Even though the investigations by protector Clarke (in approving the waivers) and Commissioner Matson and Attorney-General Swainson (in validating them) were defective, Māori were considered to have sold the land concerned. Disallowance of settler claims for non-compliance with the regulations did not affect that status; instead, such land and areas described in the deed but in excess of the Crown grant were considered to have 'reverted' to the Crown. This was a significant shift from FitzRoy's promise to Māori regarding pre-treaty land claims that any surplus lands were to return to the original owners, which we discuss in the next chapter. This had seemed to disavow any intention on the part of the Government to take these lands for itself, unless Māori no longer wished to claim them. In both instances, the idea that land 'reverted' – whether to Māori (as FitzRoy had promised in the case of old land claims) or to the Crown (as asserted in the case of pre-emption waivers) – was a reflection of the Crown's assumption of the radical title. While Grey's 1846 ordinance acknowledged that there might be Māori who had not participated in waiver transactions whose rights were unextinguished, the Crown set about issuing mineral licences and on-selling the lands it considered itself now to own.

It is well established in treaty jurisprudence that the Crown's right of pre-emption created a fiduciary obligation. In our view, waiving that right did not relieve the Crown of that obligation; indeed, the regulations introduced under FitzRoy's proclamations, though deficient in several respects, reflected the Governor's awareness and acceptance of that fact. However, his protections proved inadequate – evaded by settlers or abandoned as their interests increasingly came to dominate in Crown policy. Notably, purchases beyond the few hundred acres described in FitzRoy's notice of 6 December 1844 were approved, and grants endorsed later by both FitzRoy and Grey. There was no assessment of whether lands were being acquired that Māori would need for their own sustenance and no tenths were set aside. Waiver certificates were also approved for 'purchases' already negotiated, negating the competition that was supposed to benefit Māori vendors.

Both the Secretary of State and Governor acknowledged the danger posed to Māori and the Crown's responsibility to ensure that no harm was inflicted upon them by excessive and inappropriate land purchase. Earl Grey's instructions

regarding the settlement of pre-emption waiver purchases had clearly stipulated the Māori vendors must be 'according to the native laws and customs, the real and sole owners of the land'.[1009] But an effective process had not been created and in many cases, the assent of all rightful owners had not been established. Governor Grey's condemnation of the pre-emption waiver proclamations as injurious to Māori – and of FitzRoy and the protectorate, in general – failed to produce anything substantive; as with the old land claims, nothing effective was done to remedy the injustice he had repeatedly identified. The measures he introduced were concerned with the interests of the settlers – by his own admission at the expense of Māori, even though he had railed at the injustice FitzRoy's waivers had inflicted upon them.

Grey's 1846 ordinance undermined the tenths provisions – a crucial acknowledgement of the Crown's continuing duty of protection despite the modification of its pre-emptive right – and the investigations under his three options perpetuated failures to identify all rightful owners properly, establish that a fair price was paid, and ensure that Māori retained their valued sites and sufficient lands for their use. We agree with the assessment of Stirling and Towers that 'Once again, what had appeared to be a robust process on paper turned out to be largely ineffectual in reality, and again Maori paid the price.'[1010]

We find therefore that:

- the administration of the waiver policy was deeply flawed from the outset, Crown scrutiny was deficient to the point of negligence with the result that intended protections set out in FitzRoy's proclamations were able to be evaded, and expected benefits failed to materialise in breach of te mātāpono o te matapopore moroki/the principle of active protection.
- Governor Grey's Land Claims Ordinance 1846 and his options of August 1847 for the settlement of waiver claims favoured settler and Crown interests over those of Māori in breach of te mātāpono o mana taurite/the principle of equity and te mātāpono o te matapopore moroki/the principle of active protection.

We leave our findings on surplus land until the next section.

6.7 Were the Bell Commission and the Crown's Policies on Scrip and Surplus Lands in Breach of the Treaty?

6.7.1 Introduction

By the mid-1850s, a decade and a half after Hobson had promised to investigate the old land claims and return Māori lands that had been unfairly taken, considerable uncertainty still existed. Crown grants had been awarded for many of the claims, but not surveyed. Under the doctrine of radical title, which we have found to be in breach of the treaty and its principles, the Crown had laid claim to significant areas of 'surplus' lands but in all but one case, had made no attempt to enforce

1009. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 556–557.
1010. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 559.

possession. Nor had it sought to assert its claim over lands it had acquired through 'scrip' on the ground (see key terms in section 6.1.2). In many cases, Māori continued to live on and use ancestral lands, not knowing that in terms of colonial law, those lands were now the property of the Crown, or settlers.

The settler Parliament had begun to operate in 1854 and immediately began to assert a right to legislate over matters affecting Māori. The Land Claims Settlement Act 1856 was enacted to bring finality to all remaining old land and pre-emption waiver claims, enabling settlers' grants to be confirmed, and the Crown to claim its portion. In 1857, the second Land Claims Commission was established under the former New Zealand Company agent Francis Dillon Bell. He confirmed or increased grants for many of the old land claimants in this district, and his decisions also resulted in the definition of what lands the Crown owned by reason of 'scrip' and its claim to the 'surplus' for both pre-treaty and pre-emption waiver 'purchases'.

The recommendations of the second Land Claims Commission resulted in grants totalling 159,461 acres being awarded to settlers in the case of old land claims, while the Crown netted some 51,980 acres of 'surplus' lands.[1011] By our calculation, the finalisation of pre-emption waiver claims resulted in the transfer of 14,400 acres to settlers and a further 21,168 acres to the Crown, which also acquired another 4,245 acres after surveying 'scrip' lands in this district (see section 6.1.3).

Claimants saw the policies concerning surplus and scrip, and the decisions of the Bell commission, as compounding earlier treaty breaches that arose from the Crown's assertion of radical title and the failure of the first commissions to investigate Māori understandings of the transactions properly or to protect unextinguished Māori interests.[1012] Claimants said that the Bell commission and the legislation it operated under failed to address the shortcomings of the first commission and FitzRoy's interventions; failed to provide reserves for Māori; failed to respect or uphold shared-use and trust arrangements; and rejected or dismissed evidence from Māori.[1013] Bell's overriding concerns were to secure surplus land for the Crown and to bring finality to the old land claims.[1014] Ultimately, the Crown took the surplus lands in breach of promises of their return made at Waitangi in 1840 and Waimate in 1844.[1015]

Claimant hapū who raised specific concerns about the Crown's scrip policy and practice include Te Māhurehure, Te Ihutai, Te Kapotai, Ngāti Hau, Ngāti Manu, Te Parawhau, Te Uri o Te Pona, and Te Whakapiko. Claimants submitted that the policy had undermined the economy by drawing settlers away from the

1011. This figure inclides 1,010 acres awarded to Busby by arbitration.

1012. Closing submissions for Wai 1333 (#3.3.313), pp 11–13; claimant closing submissions (#3.3.223), pp 30–31; closing submissions for Wai 2003 and Wai 250 (#3.3.272), pp 23–24.

1013. Closing submissions for Wai 354 and others (#3.3.399), p 143; closing submissions for Wai 1514 (#3.3.357), p 35; closing submissions for Wai 1354 (#3.3.292), para 109; closing submissions for Wai 1333 (#3.3.313), pp 13–14; claimant closing submissions (#3.3.223), pp 25–26.

1014. Closing submissions for Wai 1333 (#3.3.313), pp 13–14.

1015. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 147; closing submissions for Wai 354 and others (#3.3.399), p 143.

district and leaving land in an undeveloped state.[1016] The long delays in finalising scrip claims impeded proper scrutiny and created uncertainties over locations, boundaries, reserves, and other matters.[1017] Claimants submitted that the Crown took lands that had not been subject to valid transactions,[1018] and took more land than the scrip awards entitled it to do.[1019] In a number of blocks (including Motukaraka, Orira, Rawene, Papakawau, Powditch's Whangaroa claims, and Baker's Mangakāhia claims), claimants regarded their lands as having been confiscated or illegitimately taken.[1020] Claimants also said that John White, who managed the Hokianga surveys, dismissed concerns raised by Māori,[1021] and had a familial conflict of interest that the Crown did not address.[1022]

The Crown conceded that it had breached the principles of the treaty by claiming surplus lands without first ensuring that Māori had adequate lands for their future needs; by failing to investigate the claims for which scrip was given; and by taking decades to settle the titles and assert its own claims.[1023] The Crown also acknowledged that it had not adequately explained the surplus lands policy to Māori when it was first introduced, and that its implementation 'created significant hostility between Māori, settlers and Crown officials'. Many Māori had no knowledge that the Crown had claims to the surplus lands, and this caused 'Considerable protest and confusion' when the Crown ultimately took possession of the land, which in many cases, Māori had returned to or never left.[1024]

The Crown did not accept that its assertion of radical title, on which the surplus lands policy was based, was in itself in breach of the treaty. (We have dealt with this issue in chapter 4.) Nor did the Crown consider:

1016. Closing submissions for Wai 549, Wai 1526, Wai 1728, and Wai 1513 (#3.3.297(a)), paras 149, 218–219; claimant closing submissions (#3.3.222), para 115.

1017. claimant closing submissions (#3.3.222), paras 122, 126; claimant closing submissions (#3.2.223), paras 87–90, 95; closing submissions for Wai 354 and others (#3.3.399(b)), para 10.126/108 (a) (v); closing submissions for Wai 1538 (#3.3.303), paras 56–58; closing submissions for Wai 1464 and Wai 1546 (#3.3.395), paras 4.20, 4.49–4.51.

1018. Closing submissions for Wai 354 and others (#3.3.399(b)), para 10.126; closing submissions for Wai 1666 and 2149 (#3.3.323), paras 47–49; closing submissions for Wai 2355 (#3.3.275(a)), paras 5.8–5.23.

1019. Claimant closing submissions (#3.3.222), paras 20–22, 113–116; claimant closing submissions (#3.2.223), paras 101–104; closing submissions for Wai 354 and others (#3.3.399(b)), para 10.126; closing submissions for Wai 1538 (#3.3.303), paras 56–58; closing submissions for Wai 549, Wai 1526, Wai 1728, and Wai 1513 (#3.3.297(a)), paras 201, 209–211, 212–214.

1020. Closing submissions for Wai 549, Wai 1526, Wai 1728, and Wai 1513 (#3.3.297(a)), paras 201, 208, 212–214, 218–219, 224; closing submissions for Wai 1538 (#3.3.303), paras 33–41, 66; closing submissions for Wai 2072 (#3.3.279), para 29; closing submissions for Wai 1354 (#3.3.292), paras 122–123; closing submissions for Wai 1666 and Wai 2149 (#3.3.323), paras 47–49; closing submissions for Wai 2355 (#3.3.275(a)), paras 5.8–5.23; closing submissions for Wai 1666 and Wai 2149 (#3.3.323), paras 47–49; closing submissions for Wai 156 (#3.3.401), paras 105–106, 130–132.

1021. Closing submissions for Wai 1354 (#3.3.292), paras 111–118, 120–121.

1022. Amended closing submissions for Wai 549, Wai 1526, Wai 1728, and Wai 1513 (#3.3.297(a)), paras 212–214.

1023. Crown statement of position and concessions (#1.3.2), p 52.

1024. Crown statement of position and concessions (#1.3.2), pp 55–56.

- that it had led northern Māori to believe that all surplus lands would be returned;[1025]
- that there was clear evidence of significant concern about surplus lands among northern Māori in the early 1840s;[1026] and
- that Governor FitzRoy had made significant promises regarding the return of surplus lands that the Crown failed to honour.[1027]

The Crown submitted that claims to surplus lands were investigated through the Myers Royal Commission of Inquiry (1946 to 1948), and all claims were settled in 1953 through the Maori Purposes Act 1953.[1028] With regard to scrip, Crown counsel submitted that on many occasions, it received less land than it had paid for.[1029]

The Crown's concessions and acknowledgements, though significant, did not address all the claimants' concerns. In this section, we will consider the nature of the promises made to Māori about the return of surplus lands; the purpose and actions of the second Land Claims Commission; and the impact of the surplus and scrip policies on Māori communities in Te Raki. We will consider the Crown's submission about the Myers commission and the Maori Purposes Act 1953 in section 6.8.

6.7.2 The Tribunal's analysis

6.7.2.1 *Did the Crown mislead or break promises to Te Raki Māori over its 'surplus' lands policy?*

In his 1839 instructions to Hobson, Lord Normanby outlined three, interrelated but also potentially contradictory objectives for the new Crown Colony Government: protection of Māori, funding the colonial project, and controlling land use and settlement. As the Tribunal explained in the *Hauraki* report, Normanby assumed that Māori had already parted with vast tracts of land in many parts of the country, and he aimed to prevent any repeat of the New South Wales experience in which settlers with large holdings would 'sprawl across the colony to the detriment of sound economic development and security'. This, then, was a significant practical motivation behind the Crown's decision to operate the land commission process as it did, whereby no pre-treaty transaction would be recognised until it had conducted its own title determination process, through which settlers would be limited to 2560 acres for any valid purchase. In the Hauraki Tribunal's view, it was implicit in these instructions that the Crown would find some land acquisitions invalid and therefore leave them in customary ownership. In particular, Crown officials doubted the legitimacy of the 'huge' South Island and Cook Strait purchases, as well as some of the larger Bay of Islands transactions. But, in the assessment of that inquiry, the instructions also implied that the Crown

1025. Crown closing submissions (#3.3.412), pp 4, 59–60.
1026. Crown closing submissions (#3.3.412), pp 4, 59–60.
1027. Crown closing submissions (#3.3.412), pp 4, 59–62.
1028. Crown closing submissions (#3.3.412), p 56.
1029. Crown closing submissions (#3.3.412), p 4.

would retain any 'surplus' above the 2,560-acre limit from lands that it judged to have been legitimately alienated; and in addition, that the Crown intended to make use of those lands to advance colonisation, either by making grants to settlers or by using the land for public works.[1030] The underlying legal principle, as we have already discussed, was that from the moment of its assertion of sovereignty, the Crown would also acquire radical or underlying title to all New Zealand lands, subject to the 'burden' of Māori customary rights.[1031]

During the Tiriti debates, rangatira certainly expressed considerable concern about the lands that missionaries and other settlers were claiming to have purchased, and they sought assurances that the new Governor would enforce their understanding of the transactions – in their words, 'return' the land. Hobson's response, that 'all lands unjustly held would be returned',[1032] was, in our view and in that of earlier Tribunal inquiries, a critical assurance which undoubtedly influenced the rangatira to sign. We agree with the assessment of the *Hauraki* report that those who signed at Waitangi and Māngungu 'expected to get back much of the land claimed by traders and others, and that much of this land would remain in customary Maori tenure'.[1033]

The 1840, 1841, and 1846 Land Claims Ordinances established commissions to determine whether settlers had made valid and equitable purchases from Māori. The surplus lands policy was implicit in these measures. The commissioners could determine that land had not been legitimately purchased, in which case it would remain in customary ownership. But they could also determine that land had indeed been acquired on equitable terms, and then award only a part of it to the settler.[1034] Gipps later elaborated on the surplus lands aspect of this policy in his instructions to Hobson. On 2 October 1840, he explained that the commission must give precise descriptions of lands 'alienated . . . but not awarded to the claimant';[1035] and on 30 November 1840, he specified that '[if] the chiefs admit the sale of land to individuals . . . the title of such chief to such lands are of course to be considered as extinct whether or not the whole or any portion of the land be confirmed to the purchasers'.[1036]

1030. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 1, pp 81–83. Also see Alan Ward, *National Overview*, vol 2, p 32: 'Although Normanby's instructions had not yet spelt out the details, the implication was that a settler would get a grant, in proportion to his outlay, within any area found to be validly and equitably purchased; the balance would be available to the Crown for allocation to other settlers.' As Ward explained, this was the reasoning behind Gipps' sliding scale of land prices. It was not intended to determine whether fair prices had been paid to Māori, but rather to determine the proportions that would be allocated to settlers or retained by the Crown.

1031. Moore, Rigby, and Russell, *Old Land Claims* (doc H1), pp 11–12.

1032. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 359.

1033. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 1, p 84.

1034. Ward, *National Overview*, vol 2, p 32; Moore, Rigby, and Russell, *Old Land Claims* (doc H1), pp 15–16.

1035. Gipps to Hobson, 2 October 1840 (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc I4), p 14). Armstrong explicitly described this instruction as a policy for 'surplus' lands, even if Normanby did not use that term at the time.

1036. Gipps to Hobson, 30 November 1840 (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc I4), pp 20–21).

Again, however, no effort was made to explain the 'surplus' policy to Māori, though they were certainly aware that the Crown was taking steps to address the old land claims question.[1037] Busby, George Clarke, and several settlers, as well as FitzRoy himself, described keen Māori interest in the question of what would happen to land that was not awarded to 'their' settlers. Busby informed the Colonial Office that during the debate of the Land Claims Ordinance 1840, in which Busby himself had participated, a Māori from Hokianga (whom he did not name) had been 'introduced by some person' into the gallery of the New South Wales Legislative Council. On his return to New Zealand, the Māori witness had created 'the greatest excitement and indignation amongst his countrymen, by his account of the proceedings he had witnessed'. As Busby explained it, northern leaders believed that the Crown intended to take for itself the lands that missionaries and others were occupying, and were incredulous at this prospect.[1038] Although the fate of those lands had not been specifically discussed during the New South Wales debates, the Crown had been accused of intending to confiscate them[1039] According to Busby, a delegation of Christian Māori visited their pastor Richard Davis 'and asked if it were indeed true that the British government intended to take possession of their lands?' Davis assured them that it was not. Nonetheless, Busby added,

> The sentiment has been universal amongst the natives in the neighbourhood of the Bay of Islands: that if the Queen (according to the enactments of the Land Claims Bill) deprived her own children of their land, it was only because she was not yet strong enough, that she did not interfere with theirs.[1040]

Busby was writing early in 1845, shortly before the Northern War broke out, and was tracing the history of Māori concerns about surplus lands, which he saw as relevant to rising tensions. Clearly, he was not impartial, but nonetheless it is worth considering his suggestion that Māori were alarmed about the Crown's apparent intention to interfere with their arrangements with settlers. In a letter published earlier in the *Bay of Islands Observer*, he had argued that 'no sophistry could convince the natives of the justice of the proceedings of the government which should despoil a purchaser of their land of his property'. The chiefs had assured landholders of their 'determination . . . to support them in the possession of it against the government'. This, as Busby explained, was because Māori lands had been 'expressly sold by the chiefs to the missionaries, in order that the sons of the missionaries might be the friend and neighbour of the sons of the chief'. Others had been married to the 'daughters of chiefs from whom they [had] purchased land, or [had] families by them'. As a result, there was a 'union of interests between

1037. Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 6; Waitangi Tribunal, *The Hauraki Report*, Wai 686, p 84.
1038. Busby to Hope, 17 January 1845, BPP, vol 4, p 517.
1039. Donald Loveridge, 'The New Zealand Land Claims Act of 1840' (Wai 45, doc I2), pp 84, 128.
1040. Busby to Hope, 17 January 1845, BPP, vol 4, p 517.

'Abominable and grossly unjust . . .'

S M D Martin began his editorship of the *New Zealand Herald and Auckland Gazette* with an open letter to Governor Hobson criticising the New South Wales Land Claims Ordinance:

> To crown the infamy of the whole concern, the surplus lands, instead of going back to the natives, the parties alleged to have been injured, are strangely enough declared to be the property of the Crown. We are tried, because we are said to have stolen the natives' property; when our crime is proven, the property is taken from us, but instead of being restored to the natives from whom we stole it is kept by the Judge himself. Abominable and grossly unjust as this act is, with the exception of Mr Hannibal McArthur, every one of the members of the Botany Bay Council approved of it.[1]

1. S M D Martin 'New Zealand: In a Series of Letters', 1845

the natives and the settlers' that Busby argued could not be disturbed, except by military force.[1041]

Māori concerns about the Crown's intentions had undoubtedly been inflamed by some settlers, who alleged that officials were being deliberately deceitful and who argued that the policy was unfair to Māori and settlers alike.[1042] We noted earlier, Clarke's warning in this regard, and also that some Māori were hoping that their land would revert to them through the work of the commission – as Clarke saw it, no matter how 'fairly purchased'.[1043] S M D Martin, magistrate and local newspaper editor, referred to the injustice of a policy under which the Crown might declare 'that the surplus lands which Europeans might have fairly purchased from the natives, but for which they had not given a sufficient consideration, would revert to the Government, and not to the native who was presumed to have been cheated or overreached'.[1044] Inadequacy of price was a matter for increasing Māori complaint but not, in fact, considered by officials as a reason to disallow claims, while settlers protested about the implication that they had swindled Māori.[1045]

1041. James Busby letter, *Bay of Islands Observer*, 17 March 1842 (cited in David Anderson Armstrong and Bruce Stirling, 'Surplus Lands. Policy and Practice: 1840–1950' (Wai 45, doc J2), p 21).
1042. Loveridge, 'The New Zealand Land Claims Act of 1840' (Wai 45, doc I2), p 128.
1043. George Clarke to Colonial Secretary, 9 February 1841, MA 4/58, p 19 (cited in Armstrong, 'The Land Claims Commission' (Wai 45, doc I4), p 47).
1044. S M Martin, *New Zealand: In a Series of Letters* (London: Simmonds & Ward, 1845), p 307.
1045. See Brodie evidence, 4 June 1844, BPP, vol 2 [556], p 41.

It would be difficult, too, to explain why the Crown should be entitled to any land if the money paid had entitled settlers only to so many acres. Another settler, Charles Terry, argued that 'whatever portion [was] disallowed' ought to 'revert' to Māori as a matter of 'equity':

> It is not the value of such lands that gives to this question its importance, and contingent consequences, but it is the impression and feeling which it will create among the aborigines, of the character and justice of the government which has so recently assumed the sovereignty of their native land, and under whose laws and institutions they and their posterity are henceforth to live.[1046]

Clarke and FitzRoy also made observations about the dangers inherent in any Crown attempt to keep the surplus for itself. Writing soon after the end of the Northern War, Clarke suggested that it was only assurances from the missionaries to Māori that the Crown's proceedings were 'merely matters of form and theory' that had 'prevented the northern chiefs from rising . . . to vindicate their independence'. According to Clarke,

> The smothered feelings of disaffection were in consequence manifested only in threats to oppose, even to the death, every attempt by the government to interfere with their lands . . .
>
> This opinion was still further strengthened when it became known that the surplus land confiscated under the sanction of the 'Land Claims Ordinance' was to be appropriated and resold, for the benefit of the government, and not restored to the natives, as the original proprietors.

What was more,

> not only the natives, but their advisers also, very much misunderstood the Treaty of Waitangi, if it really gave power to the local government to become, as it were, general plunderers, or to enact measures having a tendency to weaken the natural sense of justice which always inclined the natives to maintain inviolate their engagements with Europeans for the sale of land, when fairly and equitably made.

In Clarke's opinion, the Government's attempts – to which Māori had strongly objected – to on-sell land acquired through the extensive pre-treaty transactions of the missionary William Fairburn had undermined their 'morals' by giving the 'sanction of official authority' to 'objectionable principles of action'.[1047]

FitzRoy had been concerned about the surplus lands issue even before he left for New Zealand, regarding it as an act of injustice to Māori. This reflected his

1046. Charles Terry, *New Zealand its Advantages and Prospects as a British Colony* (London: T & W Boone, 1842) (cited in Armstrong and Stirling, 'Surplus Lands' (Wai 45, doc J2), p 23).

1047. Clarke to Colonial Secretary, 30 March 1846 (cited in Armstrong and Stirling, 'Surplus Lands' (Wai 45, doc J2), pp 29–30).

appreciation (expressed before the House of Lords select committee in 1838) that Māori land transactions were not intended as absolute alienations but rather as a conditional sharing of the land and its resources with settlers. In his view, Pākehā had chosen not to challenge that understanding because doing so would have provoked Māori opposition to their settlement. This put the Crown in a difficult position. In May 1843, before departing for New Zealand, FitzRoy had sought clarification from the Colonial Office, indicating his reluctance to assert any Crown claim to the surplus lands. Referring to the land ordinances, he asked, 'To whom should land now belong which has been validly purchased from New Zealand aborigines, but which, exceeding a certain specified quantity, cannot be held, under existing laws, by the original purchaser?' His own conclusion, reached after 'deliberate consideration', was that the surplus land 'ought to return to those aborigines from whom it was purchased'. The crux of the matter, he believed, was that Māori might still be occupying those lands and had given up no rights, except to the extent that they had allowed the settler also to occupy a portion:

> Suppose that a fertile tract of land, 10,000 acres in extent, had been validly purchased from a populous tribe of aborigines by a settler of 1830. In effect, notwithstanding such purchase, not a native is or has been dispossessed of any practical benefit, except that of sale.
>
> Each uses the land and its produce as before, the only sensible difference being, that the settler also uses it as he pleases; but he, for his own sake, avoids interference with the native huts, their sacred burying-places, their cultivated grounds, and general habits.[1048]

On the settler being restricted to a grant of, say 3,000 acres, the Government would sell the rest to numerous newly arrived emigrants 'unacquainted with the native habits or customs, but fully alive to British rights of property'. When that happened, Māori would be 'disturbed, obliged to move, be disappointed, and hate the Government, whose conduct ought to be . . . such as to ensure their respect and attachment'. FitzRoy argued that 'justice' to Māori, who at the 'time of selling such extensive tracts of land did not know their value . . . nor foresee the consequences to themselves', might require the dispossession of settlers; and that the Crown could 'lay no claim whatever to the surplus land in question.'[1049] FitzRoy's views are revealing for several reasons, not least that he appears to have accepted that the Crown could validate pre-treaty transactions as sales, even while acknowledging that Māori had not understood them as such and had retained most rights for themselves.

Lord Stanley, in reply, said he assumed that FitzRoy was referring to transactions in which the payment had been sufficient and had been 'untainted by any

1048. FitzRoy to Lord Stanley, 16 May 1843, BPP, vol 2, p387 (Crown document bank (doc H20), p107).

1049. FitzRoy to Lord Stanley, 16 May 1843, BPP, vol 2, p387 (Crown document bank (doc H20), p107).

such fraud or injustice' that would render them invalid before the Land Claims Commission. In such cases, any land over the 2,560-acre limit belonged to the Crown. Māori could not be the owners since their interests had been legitimately extinguished, and the buyer could not be the owner because the law did not allow it. It followed that such land was 'vested in the Sovereign, as representing and protecting the interests of society at large'.[1050] In other words, such land would become available for the purposes of sale and settlement.

While that was the legal principle, Stanley also gave FitzRoy the discretion to return the land to Māori were that best for the colony. He acknowledged that, in practice, 'difficulties' would 'probably arise'. Should Māori be still in possession of such lands, or 'solicit the resumption of them' prompted by 'feelings entitled to respect', it would be FitzRoy's 'duty . . . to deal with the original proprietors with the utmost possible tenderness, and even to humour their wishes, so far as it can be done, compatibly with the other and higher interests over which your office will require you to watch'. Stanley was aware that such a return would be FitzRoy's inclination.[1051]

FitzRoy demonstrated this immediately on his arrival in New Zealand. He later recorded that he had found excessive discontent in the northern part of the island; that Māori were dissatisfied 'by their having heard that the lands actually bought by settlers, but not to be retained by them under the new order of things, were to be taken by the Government and eventually resold to other parties'.[1052] As we discussed in earlier chapters, the 'inhabitants of Auckland' had presented him with an address in December, asking for their titles to be issued and objecting to the Crown's claim to the surplus on the grounds that 'it would be highly unjust towards the natives, and, at the same time, highly impolitic, as the natives lay claim to such surplus lands; and the forcibly taking possession of them by the Government would be attended with the very worst consequences'.[1053] FitzRoy agreed that it would be 'improper' for the Crown to claim the surplus lands under such circumstances. He had also received a petition from Māori, to which he responded (according to the *Southern Cross*) with a verbal promise, addressed to a gathering of rangatira at Government House that:

> an investigation would be made regarding all lands purchased from them by Europeans, and after allowing certain portions of these lands to such Europeans in accordance with certain arrangements, and upon certain principles, all the surplus

1050. Stanley to FitzRoy, 26 June 1843, BPP, vol 2, p 390 (Crown document bank (doc H20), pp 109–110).

1051. Stanley to FitzRoy, 26 June 1843, BPP, vol 2, p 390 (Crown document bank (doc H20), pp 109–110).

1052. FitzRoy memorandum, 20 March 1847, BPP, vol 5, pp 624–625; Crown memorandum (#3.2.2682), pp 7–8; Phillipson, 'Bay of Islands and the Crown' (doc A1), p 189. We note that FitzRoy's memorandum linked that discontent directly to the outbreak of the Northern War (as discussed in chapter 5).

1053. Address from the inhabitants of Auckland to Governor FitzRoy, 26 December 1843, BPP, vol 4, p 237.

> lands should revert to the original native owners, . . . but that in the event of the original owners not being discovered, the surplus lands would be claimed and held by the Crown.[1054]

The editor of the newspaper saw this as an unequivocal and most sincere statement that any surplus lands would revert to Māori, and that the Crown was to 'act as Umpire . . . for the purpose of Justice solely', while its purported claim to the 'Lion's share' was 'abandoned'.[1055] Both the address and FitzRoy's response were enclosed in his despatches.[1056] That same promise was recorded by the CMS missionary, James Kempthorne, following discussions with FitzRoy on 'Native Lands' in December 1843 and January 1844. The surplus would be returned, 'except in cases where the question of the ownership might excite feuds'. In such instances, the purchase would be 'made complete by and under the Queen's name'.[1057]

The matter was raised again at the Waimate hui attended by Ngāpuhi rangatira on 2 September 1844. Crown counsel argued that this discussion was the Governor's initiative rather than broached by Māori themselves.[1058] FitzRoy met privately with the leading chiefs after the public hui, but there are no detailed minutes of this discussion. Based on what was recorded, Crown counsel argued that Māori had failed to raise the issue with FitzRoy and seemed to be unconcerned.[1059] However, according to the journal of William Cotton (the bishop's chaplain), William Hau had been charged with raising 'all the native causes of complaint' in the private discussions. One of these matters was '[T]he land which has been sold to Pakehas, or rather that portion of it which is over and above the quantity granted to each claimant according to the established scale'. This was to be 'no longer taken possession of by Gov but revert[ed] to the original owners'. Cotton saw this as 'just', remarking that he had never understood 'the old way of proceeding'.[1060]

The account published in the *Southern Cross* also suggested that the question was of concern to Māori. The chiefs who had attended the Waimate hui had been anxious to obtain information on various issues 'such as the right of selling to Pakehas, and the decision of who should retain the surplus lands of the claimants . . . [A]ll these matters were freely & amicably discussed, and settled to the entire satisfaction of the Natives.'[1061] According to Phillipson, a commitment to return

1054. *Southern Cross*, 30 December 1843 (Crown document bank (doc H20), p 111) (Crown counsel closing submissions (#3.3.412), p 58).

1055. *Southern Cross*, 30 December 1843 (Crown document bank (doc H20), p 111); Crown counsel closing submissions (#3.3.412), p 59.

1056. Submissions in reply for Wai 354 and others (#3.3.475), p 29.

1057. Kempthorne, minutes of discussions with FitzRoy, 29 December 1843, 3 January 1844 (cited in Armstrong and Stirling, 'Surplus Lands' (Wai 45, doc J2), p 14).

1058. Crown closing submissions (#3.3.412), p 59.

1059. Crown closing submissions (#3.3.412), p 59.

1060. Cotton journal, 5 September 1844 (cited in Grant Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 339).

1061. Report of FitzRoy meeting with Maori, 2 September 1844 (cited in Armstrong and Stirling 'Surplus Lands' (Wai 45, doc J2), pp 14–15).

the surplus was also implicit in a letter written by FitzRoy to Heke the following month, in which he stressed the protective aspect of the limitations placed on the size of grants to settlers.[1062]

Dr Phillipson noted that the Governor did not explicitly mention his promise to return surplus lands in his despatch of 16 September 1844 to the Colonial Office, in which he reported on the hui,[1063] although he did send a copy of the newspaper account of his discussions with Ngāpuhi at Waimate.[1064] The following month, he informed Lord Stanley of the strength of Māori opposition to the Crown's claim to be the owner: that Māori were suspicious of the Crown's intentions and angry that the settlers to whom they had 'sold' land had not received grants. They had been 'exceedingly irritated' when the Crown attempted to take up surplus land out of Fairburn's claim, and it was 'quite impossible to make them comprehend our strictly legal view of such cases'.[1065] To have insisted on that view would have been exceedingly unwise, he continued: 'The natives would never have allowed it to take effect; and the attempt to do so would have injured the character of the Queen's Government very seriously, if not irretrievably; so tenacious are the natives of what they consider to be strict justice.'[1066]

Crown counsel, in closing submissions, argued that FitzRoy had outlined his 'future intentions' for the surplus lands at a time when few grants had been made and the first commission was still conducting its hearings. Counsel also suggested that FitzRoy had not entirely abandoned the Crown's claim to the surplus lands, and that based on the contemporary evidence, '[T]here must be some doubt as to precisely what FitzRoy actually said' at Government House and at Waimate.[1067] In essence, counsel argued, this was a policy under development, without official sanction, and FitzRoy had not informed the Colonial Office of any promises to return the lands.[1068] Further, there was 'no evidence that Northland Maori were concerned about the status of the surplus lands', nor had they raised the issue with FitzRoy at Waimate or elsewhere.[1069] We do not accept these arguments. To us, there is little doubt as to what FitzRoy intended and gave Ngāpuhi and other Māori to understand: that land in excess of the scale would be returned to them. This had been specifically recorded in Cotton's journal. Also indicating that such a promise had been made were the report in the *Southern Cross*, which was sent to the Colonial Office; FitzRoy's public reply to the address from Auckland settlers; and Martin's editorial comment.[1070]

1062. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 346.
1063. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 339.
1064. Extracts of the *Southern Cross*, 7 September 1844, BPP, vol 4, pp 365–370; see also submissions in reply for Wai 354 and others (#3.3.475), p 30.
1065. FitzRoy to Stanley, 15 October 1844, BPP, vol 4, p 409.
1066. FitzRoy to Stanley, 15 October 1844 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 340).
1067. Crown closing submissions (#3.3.412), pp 60–61.
1068. Crown closing submissions (#3.3.412), p 59.
1069. Crown closing submissions (#3.3.412), p 59.
1070. See Phillipson on this point, 'Bay of Islands Maori and the Crown' (doc A1), p 340.

Nor do we accept the Crown's argument that this was a policy in development, without official sanction. To the contrary, it was a matter to which FitzRoy had devoted much thought and to which he attached considerable importance from the very beginning of his appointment. This was signalled by his correspondence with the Colonial Office in which he set out his considered views on the subject, and Stanley, in reply, had granted him discretion to respond with 'utmost possible tenderness', which could extend to returning the lands in cases where Māori remained in occupation or sought their resumption.[1071] Instead, we agree with Phillipson: Lord Stanley did not intend that *all* surplus lands be returned to Māori but he had granted the Governor broad discretion under which those lands could be returned 'on a fairly significant scale'.[1072]

Māori were entitled to rely on the commitments FitzRoy made directly to them, that these lands would be returned (and that their authority would be respected in other ways as well, as discussed in chapters 4 and 5). Contemporary observers agreed that his promises to Māori were 'explicit, public, unequivocal and repeated'.[1073] Why exactly FitzRoy failed to make categorical mention to the Colonial Office of his particular commitment to Ngāpuhi about the surplus is not known; perhaps he thought his intentions on the issue were abundantly clear, since he had discussed the matter with Stanley and been granted discretion. Certainly, no counter-instruction or rebuke was ever issued. In any event, we agree with claimant counsel that 'It was not necessary for FitzRoy to report to the Colonial Office his promises to Māori to return surplus lands to them for those promises to be valid and binding upon the Crown.'[1074]

As it happens, FitzRoy did not take any steps to fulfil his commitment to Māori, leaving the matter in abeyance. He made no attempt to define or sell the surplus land, but neither did he take steps to ensure its return. His failure to act on his promise would ultimately cause significant harm to Ngāpuhi and other Māori involved in pre-treaty land agreements. If Governor Grey knew of FitzRoy's Waimate promise, he did not act on it. He did attempt to overturn FitzRoy's expanded grants to the missionaries and said he would return those lands to Māori, sending officials to the north to assure them on this point.[1075] The possibility of the Crown keeping any of that land was not something Grey seems to have contemplated, but as discussed in section 6.6.2, his own efforts to give clarity to the situation were ineffective and gave no real assistance to Māori – neither to Tāmati Waka Nene at Kerikeri (nor to Tāmati Waka Rewa at Kawau.

In practice, the failure of successive Governors to address these issues left Māori with a false sense of security. In many cases, they continued to occupy and use lands that the settlers had claimed and the Crown had awarded; and they continued to believe that this was their right, in accordance with the pre-treaty

1071. Stanley to FitzRoy, 23 June 1843, BPP, vol 2, p 390 (Crown document bank (doc H20), pp 109–110).
1072. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 340.
1073. Submissions in reply for Wai 354 and others (#3.3.475), p 31.
1074. Submissions in reply for Wai 354 and others (#3.3.475), p 29.
1075. Nugent to Colonial Secretary, 2 January 1848, BPP, vol 6 [1002], pp 99–100.

agreements they had reached with settlers. It was not until the late 1850s, when the Bell commission was established, that the Crown would seek to define and take control of the surplus lands; in some cases, Māori still did not know of the Crown's claim until the late 1860s onwards, when they placed their lands before the Native Land Court. By that time, power had shifted into the hands of the colonial Legislature and Government officers, who were only too willing to enforce the Crown's claim to the surplus lands. As we discuss next, the Bell commission readily overruled Māori protests that their title was unextinguished, and rejected requests that the land be 'returned'. As Bell repeatedly explained, Crown ownership of such land was now 'the law'.

6.7.2.2 *What were the purposes of the Land Claims Settlement Acts 1856 and 1858?*

The historian W H Oliver has described the Crown's implementation of its old land claims settlement policy as 'contradictory, vacillating, dilatory and unintelligible'.[1076] By the mid-1850s, most grants had still not been surveyed, and consequently neither had the exclusions for Māori specified in the deeds or acknowledged more generally by the first Land Claims Commission. The awards that had been exchanged for scrip (discussed at section 6.7.2) were undefined. Even in instances where a survey had been undertaken, grantees had generally marked out the area they had been awarded, rather than the whole of the area found to have been sold, leaving any surplus to which the Crown might lay claim undefined also. Doubts remained, too, about the integrity of grants made under pre-emption waiver certificates, despite the investigations undertaken by Matson or by Attorney-General Swainson. Grey's Quieting Title Ordinance had done very little to resolve these issues, and the continuing lack of clarity was recognised as an impediment to both the future development of land-based resources and the Crown's land purchase operations. The increasing purchase activities of Crown officers were a further complication, sometimes overlapping with undefined grants or with 'surplus' lands. The Chief Native Land Purchase Commissioner, Donald McLean, had instructed Bay of Islands Native Land Purchase Commissioner Henry Kemp in 1855 to buy 'fresh tracts' of land and to inform himself of what land was already alienated to settlers in order to avoid repurchase.[1077]

When the newly established settler Parliament first met in 1854, the Bay of Islands member, Hugh Francis Carleton, referred to the uncertainty around pre-emption waiver claims and he recommended the establishment of a new commission to bring finality to the matter.[1078] Soon afterwards, Commissioner of Crown Lands William Gisborne also raised the issue in a report to the Colonial Secretary, in which he noted the unresolved complications arising from unsurveyed or otherwise unresolved old land claims. On occasion, grantees who had been awarded some hundreds of acres 'assert floating rights over . . . thousands of acres, as their grants determine no specific piece, and as the boundaries in it are those of their

1076. W H Oliver, 'The Crown and Muriwhenua Lands' (Wai 45, doc I7), p 6.
1077. McLean to Kemp, 17 November 1855, AJHR, 1861, C-1, p 43, enclosure no 6.
1078. 'Settlement of Land Claims', 21 June 1854, *New Zealand Parliamentary Debates*, vol A, p 112.

original claim'; on other occasions, 'vast tracts are left unoccupied' and '[n]ative claims, which in many cases have never been wholly extinguished, are revived in full force, and become a fruitful source of confusion and discord'. Gisborne recommended compulsory surveys to define settler and Māori interests on the ground, and also that 'some provision . . . be made for satisfying native claims that might be found to arise in respect of the surplus lands to which the Crown would be entitled'. More broadly, he suggested the establishment of a new commission to deal with any cases that were still disputed; however, no cases where grants had been issued should be reopened, since this would result in 'conflicting claims on the part of the Crown, on the part of the natives, and on the part of the Europeans'.[1079]

In 1856, a House of Representatives select committee was appointed to 'consider . . . the nature and extent of Outstanding Land Claims, and the best means of finally disposing of the same'.[1080] The committee, chaired by Alfred Domett, condemned FitzRoy's decisions to revisit the awards of the first Land Claims Commission and issue unsurveyed and 'imperfectly described' grants.[1081] It also criticised FitzRoy's 'experiment' in waiving the Crown's right of pre-emption as well as Grey's subsequent policies with regard to the purchases under that system; in the committee's view, Grey's notice of 15 June 1846 had been issued with 'the avowed design of extinguishing . . . claims summarily and arbitrarily'. As noted earlier, it also thought the regulations had been too strictly enforced and too many claims disallowed.[1082]

The committee's report then outlined the 'extensive and complicated' situation that existed:

> The grants are often bought and sold, the re-purchasers still preferring [making] their claims. Some of the grantees are in possession of the lands granted; but a great part of those claimed are unoccupied by any one. Some portions have been resumed by the natives; and some, where the native title had been extinguished, and no grants made, have been considered Crown lands, and taken by the Government as such; although in reality it has generally had to make the natives some additional payment. Still, in a great number of cases no possession has been obtained by any one; the natives disputing the ownership of the land in the absence of the claimants, or the insecurity of the titles they hold preventing the latter from attempting to enforce their supposed rights.
>
> Some of the claimants, whose claims have been disallowed by the Commissioners, are still urging them; the limit of 2,560 acres is a ground of dissatisfaction with others; some have taken grants for what they could get, but under protest; and some, about

1079. Gisborne, memorandum about old land claims and about pre-emption claims, 7 July 1855, enclosures to messages from His Excellency, *Votes and Proceedings of the House of Representatives, 1855*, p 3 (Armstrong and Stirling, 'Surplus Lands' (Wai 45, doc J2), pp 47–48).
1080. Select committee report on outstanding land claims, 16 July 1856, BPP, vol 11, p 587.
1081. Select committee report on outstanding land claims, 16 July 1856, BPP, vol 11, p 587.
1082. Select committee report on outstanding land claims, 16 July 1856, BPP, vol 11, pp 588, 592.

fifty, have not yet taken out the grants prepared for them, which are still lying in the office after a lapse of ten or twelve years.[1083]

By this stage, the colonial Government considered itself as having a right to the 'surplus' and was enforcing this where it could, although confusion about boundaries and general pragmatism meant that payment might be deemed necessary, too, in situations where Māori continued to occupy or use the land.

The committee stressed the pressing need for certainty of title, concluding that it was essential to establish a special court or tribunal with 'ample powers' to 'determine and finally adjust' all matters connected with old land claims and pre-emption waivers. In its view,

> Nothing less than a verdict, backed by all the authority and weight of a body representing the opinions of the whole community, will convince such claimants that finality or conclusiveness has been arrived at, and that all hope of further successful agitation of the matter would be idle. And this perhaps formed one of the greatest difficulties encountered by Sir George Grey in his attempts to settle the claims, that no enactments of his, especially with popular institutions looming in the immediate future, could absolutely fix the point where decision would be actually final, and appeal or reversal really unattainable.[1084]

All imperfect grants should be called in for investigation, the old grants cancelled, and (following the example of the Crown Quieting Titles Ordinance) fresh ones issued that could be greater in size than the acreage granted by one-sixth to allow natural boundaries to be followed instead of survey lines. All the land in the old grants should be retained, even though many of those issued by FitzRoy might not be 'strictly legal'. In the committee's view, the practice of issuing scrip meant that it would now be unfair to reduce the size of grants of those who had not taken up that option.[1085] Nor should disallowed or lapsed claims be re-opened. The report also stressed the need for surveys. The boundaries of 'all lands claimed' ought to be clearly marked in an 'unmistakable manner', because it was 'absolutely essential that in every case it is decisively ascertained whether any obstruction to the occupation of the land would be raised by native owners or claimants'. Only a 'positive attempt' to define claims 'on the ground itself' would reveal this information.[1086]

Pre-emption waiver claims should be reconsidered also, and 'any proved injustice be remedied'. However, in the committee's view, restrictions should be placed on the acreage granted to a waiver claimant (not on the acreage that could be deemed 'sold' – a distinction that resulted in a sizeable 'surplus' for the Crown). It recommended that the terms set out in Governor Grey's third option of 10 August

1083. Select committee report on outstanding land claims, 16 July 1856, BPP, vol 11, p 588.
1084. Select committee report on outstanding land claims, 16 July 1856, BPP, vol 11, p 590.
1085. Select committee report on outstanding land claims, 16 July 1856, BPP, vol 11, p 591.
1086. Select committee report on outstanding land claims, 16 July 1856, BPP, vol 11, p 591.

1847 (discussed at section 6.6.2.4) should be applied in all cases of lands to be granted under waiver claims. A number of reasons were given:

- these purchases had been permitted on 'a most erroneous principle, and one clearly detrimental to the general interests';
- the home government had given its 'imperial fiat to Sir George Grey's proceedings';
- any grants that the claimants would 'legally have been entitled to' barred the right of the Crown only and did not extinguish 'the claims of any European or any native whatever'; and
- the payment of five shillings per acre 'relieved the claimants from the obligation of proving their strict compliance with the proclamations'.

Five shillings per acre should then be paid for a maximum grant of 500 acres and 'the title of the natives proved, to the satisfaction of the Commissioners (as in all other cases) to have been extinguished'. The committee noted one further complication:

> But as in many of these penny an acre cases, including most of those affecting the most valuable lands, the lands, as your Committee is informed, have been resumed and re-sold by the Government, wherever such claims are found to be good, it will be necessary to compensate the claimant.[1087]

For the new court's decisions to be accepted and to be final, the committee continued, it was essential that it be composed of men of the highest integrity. The committee therefore recommended that two judges of the Supreme Court be included in a panel of no more than six commissioners. Those selected ought to be 'men of judgment, firmness, and discretion', who would 'combine energy with the utmost caution; who will act with a vigilant eye towards the preservation of the public interests on the one hand, and the obligation to administer strict justice to the [Pākehā settler] claimants on the other'. The 'humble' should not be denied redress, but the 'property of the whole community should not be carelessly tampered with, or lightly squandered or frittered away'. Significantly, there was no mention of Māori interests, even as a matter to be weighed in the balance.[1088]

6.7.2.2.1 The Land Claims Settlement Act 1856

Except for the recommendation that Supreme Court judges be appointed, the Land Claims Settlement Act 1856 closely followed the select committee's suggestions. The Act provided for more than one commissioner but only Francis Dillon Bell was appointed. This, in our view, was a watering down of the committee's recommendations and an indication that speed of decision-making was considered paramount. We observe, too, that there was no provision for a Māori commissioner (something that would have to wait another 60 years, until the appointment

1087. Select committee report on outstanding land claims, 16 July 1856, BPP, vol 11, p 592.
1088. Select committee report on outstanding land claims, 16 July 1856, BPP, vol 11, pp 591, 593.

of Ngāti Maniapoto leader John Ormsby to the Native Land Claims Commission in 1920). Nor was there any official with responsibility to safeguard their interests.

Bell was closely identified with the colonial project – as a former New Zealand Company agent; a land purchaser commissioned by Governor Grey; and a member of the Wellington Provincial Council, the Legislative Council, and the House of Representatives, where he had served as Colonial Treasurer in the Sewell Ministry (in 1856).[1089] He cannot therefore be regarded as an impartial arbiter between opposing Māori and settler claims.[1090] Nor was this the intention of the legislation.

Passed by a settler Legislature increasingly impatient with the slow rate at which Māori land was being acquired, the Act was intended to provide a final settlement of disputed grants and at the same time increase the acreages that could be ultimately claimed by the Crown as surplus. This new commission was given greater powers than its predecessor, including the capacity to compel the attendance of witnesses and production of documents and, most importantly, evidence of a proper survey. Failure to comply with these requirements would result in the voiding of existing grants. At the same time, claimants were offered generous allowances in order to persuade them to surrender their old grants and make the largest claim possible, ignoring any informal arrangements with Māori outside the written deed.[1091]

Under section 9, commissioners held full power to hear and determine all claims that might have arisen under the earlier ordinances, and 'all claims whatsoever to land or compensation arising out of dealings with the aboriginal inhabitants of the Colony prior to the establishment of British sovereignty' or from FitzRoy's pre-emption waiver proclamations. There was no intention of opening up the question of whether a transaction had been valid or not. Section 15 prohibited the commission from investigating claims in a number of circumstances including, under section 15(2), when 'claims [had] been . . . allowed wholly or in part, and in respect of which the claimant shall have accepted . . . compensation in money or debentures, or a grant of land'. The commission could not reopen claims that had lapsed or been disallowed (except in pre-emption waiver cases). Section 16, however, provided a mechanism (by Attorney-General notice in the Government *Gazette*) for calling in and reconsidering 'voidable grants' that had not yet been surveyed, along with those 'over which it may be alleged that the Native title has not been extinguished'. The cut-off date was 1 July 1858. In these cases, the commission could require a survey, endorse the grant, or cancel it and issue a new one (sections 17 to 23).

1089. Raewyn Dalziel, 'Bell, Francis Dillon', *Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, 1990, https//teara.govt.nz/en/biographies/1b16/bell-francis-dillon, accessed 17 October 2022.

1090. See Oliver's view that Bell was acting for political reasons rather than as an impartial arbiter according to legal criteria, in Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 171.

1091. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 24–25; Richard P Boast, 'Surplus Lands. Policy-making and Practice in the Nineteenth Century', report commissioned for the Waitangi Tribunal, 1992 (Wai 45, doc F16), pp 163, 177–178. Boast analysed the Act's provisions on pp 163–167 of his report.

Section 23 provided for the issue of new grants which, if possible, should be for the area of the cancelled grant plus up to one-sixth, but in other circumstances could be less than the original grant (for example, if the surveyed boundaries were smaller than the original grant, or more than one settler was claiming the same land). When several grants had been made of the same tract, the commissioners were to make a division they deemed 'best adapted to meet the justice of the case'. The commissioners also had the discretion to exercise their powers in any instance the Act had not already provided for, as they may 'judge best adapted to meet the justice of the case but as near as may be in accordance with the provisions of this Act'.[1092] Under section 38, no land could be included in a grant unless it was 'proved to the satisfaction of the Commissioners that the Native title is extinguished'; and section 39 provided that, if settlers covered the cost, the Crown could buy out any remaining Māori interests.[1093] As Professor Boast has observed, the section was silent over what would happen if Māori did not allow their interests to be extinguished in this way.[1094]

There was a clear presumption that pre-treaty transactions were sales and that Māori customary interests were in the nature of ownership rights, which endured only where Māori actually occupied and used the land, or where they had not consented to the original transaction, in which case boundaries might be adjusted. There was no recognition of the original intent behind the transaction – that Māori and settlers would share the land for ongoing benefit.

Sections 29 to 31 of the Act dealt explicitly with pre-emption waiver claims. As recommended by the select committee, claimants could purchase land granted by way of settlement of their claims at a rate that did not exceed five shillings per acre; grants were not to exceed 500 acres, including any land awarded as compensation for losses sustained by reason of non-settlement of claims; the price of any land awarded as compensation was to be not less than one shilling nor more than 20 shillings per acre; and grants were not to exceed the area specified in the original claim. The Act made no reference to the disposal of tenth reserves.

Survey requirements and incentives were a key mechanism. Section 40 repeated the requirement that no land could be granted unless it had been surveyed and it stipulated that the boundaries must be 'marked out upon the ground'. This was potentially a costly exercise for blocks that were steep or covered in bush, but one that the Crown (under section 44) incentivised by providing for settlers to receive an acre for every 10 shillings they had spent on surveys and maps; this was in addition to the standard allowance in land for such charges at a rate of one shilling and sixpence per acre.[1095]

1092. Native Land Claims Settlement Act 1856, s 23(c) and 23(f). Section 23 also provided for circumstances in which the surveyed boundaries were smaller than the original grant, or where more than one settler was claiming land within the surveyed boundaries.

1093. Section 38 also prohibited any grants of land that might be needed for 'public utility or convenience'.

1094. Boast, 'Surplus Lands' (Wai 45, doc F16), p 167.

1095. Boast, 'Surplus Lands' (Wai 45, doc F16), pp 166, 184–185.

In 1857, Bell introduced rules that further clarified the survey requirements. Significantly, rule 17 made it clear that settler claimants would have to survey the entire boundary of their original transaction with Māori, except in cases where it greatly exceeded 'the maximum quantity to be granted'. Their compensation would be calculated based on the 'area actually surveyed, whatever . . . the amount awarded in the claim'. Rule 18 allowed the commission to order new surveys; for example, to connect up boundary lines so as to create a contiguous block, with a further allowance in land to be calculated 'with reference to the contract prices at the time for work of a similar description executed for the Government'.[1096] Survey incentives were again strengthened in 1858 (discussed later).

As the *Muriwhenua Land Report* observed, the Act provided very limited protections for Māori customary rights, and no means to remedy the defects that had plagued the old land claims process from the beginning. The Act did not require that adequate reserves be set aside for Māori; did not provide for any investigation into the true nature of the original transactions; did not require any protection for conditions imposed on those transactions such as joint-use or trust arrangements (express or implied); did not require an examination of claims not investigated by the first commission but for which scrip had been awarded; and did not even require that Māori be heard on matters such as the area to be reserved or granted to settlers and the Crown. Rather, the Act's principal purpose was to protect settler interests by facilitating a final settlement of their claims.[1097]

6.7.2.2.2 The Land Claims Settlement Extension Act 1858

Bell praised the first Act for encouraging settler claimants to survey the maximum area possible. In his view,

> It was fortunate that the General Assembly determined to make the survey allowance large, for although a great quantity of land has been thereby absorbed, it produced the advantage of early surveys and encouraged their extension so as to comprise the whole of the land originally bought from the Natives. Even the gain to the Crown of the surplus land thereby secured, is nothing in comparison with that of facilitating the termination of the long suspense and doubt in which the claimants were involved. And I have been assured by not a few of them that the result will be the renewal of energy and hope, and the speedy cultivation of much land that has hitherto lain waste.
>
> The progress made in the surveys has enabled a plan to be compiled of the country on the western shore of the Bay of Islands as far up as Whangaroa; this will shortly be connected to the Northward with the Mongonui surveys, and extended to the West Coast by the survey of the Hokianga scrip claims: placing the Government for the

1096. See Boast, 'Surplus Lands' (Wai 45, doc F16), pp185–186.
1097. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p395.

first time in possession of a general map of that part of the Province of Auckland, showing the position of the old claims, and of the blocks purchased for the Crown.[1098]

Bell now sought to enhance the position of settlers and the Crown further. On his advice, additional incentives to have claims surveyed and validated were enacted. In particular, section 3 of the Land Claims Settlement Extension Act 1858 allowed claimants to exchange their claim for Crown land in the same province. Section 8 again undermined the provision of reserves that had been left so vulnerable by earlier failures of Crown policy. It provided that, where a reserve had been set aside in the original grant, and Māori were 'willing to surrender such reserves', the Crown could obtain a cession of the land and include it in the grant, for which the grantee was charged 10 shillings per acre. Professor Boast saw this as a clear statutory assertion that land subject to old land claims was a category of Crown land.[1099] Bell had no doubt of this and, as we shall see, was prepared to override the private accommodations that had been made between settlers and Māori as to where boundaries ran and what land was excised.

Under section 9 of the Extension Act 1858, if the exterior boundaries of a claim or grant exceeded the 2,560-acre maximum, the Governor (on the commissioner's advice) could allow the settler to buy the surplus, again at a rate of 10 shillings per acre. The right would expire if not used within six months. Bell stated that he had thought it his 'duty to submit' this suggestion since the 'person who extinguished the native title [had] the best right' to buy the 'considerable surplus' that the Government had gained without cost. He argued that 'an advantage would accrue to the public' out of this measure and that it was 'very much required in a few small claims to settle them fairly'.[1100]

Bell had also advocated on behalf of settler claimants whose applications had been previously disallowed because they had been unable to pay fees, or could not produce a deed even though Māori admitted the sale.[1101] Section 15 was intended to address these 'exceptional cases' which did not come within the criteria of the 1856 Act. Claimants who could now supply the required evidence, or otherwise show undisturbed occupancy, were able to make a claim to the commission. The scope for applications was also expanded by section 2, which extended the time limit, and section 13, which allowed for grants to be made to 'half caste' children.

6.7.2.3 *What did the Bell commission recommend in terms of settler grants and Crown 'surplus'?*

The legislation was intended to tidy up uncertainty about title, encourage survey, and convert doubtful Crown grants into valid ones. While section 15 has been

1098. 'Memorandum by the Chief Commissioner of Land Claims on the "Land Claims Settlement Extension Bill"', 1852, AJHR, 1858, C-2, pp 2–3.

1099. Boast, 'Surplus Lands' (Wai 45, doc F16), p 176.

1100. 'Memorandum of the Chief Commissioner of Land Claims', 15 May 1858, AJHR, 1858, C-2, p 3.

1101. 'Memorandum of the Chief Commissioner of Land Claims', 15 May 1858, AJHR, 1858, C-2, p 4.

interpreted as preventing the Bell commission from investigating the validity of transactions already confirmed by its predecessors, some grants remained voidable. It was Bell's application of the legislation that most severely circumscribed Māori capacity to challenge earlier awards. Bell himself proceeded on the basis that all pre-treaty transactions had been legitimate sales, and besides was eager to maximise the land held by settlers and the surplus available to the Crown. He therefore acted to suppress any effort by Māori to revisit the first commission's findings, or to make any claim to own any portion of the land covered by the original deed. He also considered that the Quieting Titles Ordinance had removed all doubts as to the legality of FitzRoy's grants, which he endorsed, embedding the injustice to Māori about which Commissioner Godfrey and Governor Grey had been so concerned. Boast has pointed out that 'Bell acted on the quite explicit assumption that the surplus lands belonged to the Crown.'[1102]

Bell was aware that FitzRoy had advocated the return of those lands to Māori, but in his view,

> There never was any doubt that the Imperial Government considered the Crown was entitled to the surplus land; and Lord Stanley expressly declared in May 1843, in answer to a question by Captain FitzRoy before he assumed the Government, that the excess in a claim over the quantity granted would revert to the Crown. . . . Lord Stanley, contemplating the extinction of the native title over all the land comprised in the exterior boundaries of a claim, said with respect to the excess – 'the hypothesis being that it neither belongs to the aboriginal owners nor to the purchasers, it must be considered as Demesne of the Crown.' This must be conclusive against Governor FitzRoy's opinion.[1103]

In fact, Stanley's instruction to FitzRoy had been rather less clear-cut than Bell suggested. Stanley had directed FitzRoy to act with the 'utmost . . . tenderness' towards Māori and 'humour their wishes' if possible. What is more, Stanley assumed that a thorough investigation would have taken place to determine whether Māori interests had been genuinely extinguished, yet this had not been the case: there were serious defects in the procedures of the first Land Claims Commission, and in the case of scrip, sometimes there had been no inquiry at all.[1104] For Bell, the issue was not whether Māori owned or had any enduring rights in such lands (he flatly rejected Māori requests for the land to be returned) but rather, whether settlers' claims were valid against those of the Crown.

In contrast, he expressed sympathy for the northern settler claimants, whom 'personally' he would be glad to see 'get the whole of their land as residents and old settlers'. Their claims were small in scale and posed little danger to future settlement even if awarded in their entirety. Yet Bell thought that settlers who had applied for Crown grants under the scales set out in the 1841 and 1842 ordinances

1102. Boast, 'Surplus Lands' (Wai 45, doc F16), pp 178–179.
1103. 'Report of the Land Claims Commissioner', 8 July 1862, AJHR, 1862, D-10, p 18.
1104. See Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1152–1156.

were prevented from pursuing a claim to the surplus and could not, as he phrased it, 'eat their cake and have it'. He feared also that if the principle was conceded for smaller claimants, others would expect the same consideration.[1105]

The Crown's surplus was thus maximised, both by the various incentives that had been created in the legislation (some at Bell's instigation) and by the commissioner's own insistence that the outer boundaries of the land subject to the validated deed, however vaguely defined, be surveyed, rather than the more restricted acreage of the recommended grant. Bell did allow some exceptions to this (under rule 17) if the original claim was much larger than the subsequent grant, but even in those cases, claimants were induced to take the boundary as far as Māori would tolerate.

The first commission had protected unextinguished Māori rights only if they were explicitly provided for in the deed. Yet Godfrey had acknowledged that there remained such rights in the grants issued by the first Land Claims Commission, so there must also have been unextinguished rights in lands that were covered by the deed but excluded from the grant. Yet Bell's inquiry would override even these arrangements. Not only did Bell substantially increase the area held by settlers, but as the Tribunal noted in its *Muriwhenua Land Report* he also 'gave unconditional grants, severing such ancillary obligations as may still have been apparent'. All Māori received were a few small reserves, designed not for their benefit but to 'remove their claims to a continuing right of occupation of the surplus lands.'[1106] While the Crown had wavered over whether to pursue its claim to the surplus, and on a number of occasions had assured Māori that it would not, 'Bell made it his concern to get as much land as possible for European occupation and use, and to secure the remaining surplus for the Government, irrespective of its existing use by Maori or their likely needs in future.'[1107]

Bell presided over a sequence of hearings in 1857 to deal with the northern claims, beginning in Coromandel and reaching Russell in 21 to 26 September. In the following month, the commission sat in a number of locations: Mangonui for a week; Whangaroa and Waimate for a day each; and two further days (12 and 14 October) at Russell. On 21 December, the commission heard Auckland cases. But it would be several years before Bell would release his final report, in 1862.[1108]

The notification requirements of the Act concerned settlers only,[1109] but before opening his first hearing in the Bay of Islands, Bell published a notice in *Te Karere*, discouraging Ngāpuhi from seeing this as an opportunity to make further demands or to repudiate transactions that the commissioner considered already 'properly settled' by their 'fathers':

1105. 'Report of the Land Claims Commissioner', 8 July 1862, AJHR, 1862, D-10, pp 17, 18.
1106. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 159.
1107. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 171.
1108. Boast, 'Surplus Lands' (Wai 45, doc F16), pp 170–171, 174.
1109. Section 7 of the Land Claims Settlement Act 1856 empowered the commissioners to set the rules for sitting and notification. These were issued in the *New Zealand Gazette*, 8 September 1857: 'Rules', 8 September 1857, *New Zealand Gazette*, 1857, no 25, pp 144–145. A form of notice was attached in schedule B to the Act.

> When the Europeans first arrived at this island, the Maories were an upright people and for those lands which were purchased by Europeans no second payment was ever demanded. When the claims of the old settlers, who were living among the Ngapuhi, were investigated, they manifested no desire to conceal the boundaries of the land they had sold, but on the contrary, the particulars of any transaction were fairly and truthfully stated, both as regarded the boundaries and the payment; nor did they desire to withhold anything that had been justly sold by them at a former period. And now, O Ngapuhi, Mr Bell, the Land Claims Commissioner, is about to proceed to your district, for the purpose of investigating the claims of some of the old settlers: – and do you now follow the example set you by your fathers during the former investigations: – let the right be upheld, but let there be no demanding a second payment for what has already been properly settled: – let not that be practised by you. You are the people who first received the Europeans, and now do you still continue to adhere to that which is right, and hold fast the last words of your fathers who are dead. – So ends.[1110]

This set the tone for the hearings that followed. As we explore in the following section, Bell would almost invariably dismiss Māori objections that they continued to have rights in the land; he saw these as importunate demands from younger men, and told them that the surplus belonged to the Crown and no portion could be 'returned' to them.

Bell's commission resulted in the old land claims being defined and finalised. Surveys were completed, in most cases covering the entire area of the original deeds; and the Crown then issued grants to the settlers from within those surveys, the acreage based on a series of calculations, and claimed any 'surplus' for itself. Māori interests were thereby extinguished. In all, we calculate that the Crown took some 51,980 acres of Te Raki land in this manner – about one-quarter of the total area lost to Māori as a result of the old land claims. The extent of loss to Māori was greatest in the region of the Bay of Islands – we calculate over 35,000 acres – but was substantial at Whangaroa as well. Bell's re-examination of pre-emption waiver claims resulted in another 20,877 acres of surplus for the Crown, almost all of it in Mahurangi and the Gulf Islands. In the Hokianga taiwhenua, the area taken was 6,620 acres, much of that a result of the Crown's scrip policy (which we discuss in section 6.7.2.5). All districts were affected to some extent, and some hapū more than others, as we will see later.

We have already referred to several of the cases in which the Crown obtained large areas of surplus land. In the Bay of Islands, the Crown took 11,819 acres from James Kemp's Puketōtara claim (OLC 595); 1,914 acres from George Clarke's claim (OLC 634) at Waimate; 4,926 acres from Orsmond's claim (OLC 809); 1,043 acres from Henry Williams' claim (OLC 524) at Pakaraka; 1,817 acres from James Shepherd's claims (OLC 804–806), and 1,038 acres from the Church Missionary Society's claims (OLC 660–669) at Paihia and elsewhere. The Crown also took 8,746 acres from John King's claim (OLC 604) which straddled the Whangaroa and

1110. 'A Word to the Ngapuhi', *The Maori Messenger: Te Karere Maori*, 31 August 1857, pp 3–4.

Sub-district	First commission FitzRoy award (acres)	Bell commission award (acres)	Crown surplus (acres)
Bay of Islands	44,208	57,596.25	35,541
Hokianga	6,620	837	773.25
Mahurangi	0	4,008	80
Whāngārei / Mangakāhia	414	2,585	3,890
Whangaroa	7,727.5	15,010	11,696
Total	58.969.5	80,036.25	51,980.25

Table 6.5: 'Surplus' lands taken by the Crown as a result of old land claims in Te Raki.

Bay of Islands taiwhenua. Additionally, at Whangaroa, the Crown took 5,860 acres from James Shepherd's OLC 802–803 claims; 2,889 acres from William Baker's OLC 549 claim; and another 1,742 acres from James Kemp's OLC 599–602 claims. In Whāngārei, the Crown acquired 3,890 acres from Gilbert Mair's OLC 1047 claim. We will return to a number of these cases in more detail later.

6.7.2.3.1 The Bay of Islands missionary claims

In the Bay of Islands area, Bell endorsed or, in some cases, substantially increased the grants to settlers, while also awarding the Crown more than 35,000 acres of surplus lands (excluding pre-emption waivers). As table 6.6 indicates, much of this boon to the Crown estate came from the missionary claims.

After returning to Kororāreka from his sittings at Mangonui and Whangaroa (discussed later), Bell began to deal with these claims. Given the extensive areas encompassed by the missionaries' deeds, and the promises made to Māori about their continued occupation, it is unsurprising that they often opposed the survey of these lands.

Bell dealt first with Davis' Waimate claims (OLC 773 and OLC 161). FitzRoy had expanded his initial 1,963-acre grant to 3,000 acres, leaving no provision for Māori who continued to live on these lands (and, indeed, exert authority over them). We discussed in section 6.5.2.2, for example, how Davis had paid compensation in 1848 to avoid a muru after his son violated a wāhi tapu. Davis now told Bell that he had been forced to leave some 300 acres out of his new claim because of 'some difficulty' over the survey that involved younger Māori men who 'were hardly born at the time of the purchase.'[1111] Bell reluctantly accepted that this land (described as 'between the road to the Bay and the Waitangi River') would have to remain in Māori hands, although Davis later expressed the hope that he would be able to

1111. Davis evidence, 13 October 1857, OLC 1/773 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 697).

OLC	Claimant	First commission award	Bell commission award	Crown surplus (acres)
14–22	James Busby	2,923 acres	Judged void but subsequently awarded under arbitration	1,010
59	Thomas Bateman	1,200 acres	1,157 acres for claim with 542 acres already taken by the Crown	128
100	George Thomas Clayton	4 acres	0.75 acres	3.25
116	James Reddy Clendon	1,418 acres increased to 1,800 acres by FitzRoy	2,685 acres	657
227	William George Cornelius Hingston	1,600 acres	1,276 acres	84
231	Thomas Hopkins and William Tully Pearse	305 acres	Hopkins was informed a survey was required	350
353	Benjamin Nesbit	106 acres	227 acres but rounded up to 230 acres	125
521–526	Henry Williams	7,010 acres for all his claims; FitzRoy expands grant to 9,000 acres	9,203 acres*	1,043
554	William Derby Brind	440 acres	390 acres, 1a 2r 11p, and 1 acre (392.5a)	50
595–598	James Kemp	1,354 acres, increased by FitzRoy to 5,276 acres	6,954 acres in 10 grants	11,819 †
603–606	John King	672 acres increased to 5,150 acres by FitzRoy	Bell awarded 12,637 acres for all of King's claims, which totalled 21,000 acres	8,746 ‡
633–634	George Clarke	increased to 5,500 acres by FitzRoy	Bell awarded 5,539 acres at Waimate and three other grants for a total of 7,010 acres	1,914
638	Joel Samuel Polack	0.5 acres		4.5

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660–669	Church Missionary Society	733 acres	—	1,038
734–735	CMS families (James Kemp)	3,100 acres	4,450 acres and 947 acres, total 5,397	333
736	CMS families (James Kemp)	500 acres	947 acres	1,050
769	Ambroise Bagile Victoun de Sentis	No award by commissioners but FitzRoy allowed £30 scrip	0	5.25
773, 161	Richard Davis	2,560 acres increased to 3,000 acres by FitzRoy	4,308 acres in 7 grants	362
804–806	James Shepherd	Nil, 343, and 367.5 acres	Nil, 22, and 259 acres	1,817 ¶
809	John Muggridge Orsmond	No award by commissioners but 2,560 acres granted by FitzRoy	Bell awarded 4,681 acres in 9 grants	4,926
863	Edward Bolger	300 acres	437 acres	76
Total		44,208 acres	57,596.25 acres	35,541

* Bell's ultimate award included OLC 526, which had gone through the Quieting Title procedure but which was added to the Pakaraka estate.

† There was considerable confusion as Kemp's entitlement based on the boundaries described in the original deeds. We have used the Rigby's figures: Rigby, 'Old land claims spreadsheet' (doc A48(d)).

‡ Part of this claim lay within the Whangaroa district.

¶ A return prepared for the 1948 Surplus Lands Commission gave the respective acreages as 378 acres and 1,580 acres, but we have used the figures from Rigby's spreadsheet, which were also based on the Surplus Lands Commission papers, in the absence of definitive evidence either way: Rigby, 'Old Land Claims spreadsheet (doc A48(d)); Stirling and Towers, supporting papers (doc A9(a)), vol 5, p 588.

Table 6.6: Crown taking of surplus lands in the Bay of Islands.

acquire it at 'some future time'.[1112] There were other objections, too. Te Morenga Kēmara wrote to Bell complaining that Davis was wrongly claiming land between Owiritangitangi and Tikitiki, having obtained his 'tuku' from the wrong people.[1113] Bell recorded:

> In the Evening the Natives assembled and brought before the Commissioner several disputes and claims – relative to Mr Clark's, Wm Williams, and the Rev Mr Davis' Lands. At a little before midnight the Commissioner gave his decision, overruling all their objections upon the proofs afforded by repeated references to the old papers in the several claims. They were asked whether it had ever happened that Government had taken from them and given to a European, any land stated to be their property by the former Commissioners; and in what light would they regard the present Court, if at the request of a European made 13 years after the former adjudications reserved by them were taken away? Equally they could not expect that after such a lapse of time I should listen to the claims of Natives to get back portions of the land awarded to Europeans by the former Commissioners.[1114]

According to Bell, it was his 'invariable practice' to hear 'all they had to say', but clearly his mind was already made up, as he announced: 'I should certainly not give back an acre which had been validly sold by those who in those days were really empowered to sell, nor allow the claim of anyone who had failed to bring his objection forward at the original inquiry.'[1115] He was unhappy that Davis had left out a portion of his claim 'to please certain of them', but reluctantly accepted the excision. At the same time, he warned the assembly that had he been present at the survey, he would have insisted that the boundaries stated in the deed be followed and that the Crown hold on to 'every acre'. Bell maintained that Māori were 'perfectly satisfied' with his proceedings and apologised for the objections they had raised.[1116] Ultimately, he ruled that Davis was entitled to 4,308 acres (1,308 acres more than under FitzRoy's expanded grant), leaving the Crown with a 363-acre surplus and Te Morenga Kēmara's people with the 300 acres that had been excised.[1117]

The commissioner was reluctant to repeat this small concession, insisting that Kemp's surveys follow the boundaries as described in the first commission's reports in order to maximise the surplus, even if this should contravene the prior

1112. Davis to Bell, 26 July 1858 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 697).

1113. Te Morenga Kēmara to Bell, no date [1857] (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 698).

1114. Bell minutes, 13 October 1857, OLC 5/34 (cited in Boast, 'Surplus Lands' (Wai 45, doc F16), p 173).

1115. Bell minutes, 13 October 1857, OLC 5/34 (cited in in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 691).

1116. Bell minutes, 13 October 1857, OLC 5/34 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 691).

1117. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 698.

understandings between CMS missionaries and Māori. As we discuss later, Māori challenged Kemp's survey of the 185-acre block, Kioreroa (OLC 596), at Waimate. They were told to attend Bell's next hearing, which would be the 'last occasion' on which they could raise their concerns. At that hearing, Bell read out the original deed and the first Land Claims Commission's report. A long discussion followed, which Bell did not record. Once he had confirmed that the survey had followed the boundaries described in the deed, 'all objections were overruled'. Besides, Bell noted, 'the objections were . . . raised by young men chiefly, and were on the whole without foundation'.[1118] Protests in the case of Kemp's Puketōtara claim (OLC 595) had a similar result. Rewa and others had challenged the survey, which took in land they claimed. This prompted Bell to examine the original deeds, which purported to alienate a much larger area. It was recorded that

> Mr Kemp had left out of his survey a considerable portion of those boundaries, viz. 1st at Tarata Rotorua and Tiheru, and 2ndly a large block between the Waipapa and Rangitane Rivers. The Commissioner after explaining the law to the natives overruled all their objections. And with regard to the land left out, he announced that it would be taken possession of for the government, as it could not for a moment be allowed that a claimant should return to the natives any portion of the land originally sold.[1119]

Although Kemp declined undertaking the survey of the 18,000-plus acres he had originally claimed under his deed, his new survey took in a further 1,849 acres over that awarded by FitzRoy. Māori, having lost their rights in that area, now asked the Crown to 'give them back a small portion'. The commissioner's response was his standard one – these calls were advanced 'chiefly by young men complaining of land having been sold while they were children', although this clearly was not true of Rewa – and he advised them to approach the Governor, who would decide the matter.[1120]

When he dealt with Clarke's Waimate claims (OLC 634), Bell resorted to the same reasoning: 'the law' said the land belonged to the Crown, and that Māori would have to make a special appeal to the Governor to have any of it reserved to them. At Waiohanga, Waka Nene sought a 'small piece', likely a wāhi tapu (described by him as a 'piece which will grow nothing'). Pirika also raised objections, the substance of which Bell did not record, reporting only that

> After a full hearing and reading over the evidence and deeds produced before the investigating commissioners it appeared clear that there was no encroachment whatever on the original boundaries sold. Waka Nene's objection to Potaetupuhi and to the piece adjoining Mr Shepherd's claim were overruled as well as all the other objections.

1118. Bell notes, 23 March 1858, OLC 1/773 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 701).

1119. Bell notes, 26 March 1858, OLC 1/595 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 681).

1120. See Bell notes, 26 March 1858 and report, 20 April 1859, OLC 1/595 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 682, 702–703).

> The natives were then informed that under the law, as they had been repeatedly told, the surplus land reverted to the Crown and that if they desired the government to make any reserve out of the same for their use, they must at once address the Governor, with whom the decision on such a request rested.[1121]

The exclusion of only a small portion (411 acres) for Māori out of Clarke's extensive grants was endorsed, leaving the Government with over 1,900 acres.[1122]

In the case of the vast Pakaraka estate formed out of the claims of Henry Williams (and children) and William Williams (OLC 521–526 and OLC 529–534 respectively), Te Tao objected that his land (at Taiāmai) had been 'given over secretly in the past by another person' and had been 'stolen'.[1123] Again the objections were noted as 'heard at Waimate' and 'overruled'.[1124] Bell's reasoning was not recorded; indeed, his minutes for the sitting that day do not refer to any Māori claim at all.[1125] The Crown gained 1,043 acres as surplus as a result of its extended ratification process, while the Williams family were granted 10,700 acres.[1126] Māori had been given explicit assurances that these 'populous' lands would be protected for later occupation as part of their shared future with the missionaries;[1127] instead, they retained only a token acreage from within their transactions.

Also noteworthy is John King's claim that straddled the Bay of Islands and Whangaroa taiwhenua. When Samuel Marsden arrived in New Zealand in 1814, he was accompanied by three lay settlers, King among them. A shoemaker by trade, he had been dispatched to learn rope-making before setting sail with Marsden and William Hall in 1809 for New South Wales, where he remained until settling in Northland.[1128] Over time, he was to amass a 'stupendous area' as a result of his pre-treaty dealings, in a huge estate known as 'Otaha'. Bound by Te Puna Inlet, Tākou Bay, southern Whangaroa, and the road between Kerikeri and Whangaroa, it sat in a contested region, with claims also hotly disputed in neighbouring Whangaroa and Puketōtara lands.[1129]

1121. Bell minute, 24 March 1858, OLC 1/634 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 693–694.

1122. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 692.

1123. Te Tao to Bell, 3 October 1857 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 704).

1124. Bell minute, no date, on Te Tao to Bell, 3 October 1857 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 705).

1125. Minutes of Commission, Waimate, 12 October 1857, OLC 5/34. See doc A9(a), vol 6, pp 3646–3647; Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1539–1541.

1126. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 705–706.

1127. See Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1522.

1128. Eugene Stock, 'Extracts pertaining to New Zealand from the "History of The Church Missionary Society"', vol 1, 1899, http://www.waitangi.com/cms/cms_vol1a.html; Peter J Lineham, 'Missions and missionaries – first missionaries', *Te Ara – the Encyclopedia of New Zealand*, Ministry for Culture and Heritage, https://teara.govt.nz/en/missions-and-missionaries/page-2, last modified 8 August 2018.

1129. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 718.

King's original claim was based on four pre-1840 deeds, which he had secured by making a series of additional payments to rangatira as part of his ongoing obligations to his Māori hosts.[1130] The claims were:

- OLC 603, August 1835: transaction between King and Manuwiri, Tahu, and others for approximately 3,000 acres; 911 acres awarded by the first Land Claims Commission;
- OLC 604, September 1836: transaction between King and Witirua, Hokai, and others for approximately 1,500 acres; 672 acres awarded by the first Land Claims Commission;
- OLC 605, September 1836: transaction between King and Manuwiri, Pari, and Tauha for approximately 500 acres; 271 acres awarded by the first Land Claims Commission; and
- OLC 606, October 1834, November 1835, and February 1836: a series of transactions between King and Waremokiaka, Ngaware, Taotahi, Tatari, and others for approximately 150 acres; 150 acres awarded by the first Land Claims Commission.[1131]

In each case, the disallowance of the New Zealand Land Claims Ordinance 1842 meant the awards had to be recalculated; in all instances, it appears that the same acreages were awarded, with the proviso that the total of all grants not exceed 2,560 acres. FitzRoy, however, overrode these decisions, increasing King's awards for OLC 603, 604, and 605 to 3,000, 1,500, and 500 acres respectively, while leaving OLC 606 at 150 acres. King was thus granted 5,150 acres, his original estimate for his four claims.[1132] An Executive Council minute reveals the thinking on the matter: King had overpaid for the land, was 'one of the earliest' missionaries, and had lived on the land 'for upwards of 25 years'; and for these reasons he deserved an expanded grant.[1133]

Stirling and Towers characterised King's relationship with his host Māori communities (particularly Ngāti Rēhia) as 'close and mutually beneficial', and indeed, he received gifts of land on behalf of his nine children, who were born on the whenua and raised among them. King told the first commission: 'all my deeds state that the land is given to myself and children and the natives have always considered them as virtually belonging to the tribe they were born amon[g]st'.[1134] He had also invested in 'building, fencing, cultivation & etc'.[1135] Be that as it may, King was another beneficiary of the CMS's relationship with leading Government officials, which resulted in the enormous increases to their awards and compounded the matter of unextinguished Māori rights.

1130. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 78.
1131. Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 395–399.
1132. Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 395–399.
1133. Minute of Executive Council, 18 July 1844 (Berghan, supporting papers (doc A39(m)), vol 13, pp 7524–7525).
1134. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 51–52; evidence of King, 18 February 1842 (Berghan, supporting papers (doc A39(m)), vol 13, pp 7515–7516).
1135. Evidence of King, 18 February 1842 (Berghan, supporting papers (doc A39(m)), vol 13, pp 7511–7512).

By the time of Bell's hearings, King had passed away and his son, John Wheeler King, brought the claim, with assistance from George Clarke senior. In October 1857, Clarke submitted plans of the surveyed land to Bell: 'The total contents within the Blocks surveyed amount to 21,226 acres. One block (at Otaha Bay) being 20,516 acres, and the other 710 acres. I desire to represent to the Court that the land included in the larger Survey is extremely sterile.'[1136] Clarke explained that, in attempting its cultivation, members of the King family had been 'obliged to relinquish it, being unable to obtain a remunerative return for their labour'. He requested that, before making any final award, Bell should inspect the land for himself. Clarke also drew Bell's attention to a 'peculiarly applicable' clause in the 1856 Act which allowed 'an additional acre for each acre of compensation land'. As for the second, smaller block, it was 'of somewhat better quality', and the family wished to retain it 'under any circumstances.'[1137]

Mindful that this was the first time the provision (section 46) had been invoked, Bell examined the matter carefully and deemed a personal inspection of the Otaha Bay claim essential. He 'crossed the land in several places', concluding with 'no hesitation' that 'taking it altogether, I had never seen such a poor and sterile tract . . . it really was hardly worth having, much less subdividing into separate properties for the numerous family of the late John King.'[1138]

Accordingly, in April 1859, Bell ruled that a double award for survey could be allowed for Otaha Bay, resulting in claims that, when totalled, amounted to an estate of close to 21,000 acres. After a final computation, Bell recommended a grant of 12,637 acres, with the provisos that this cover the cost of subdivision of the land amongst the King family (16 grants in total) and that the surplus land at Otaha Bay, which 'reverted' to the Crown, be in one block.[1139] Meanwhile, Māori occupation and use of the land continued, as did persistent protest aimed against King's claim. While opposition could seemingly take the form of skirmishes over specific issues, Māori grievance was ultimately rooted in the failings of the old lands claims processes, which had benefited the missionary families while overlooking their interests.[1140]

One such skirmish emerged in December 1861, when rangatira opposed the construction of a new road from Paringaroa to Taraire. In the Crown's view, the lands were part of the surplus it had obtained from the King transaction, but Whangaroa and Tākou Māori clearly still regarded them as their own. Two of the

1136. Evidence of Clarke, 13 October 1857 (Berghan, supporting papers (doc A39(m)), vol 13, pp 7580–7582).

1137. Evidence of Clarke, 13 October 1857 (Berghan, supporting papers (doc A39(m)), vol 13, pp 7580–7582).

1138. Bell report, 29 March 1858 (Berghan, supporting papers (doc A39(m)), vol 13, pp 7597–7598).

1139. Bell report, 29 March 1858 (Berghan, supporting papers (doc A39(m)), vol 13, pp 7597–7598. The same Court of Claims document records that after subdivision the total of grants to King family members measured 140 acres less, at 12,480 acres; cf Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 400. Prior to subdivision, 'After making the necessary calculations, Bell determined that an award of 12,637 acres would be recommended.'

1140. See Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 718–727.

rangatira involved – named as Tana Toro (of Upokorau) and Ngāpuhi Te Kōwhai (of Tākou) – told Kidd, who was in charge of the road gang, that they would not allow any work to go ahead because the land was 'in their possession by *right*, and by *wrong* claimed by the Crown or by Mr John King' (emphasis in original).[1141] Kidd referred the matter to Clarke, who had supported King's son before the Bell commission but had since been appointed civil commissioner, the Crown's senior official in the district. In turn, Clarke asked Resident Magistrate Edward Williams (son of Henry) to investigate. Williams duly reported that Tana had no quarrel with King's family; rather, he was upset with Hirini Rāwiri Taiwhanga (Ngāti Tautahi, Te Uri o Hua) over the initial transaction: Taiwhanga, in Tana's view, had 'no right to sell'.[1142] Williams believed he had calmed matters, and that Tana and Te Kōwhai would allow the road to proceed so long as their people were employed in its construction. Yet, there was further opposition very soon afterwards, with rangatira from Kāeo to Te Tii getting involved. The magistrate viewed this as a dispute about employment, but Stirling and Towers observed that the real issue was underlying rights. As they explained, the road bordered King's claim and another highly contested missionary claim, that of Shepherd at Upokorau (discussed later). It was 'hardly surprising' that the project was challenged.[1143]

Meantime, also in December 1861, another dispute was emerging at Tapuauetahi. This again concerned a local rangatira, Te Wirihana Poki, who had been left out of the original transaction and was now asserting his rights. Te Wirihana reportedly threatened to shoot a horse that Taiwhanga had received as part of the bargaining process; and he had another rangatira in his sights as well, Wawatai. When John King learned of these threats, he accused Te Wirihana of 'tugging at our land', and claimed that the rangatira had been aware all along of the original dispute.[1144] In response, Wiremu Hau, who attempted to mediate, explained that Te Wirihana had indeed known that King and his family were occupying the land but had only recently learned of 'the map'; that is, the survey of King's claims that had laid bare their vastness, and indeed the scale of the lands the Crown was now claiming and the paltry amount left for Māori. Hau tried to set up a meeting, but King failed to attend, and the matter remained unresolved. Clarke took no action except to record that Māori were making a claim to 'King's block'.[1145]

Te Wirihana continued to protest, writing to Clarke in November 1864 about 'contested lands' between Tapuaetahi and Tahoranui.[1146] He called on Clarke to investigate, saying, 'If you will not look at it, well, listen, trouble will look to it.'[1147]

1141. Kidd to Waimate Civil Commissioner, 24 December 1861 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 718).

1142. Waimate Resident Magistrate Williams, Puketona, to Waimate Civil Commissioner Clarke, 23 January 1862 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 719).

1143. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 719–721.

1144. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 721–723.

1145. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 723–724.

1146. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 724–727.

1147. Te Wirihana Poki to Clarke, 3 November 1864 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 724–726).

Clarke's reply is not in the record, but Te Wirihana's response leaves no doubt as to the gist of what he was told: that his claim had no basis and that King had already been issued with a Crown grant. Te Wirihana's outrage resonates through his words. Clarke, he said, was like a 'tangata tahae' (thief), and the missionaries had caused great harm through their greed for land. 'Ko taku tino kupu tenei ki a koe, e he ana a Hone Kingi, ka nui te he.' ('My main message to you is that [John King] is wrong, very wrong – he is simply wrong over his lands.')[1148]

Te Wirihana received no redress either from King's family or from Government officials, and he considered the land stolen by both. The distinction between CMS and Government personnel was in any case blurred, with men like Clarke filling roles in both camps over time. Ultimately, by 1865, the land was lost,[1149] the only area still retained by Māori comprising Te Tii Mangonui on the eastern bank of the Tapuaetahi River, and a reserve of six acres excluded from King's Te Puna claim. There is a later addendum to the story: in 1894, part of King's Otaha estate was bought by Māori.[1150] The land had been home to a large settlement in the 1820s and 1830s, and as Tony Walzl noted, it retained 'such significance' that Hōne Puru and others raised a mortgage against Otaha Lot 4 to purchase it back from a descendant of King. We note that a portion of the block remains in Māori ownership today.[1151]

6.7.2.3.2 The Whangaroa claims

As shown in table 6.7, for most Whangaroa settler claimants, Bell either increased the area granted or made grants where previous commissions had not. In addition, by our calculations, Bell's recommendations led to the Crown taking 11,696 acres of surplus land in the Whangaroa taiwhenua. We note that this figure differs from both those stated by the claimants in closing submissions (19,613 acres of surplus land, including 4,905 acres acquired by means of scrip; subsequently revised to 20,884 acres of surplus and 4,813 acres of scrip) and those of the Crown (3,890 acres of surplus and 3,605 acres of scrip), in part because of the different criteria we have applied.[1152] We have included the large-scale King grant (discussed earlier) in the Bay of Islands figures, when in fact it involved lands in both the Bay of Islands and Whangaroa. There is also confusion about whether the figures for the Powditch claims, which involve a particularly complex alienation history, should be assessed as scrip or surplus, as we discuss at section 6.8.2.5. In the absence of a detailed breakdown, we have no insight into the Crown's much lower finalised figures.

1148. Te Wirihana Poki to Clarke, 16 [no month given] (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 726).

1149. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 727.

1150. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 727.

1151. Tony Walzl, 'Ngati Rehia: Overview Report' (commissioned research report, Kerikeri: Ngati Rehia Claims Group, 2015) (doc R2), pp 192–193.

1152. Closing submissions for Whangaroa taiwhenua (#3.3.385), pp 31–32; Crown closing submissions (#3.3.412), p 6; submissions in reply for Whangaroa taiwhenua (#3.3.499), pp 58–59.

OLC	Claimant	First commission award (acres)	Bell commission (acres)	Crown surplus (acres)
270	Thomas Joyce	291	508	992
283	William Lillico	35	Nil (26-acre award lapses)	26
383–384	William Powditch	No grant	165 742 (total 907 acres)	Nil 95
385	William Powditch	No award but FitzRoy offered £1,500 in scrip. Claim was for 3,000 acres.	Nil	Nil
549	William Baker	557.5	1,289	2,889
599–602	James Kemp	2,284 FitzRoy awarded 4,000 acres but no order was issued.	2,722	1,742
802–803*	James Shepherd	2,000 and 2,560	3,553 and 5,723	1,697 4,163 †
882–883	Edward Boyce	No award	308	92
Totals		7,727.5	15,010	11,696

* These figures do not include a further two awards at Whangaroa (OLC 807, 808) of 132 acres since these did not result in a surplus for the Crown.

† A return prepared for the 1948 Surplus Lands Commission gave the respective acreages as 4,440 acres and 1,697 acres, but we have used the figures from Rigby's spreadsheet, which was also based on the Surplus Lands Commission papers, in the absence of definitive evidence either way. However, neither source identifies all three pieces of land that comprised Shepherd's award for OLC 803 at Upukorau: Rigby, 'Old Land Claims Spreadsheet' (doc A49(d)), Stirling and Towers, supporting papers (doc A9(a)), vol 5, p588.

Table 6.7: Crown surplus lands in Whangaroa.

Sources: The figures in this table are based on a number of sources including the reports of the Bell commission and the technical evidence in our inquiry: Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9); Rigby, 'Old Land Claims Spreadsheet' (doc A48(d)); Berghan, 'Northland Block Research Narratives' (doc A39(a)).

As in the Bay of Islands, the most significant of these takings of surplus land involved the missionary claims: those of Shepherd (OLC 802–803 and 807–808) and Kemp (OLC 599–602). Māori also lost extensive areas in the case of William Baker (OLC 549) and Hayes (OLC 881).

Shepherd's Whangaroa claims are particularly notable. In the first instance, much of the land he claimed had been acquired from his pupils at the Waitangi Mission Station. Tahua Murray of Ngāti Ruamahue explained to us that Shepherd

had a 'huge influence' on the students 'as they were only young men when they came to Whangaroa'; in her view, Shepherd 'used his influence to advance his own agenda of acquiring land'.[1153] Counsel for Ngāti Ruamahue, Ngāti Kawau, and the wider Whangaroa taiwhenua submitted that these tūpuna did not understand the ramifications their arrangements would have, 'that they would never be able to have free access to their fishing spots, wāhi tapu, and places of significance, and also in regard to their ability to exercise their kaitiaki and rangatiratanga over, and for them'.[1154] Counsel also quoted the view expressed by Presbyterian minister, Dr Lang, in 1839 that 'instead of endeavouring to protect the New Zealanders . . . from the aggressions of unprincipled European adventurers, the missionaries of CMS have themselves been the foremost and the most successful in despoiling them of their land'.[1155]

Although Shepherd brought seven separate claims, four of which were for lands in the Whangaroa taiwhenua, we will focus here on Upokorau (OLC 803), located between Whangaroa and Waimate. His claim there was based on a transaction made in 1836 and 1837 with Awa, Kowiti, and others in which they had received £40 in cash, goods that were calculated to have a value of £520 10s, and four cows valued at £60.[1156] Bell's subsequent handling of this case was conducted in the face of sustained protest from Heremaia Te Ara (Ngāti Uru, Te Whānaupani) that his hapū had not been involved in the original transactions with either Shepherd or Kemp (discussed at section 6.7.2.4). He argued consistently that their rights to the lands north of the Upokorau River were unextinguished. Ultimately, the hapū managed to retain only four small reserves totalling 22 acres, plus two modest blocks that had been excluded at the time of the first hearings.[1157]

During the first commission, Shepherd himself had acknowledged this reservation. In 1836 and 1837, he had reached agreements for an area totalling 6,000 acres, he explained, of which 2,000 acres were reserved 'for the sole use and benefit of the natives'. He also maintained that he had acquired this acreage additionally, solely to 'prevent its sale to Europeans'.[1158] Copies of the 1836 and 1837 deeds were presented, the latter of which specified that cultivations and kāinga were to be left out, though it failed to identify their location.[1159] The reservation, sited on the north

1153. Tahana Murray (doc s21(b)), pp 50–51; Bruce Stirling and Richard Towers, 'Not with the Sword but with the Pen' (doc A9), p 181.

1154. Closing submissions for Wai 1613 and others (#3.3.328), p 18; closing submissions for Wai 1312 (#3.3.319), pp 34–35.

1155. Closing submissions for Wai 1613 and others (#3.3.328), p 18; closing submissions for Wai 1312 (#3.3.319), p 33.

1156. Berghan, 'Northland Block Research Narratives' (doc A39 (a)), vol 2, p 501.

1157. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1374–1376, 1402–1408; evidence of Toro and Shepherd, 9 December 1842 (Berghan, supporting papers (doc A39(m)), vol 18, pp 10404–10405).

1158. Evidence of Shepherd, 9 December 1842 (Berghan, supporting papers (doc A39(m)), vol 18, p 10405). The third deed is missing from Shepherd's file.

1159. Evidence of Shepherd, 9 December 1842 (Berghan, supporting papers (doc A39(m)), vol 18, pp 10402, 10405).

bank of the Upokorau River, was covered by a third deed, which he had given to Protector Clarke.[1160]

At the first commission, objections to Shepherd's claim from Toro and Taka had been withdrawn when they found that land at Tawapuka on the north side of the Upokorau River was 'reserved for and given up to the Natives'.[1161] It is likely that this area included the Tawapuka and Raukaurere blocks (103 acres and 268 acres respectively), which were later put through the Native Land Court for title determination;[1162] the rest of the reserve would become a contentious issue when Shepherd undertook his survey in 1857. In the meantime, the first commission had recommended an award of 2,482 acres to Shepherd, excepting the reserve, its boundaries understood to trace the northern bank of the Upokorau Stream to the Kāeo River (the 'great water of Whangaroa'), extending to Kemp's claim, taking in the cultivations at Tawapuka, and stretching up to the road between Whangaroa and the Bay of Islands.[1163] 'Great care must be taken in the survey of this claim', the commissioners directed, in order 'to prevent an encroachment upon the land belong[ing] to, or reserved for, the natives'.[1164] Shepherd's recommended grant was recalculated when the 1842 ordinance was disallowed. Found to exceed 5,000 acres, the award was revised to to the maximum of 2,560 acres.[1165] However, the commission recommended five other awards as well (2,000 acres at Tauranga, Whangaroa; two small grants of 30 acres each on the Whangaroa Harbour; and two Bay of Islands awards of 343 and 367 acres on the Kerikeri River).[1166] These were authorised by FitzRoy, bringing Shepherd's total entitlement to 5,330 acres, well in excess of the statutory limit. The grant for Upokorau was issued in November 1844 and included the reserve stipulation.[1167]

Shepherd was one of the targets of Grey's general attack on the missionaries, and in 1848 the Governor took action in the Supreme Court seeking to force him to give up his grants, but the case did not proceed.[1168] Shepherd had written to the Government to defend the size of his claims – the land was intended for his children and acquired in their names – and as discussed earlier, the Supreme Court upheld the validity of FitzRoy's grants in similar cases. Afterwards, Shepherd divided his grants up among his children, but the Whangaroa properties remained

1160. See Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1371, 1373–1374.

1161. Evidence of Toro, 9 December 1842 (Berghan, supporting papers (doc A39(m)), vol 18, p 10404).

1162. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1373.

1163. The boundaries were appended to the file. See Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1374.

1164. Report of Land Claims Commission, 8 April 1843 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1375).

1165. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1375–1376.

1166. Bell memorandum, 9 September 1861 (Berghan, supporting papers (doc 39(m)), vol 18, p 10648).

1167. Bell memorandum, 9 September 1861 (Berghan, supporting papers (doc A39(m)), vol 18, p 10648).

1168. See Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1379–1381.

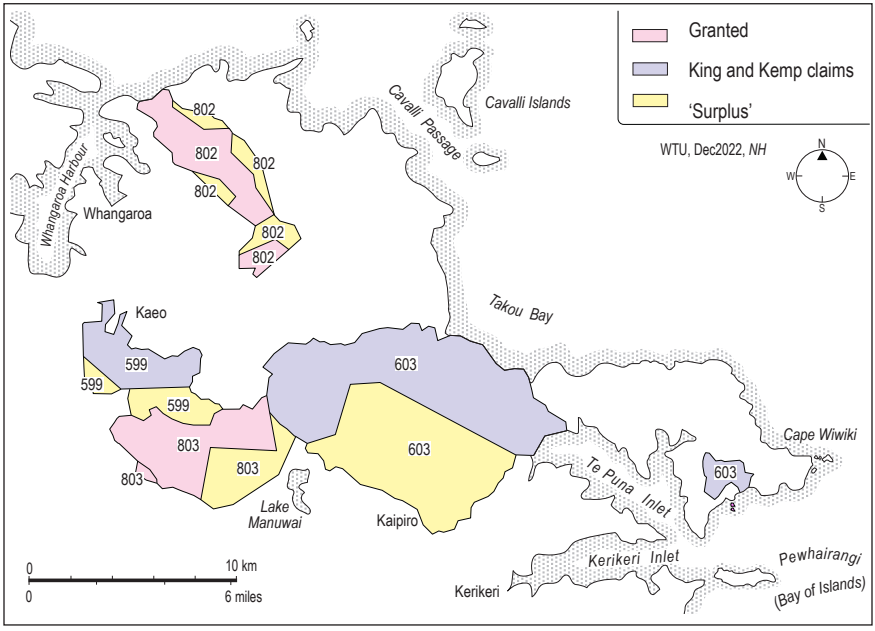
unsurveyed.[1169] Stirling and Towers noted that there was little incentive to survey while Crown purchase activity remained low in the district and if colonists respected each other's boundaries and recognised the understanding of Māori that they could continue to utilise their land traditionally. Nor was there any reason at this point for Māori to protest the Crown's validation of Shepherd's claims.[1170]

All that changed with the Bell commission. The requirement for settler claimants to survey the entire boundaries of their original claims resulted in Māori also trying to ensure their lands were properly defined and protected. After 'various conversations' between Shepherd and Bell about the survey of adjoining claims, Shepherd produced surveys of his six grants, totalling 18,880 acres. The survey of the boundaries at Upokorau (OLC 803) encompassed 10,413 acres, as compared to the 5,330 acres he had been awarded by FitzRoy.[1171]

Shepherd's claim at Upokorau was challenged by Ngāti Uru and Te Whānaupani. According to Stirling and Towers, this area had been transacted by Hira Mura, Hone Tino, Toro, and Pueka Pita in the second deed for Upokorau, signed in November 1837.[1172] During Bell's hearing at Whangaroa in October 1857, Heremaia Te Ara gave evidence that his people had not sold Maungakaramuramu and Waihuka: 'I do not know who sold it, or that he had a right to sell as I never knew he had a right with us in the land.' Unaware as he was of Shepherd's intention to survey the land, Heremaia described it as done 'in secret'.[1173] On the same day as Heremaia gave evidence, Shepherd wrote to Bell to 'protest against all opposing statements to [his] claims to land by the natives'. He had always given Māori 'sufficient time . . . to hear of it and come forward to receive their share of the payment,' he continued, and no objections had been raised before the first commission.[1174] It seems that Heremaia (a young man at the time) had been living elsewhere in 1842; more significantly, he would not have been aware of the extent of land being claimed by Shepherd until the survey was undertaken.[1175]

A subsequent letter, signed by Heremaia and Naihi Te Pakaru and dated 11 November 1858, asked that the land between Te Taita and Waihuka be returned.[1176] Two sketch maps were enclosed, showing the excluded north-eastern portion, the boundaries of Kemp's claim, and an area of land (Matawherohia) that had been sold to the Crown between 1858 and 1859. Heremaia had approached Shepherd

1169. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1381.
1170. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1381.
1171. Bell memorandum, 9 September 1861 (Berghan, supporting papers (doc A39(m)), vol 18, pp 10648–10652).
1172. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1383–1384.
1173. Evidence of Heremaia, 8 October 1857 (Berghan, supporting papers (doc A39(m)), vol 18, p 10514).
1174. Shepherd to Bell, 8 October 1857 (Berghan, supporting papers (doc A39(m)), vol 18, p 10536).
1175. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1384.
1176. Heremaia Te Ara and Naihi Te Pakaru, Kaeo, to Bell, 10 November 1858 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1385); for spelling of Naihi Te Pakaru see Erima Taniora (doc C2), p 2.



Map 6.6: Shepherd's Whangaroa claims

three times, 'but he would not agree to give my land back'.[1177] The appeal to Bell was equally fruitless. The commissioner issued his standard response to complaints from Māori who said they held unextinguished rights: that the land identified had been included in the original deeds and he could not therefore 'interfere to take it back'.[1178]

Heremaia Te Ara also protested the inclusion of the eastern portion of Shepherd's claim at Upokorau. Extending from Whakaniwha to Katiaka, it was described in the 1837 deed from which cultivations and kāinga were excepted. His letter stated: 'kia rongo mai koe e kore hoki e tika kia tango hia noa tia e te ha pa tana wahi pihi i ka pea nea e te kai whakarite whenua i mua kotinga tenei otaua whenua'. This was translated by John White (in 1859) as 'it will not be right for Mr Shepherd to take that piece of land which was excluded by the Commissioner'.[1179] Bell made no immediate response, noting that he would reply 'finally' once Shepherd had deposited his grants.[1180]

1177. Heremaia Te Ara and Naihi Te Pokaru, Kaeo, to Bell, 10 November 1858 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1386).

1178. Bell minute, 26 November 1858, on Heremaia Te Ara and Naihi Te Pakaru to Bell, 10 and 11 November 1858 (Berghan, supporting papers (doc A39(m)), vol 18, p 10521).

1179. Heremaia Te Ara to Bell, 27 September 1859 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1389–1390).

1180. Bell minute, 13 February 1860, on Heremaia Te Ara to Bell, 27 September 1859 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1390).

Further evidence was deferred until 1860 at Auckland. Here, on 16 February, Shepherd produced his 1844 grant (for 2,560 acres) and three survey plans for the land he wanted at Upokorau: Tiheru (3,863 acres); Mokau (250 acres); and Irumia, Upokorau, and Waiare (6,300 acres) – a total of 10,413 acres. He insisted that the land excluded within the original deed was 'on the other side of the river, where I gave them back a large piece of land . . . amounting to about 3,000 acres.'[1181]

Bell considered the land Heremaia had claimed between the Taita and Waiare Rivers 'fairly sold' but was undecided as to whether he 'had a rightful claim' at Katiaka.[1182] He wrote to Heremaia (who had been unable to attend) to explain his reasoning; in his view, 'these words "keep the Maori villages out" relates to the land on the side to the north of Upokorau', and 'the part occupied by Shepherd's sons is for them themselves to cultivate undisturbed'.[1183] Referring to the deeds set out by the first commission, Stirling and Towers concluded that this assessment was incorrect. Two distinct areas had been reserved for Māori: the first was the area covered by the reserve deed, Tawapuka; the second was any kāinga and cultivations in the area covered by the 1837 deed.[1184]

Letters were sent to Bell from both sides of the dispute. According to James Shepherd, Heremaia and Naihi were 'natives originally living on this land and now returning and trying to effect a breach of the peace'. Their claim, he reminded Bell, also jeopardised the Crown's surplus, for 'in the event of the natives gaining their point they would not only deprive her Majesty's subjects of their legal rights but also rob the *Government* of a portion of valuable land' (emphasis in original).[1185] Heremaia protested that it was his home that was being stolen.[1186] In the meantime, negotiations were also taking place between Bell and Shepherd regarding an exchange of land for water frontage lost as a result of new legislation, the Bay of Islands Settlement Act 1858 (discussed in chapter 7). Resolution of the issue entailed the addition of survey allowances and fees, after which Bell calculated that Shepherd was now entitled to 11,484 acres for his claims, irrespective of the 683 acres already granted to him as part of the CMS families' claim. Shepherd's final selections totalled 9,689 acres (9,408 acres for his awards in the Whangaroa region) and were brought before the commission and endorsed in September 1860. Plus, he was entitled to a further 1,761 acres at Puketī (for his survey of the Orsmond claim).

1181. Notes of Auckland sitting, 16 February 1860 (Berghan, supporting papers (doc A39(m)), vol 18, p 10588).

1182. Bell memorandum, 9 September 1861 (Berghan, supporting papers (doc A39(m)), vol 18, pp 10649–10650).

1183. Bell to Heremia Te Ara, 23 September 1860 (Berghan, supporting papers (doc A39(m)), vol 18, p 10529); Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1394–1395.

1184. Report of Land Claims Commission, 8 April 1843 (Berghan, supporting papers (doc A39(m)), vol 18, p 10401); Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1375–1376, 1395, 1397–1398.

1185. Shepherd to Bell, 8 November 1860 (Berghan, supporting papers (doc A39(m)), vol 18, pp 10581–10583).

1186. Heremaia Te Ara to Bell, 16 November 1860 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1395–1396).

The order for his selection of 1,372 acres at Upokorau was held back because, in Bell's words, there was a 'dispute with Heremaia and certain natives as to one or two small pieces included in the survey'.[1187] In January 1862, in Auckland, he finally heard evidence regarding the disputed land at Katiaka. Heremaia told the commission:

> I supposed at the time the claim was investigated by the former Commission that the piece of land now in dispute was all right (takoto pai); and did not know till it was surveyed by Mr Shepherd that it was included in his boundary. When I saw that it was included, I said: 'How is this?'
> . . . It is not well that a man should overrule the decision of the Commissioner in 1842 [*sic*, 1843]. I wished Mr Shepherd to yield the land peaceably and not to have a dispute about it. I desired and still desire that this piece of land should be returned to me, as it was never sold by me or my father, and was awarded to me by the Commissioner in 1842 [*sic*, 1843].[1188]

He recounted detailed boundaries of the area his hapū claimed (these had already been provided on the sketch maps sent to Bell in 1858). Under questioning by Shepherd, Heremaia explained that he had been only a boy at the time the deed had been signed, absent in Hokianga. The land had belonged to his father, Te Puhi, and had come to him upon his death.[1189] Shepherd maintained that he had purchased the land outright but had permitted Māori to live on it, and had later decided to return it to them while reserving the right to its timber for himself. The kāinga excluded from his 1837 deed was a 'small piece' called Pākaraka, located on the south side of the Upokorau, for which he had given a horse in 1845.[1190] Bell accepted Shepherd's evidence, regarding the dispute as pertaining only to modest blocks, and Pākaraka to have been sold, as the missionary had a receipt for the horse. He ignored the much larger area at stake.

Despite the findings of the first commission regarding the need to prevent encroachment on land in Māori ownership, the sustained protests of Heremaia, the evidence he produced as to their understanding of the matter, and Shepherd's earlier promises and subsequent admission that Māori had been occupying the land in dispute, they ended up with a tiny area on which to stand. Shepherd received three separate grants from the Bell commission for his OLC 803 claim: 1,372 acres at Upokorau, 3,737 acres at Waiare, and 614 acres at Tiheru. In addition, he was awarded 3,553 acres at 'Tauranga' (OLC 802) and 132 acres at Whangaroa Harbour (OLC 807 and 808). He selected only 259 acres for his two awards at

1187. Bell memorandum, 22 March 1864 (Berghan, supporting papers (doc A39(m)), vol 18, p10653).

1188. Evidence of Heremaia Te Ara, 24 January 1862 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp1403–1404).

1189. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp1404–1405.

1190. Evidence of Shepherd, 24 January 1862 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp1405–1406).

OLC	Name of land	FitzRoy award (acres)	Area surveyed (acres)	Selection and award under Bell commission (acres)	Crown surplus (acres)
802	Tauranga	2,000	5,250	3,553	1,697
803	Upokorau	2,560	10,413	1,372* 3,737† 614‡	4,690
807	Whangaroa	30	57	132	0
808	Harbour	30	33		
Totals		4,620	15,753	9,408	6,387

* Upokorau.
† Waiare.
‡ Tirehu.

Table 6.8: Shepherd's claims in Whangaroa.

Kerikeri after negotiations for lands taken under the Bay of Islands Settlement Act.[1191]

Stirling and Towers noted that Shepherd's selection of 5,723 acres for his OLC 803 claim left 4,690 acres to cover the excluded kāinga and the 'returned' land at Katiaka, with the rest to be claimed by the Crown.[1192] Out of all this, Māori ended up with only four small reserves totalling 22 acres 1 rood.[1193] Even this was soon gone. Heremaia continued to protest the limited extent of the land reserved on survey, and Bell referred the matter to land purchase commissioner Kemp for 'final settlement' in 1864. Shepherd proposed paying £20 to 'extinguish all claims to the small pieces in question', a 'very reasonable' proposal, Bell thought, and he directed Kemp 'to see the natives at once and obtain if possible an immediate adjustment . . . [to] complete all his claims'.[1194] Kemp succeeded in doing so the following month. In sum, the Crown surplus out of all Shepherd's Te Raki claims was 9,408 acres, 6,387 acres of which were located in the Whangaroa district.

6.7.2.3.3 The Whāngārei and Mangakāhia claims

The first Whāngārei claims were heard by Bell at Auckland in December 1857. It quickly became apparent that questions of title in the district were complicated by on-sales and Crown purchase activity which, in some instances, had revealed unextinguished Māori rights, In the case of Pataua, the property had been sold on

1191. Bell memorandum, 9 September 1861 (Berghan, supporting papers (doc A39(m)), vol 18, p10652).
1192. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p1401.
1193. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p1408.
1194. Bell memorandum, 22 March 1864 (Berghan, supporting papers (doc A39(m)) vol 18, p10653).

the death of the original grantee James Stuart (OLC 449), and the new purchaser was required to pay an additional £120 to complete the acquisition after District Land Purchase Commissioner William Searancke found Māori who had been left out of the original transaction were residing on the block.[1195]

The Bell commission's investigation into the next claim on its schedule, Taurikura, centred on whether the boundary described in Gilbert Mair's OLC 1047 deed, or that reportedly derived from his verbal transaction with Te Tao, should be recognised as valid. In their evidence to Bell, Wiremu Pohe and Hirini Tipene both argued that Te Tao should not have been able to make arrangements about the land; but Brown and Campbell, who had taken over Mair's claim, had relied on his agreement with Te Tao to dispose of land beyond what Wiremu Pohe and Hirini Tipene regarded as the OLC 1047 boundary.[1196] Ultimately, Bell opted for Te Tao's boundary, even absent a deed, concluding that the two transactions of Mair, together with the Crown's purchase for £200 of the 5,365-acre Manaia block from Wiremu Pohe and others in 1855, had extinguished the interests of all customary Māori owners to some 10,942 acres of land.[1197] At the same time, Bell upheld the original finding of the first Land Claims Commission that Mair was entitled to 414 acres. After adding in the one-sixth increment and other survey allowances, this figure rose to 575 acres. John Logan Campbell had increased his holding at Taurikura still further by purchasing 1,675 acres, at a rate of 10 shillings per acre, which earned him another 335 acres in survey allowance, thereby increasing his total award from the Bell commission to 2,585 acres (which he took in one parcel of 1,762 acres and another of 823 acres).[1198] Meanwhile, the Crown also benefited significantly from Bell's finding, ending up with 8,357 acres of 'surplus' land, although part of this was encompassed by the Crown's subsequent purchase of the 'Manaia' block.[1199] It should also be noted that the Taurikura sale was opposed by Paratene Te Manu in 1860, but Government officials declined to reopen the case.[1200] The Lands and Survey Department, taking into account the 'Manaia' block overlap, later reported the OLC 1047 surplus as 3,890 acres, while according to the Myers commission in 1948, this was the entire area of surplus lands for the Whāngārei district.[1201] Stirling and Towers summarised the outcome for Māori: they had received '£50 in goods from Mair and £200 from the Crown for all of the

1195. According to Berghan, the archives file is incomplete and there are limited details available for the claim: Berghan, 'Northland Block Research Narratives' (doc A39(a)), vol 2, p 285; Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 780–782.

1196. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1725–1729.

1197. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1729–1731.

1198. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1729–1731; Berghan, 'Northland Block Research Narratives' (doc A39 (a)), vol 2, p 632.

1199. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1731.

1200. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1731–1732.

1201. Stirling and Towers document bank (doc A9(a)), vol 6, p 440; 'Report of Royal Commission to inquire into and report on claims preferred by members of the Maori race touching certain lands known as surplus lands of the Crown', AJHR, 1948, G-8, p 36.

peninsula (just over five pence per acre), no reserves, and nothing at all from the surplus land.'[1202]

Local tensions in the Mangakāhia district between Te Parawhau and Te Uri o Hau resulted in Bell having to revisit Charles Baker's OLC 547 award. A tribal meeting was held in 1858 to get agreement on the boundaries of his claim, but the survey, under the guidance of Matiu of Te Uri o Hau, was blocked soon after it started, reportedly at the insistence of Te Tirarau. Baker proposed in mid-1859 that his award at Mangakāhia be increased from the 1,316 acres recommended by the first commission to 2,560 acres, to which Bell agreed.[1203] The prospect of Crown purchasing heightened tensions further; indeed, during early May 1862, this escalated into localised armed conflict (see chapter 8).[1204] Baker subsequently accepted that he would not be able to take up his award at Mangakāhia and so, in 1865, he was paid out £1,920 in scrip (which equated to a rate of 15 shillings per acre).[1205] Papers prepared for the Myers commission indicate that these Crown interests were absorbed into the purchase of the Oue block in 1876 (discussed later) and Tarakiekie block in 1896.[1206] While Bell also investigated Busby's previously disallowed Whāngārei claims (OLC 23 and OLC 24) under section 12 of the Extension Act 1858, final settlement was by means of arbitration under special legislation in 1867 (discussed at section 6.7.2.10).

6.7.2.3.4 Mahurangi, Gulf Islands, and pre-emption waiver claims

Most pre-emption waiver claims in our inquiry district concerned lands in the Mahurangi area or gulf islands. The Land Claims Settlement Act 1856 had adopted the maximum settler entitlement of 500 acres established under Grey's Land Claims Ordinance 1846 and again ignored the obligation to set aside tenths, ensuring a sizeable surplus for the Crown. In effect, the Crown already considered itself to own land under disallowed waiver claims, although in some cases further payments were made, especially in the southern Mahurangi where the Crown made a number of overlapping purchases (see chapter 8).

We did not receive the sort of detailed evidence relating to the disposal of the waiver claims as we did for old land claims. Still, Bell clearly assumed that native title had been already extinguished in almost all cases. In his final report, he stated:

> in the great majority of these [pre-emption waiver] cases the native title had been fairly extinguished, and that the Government took possession of and sold the land on the strength of the purchases made by the claimants, there can now be no doubt. The fact has been established by the records in my office and in the Land Purchase

1202. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1731.
1203. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 785–789; Berghan, supporting papers (doc A39(m)), vol 11, pp 6664, 6667–6669, 6671.
1204. David Anderson Armstrong and Evald Subasic, 'Northern Land and Politics, 1860–1910: An overview report' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2007) (doc A12), pp 265–266, 269–270.
1205. 'Land claims finally settled (return of, since 8th July, 1862)', AJHR, 1878, H-26, p 5.
1206. Barry Rigby, Old land claims spreadsheet (doc A48(d)).

Department and Survey Department, and by the returns which have from time to time been laid before the Assembly and printed in the Sessional papers.[1207]

His reliance on prior investigations – on findings of the Matson inquiry, with its dependence on Clarke's perfunctory advice – furthered the flaws of a system unable to examine Māori rights in lands assumed already to be alienated. Bell also relied on the fact that pre-emption waiver claims had yielded land for the Crown, which it had then sold to settlers without Māori interruption. Stirling and Towers noted that distinguishing what Crown land was the result of pre-emption waiver claims from that land it had acquired from overlapping Crown purchases was not clear. In their view, 'overlapping Crown transactions effectively "mopped up" remaining Maori interests, at least in intensively transacted areas such as southern Mahurangi.'[1208] We return to this assessment of Crown purchasing policy in chapter 8.

A similar exercise of extinguishing the last vestiges of Māori title occurred at Aotea. After Whitaker and du Moulin's claims were disallowed for want of survey by Matson, the land had 'reverted' to the Crown, the deed being testament enough to the extinguishment of Māori rights. However, a letter from Whitaker in December 1851 – requesting the services of Government interpreter C O Davis to go to Aotea and Hauraki 'with a view of adjusting the native claims' to Aotea – suggests that there were interests outstanding;.[1209]

In December 1853, Aotea settler Barstow asked the Government to 'purchase the whole of the remaining waste land of the Barrier of which the native title has not yet been extinguished'. In his attempts to secure land he was leasing at Tryphena, he had found himself 'entirely at the mercy of the natives' (Māori of 'Matewaru'). His request set in train a process where the complexities of lands to the south of Whitaker and du Moulin's purchase – of ownership, boundaries, owed payment, and wāhi tapu – were all cleared away, along with 15,000 acres of land, for which the Crown paid the equivalent of threepence per acre in August 1854.[1210]

In 1856, Māori lost their interests to the Crown in lands to the north of Whitaker and du Moulin's claims as well. No survey was made, an omission addressed by Bell when he received the claims of the two settlers for the grant of lands purchased under their pre-emption waiver certificates. Not only did he have those claims surveyed but also much of the rest of Aotea, determining the size of the Crown purchase in doing so. A survey allowance provided to Whitaker and du Moulin to cover both their own claims and the Crown purchase meant the exercise required no outlay from the Government.[1211]

Of the total of 28,608 acres surveyed, the Crown purchase, in two pieces, was found to be 2,163 and 4,600 acres respectively. By this means, from an initial

1207. 'Report of the Land Claims Commissioner', 8 July 1862, AJHR, 1862, D-10, p7 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p562).
1208. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p563.
1209. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p1783.
1210. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp1783, 1785–1786.
1211. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p1786.

	Bay of Islands (acres)	Hokianga (acres)	Mahurangi and Gulf Is (acres)	Whangaroa (acres)	Whāngārei (acres)	Total (acres)
Land granted to settlers	0.5		14,119		281	14,400.5
Scrip	320		3,925			4,245
'Surplus' taken by Crown			20,877		291	21,168
Total	320.5		38,921		572	39,813.5

Table 6.9: Total Alienation of Te Raki Māori land through the pre-emption waivers.

transaction of 3,500 acres, the extent of Whitaker and du Moulin's land was finally calculated as involving 21,845 acres. Of this, Whitaker received a grant of 5,463 acres and du Moulin a grant of 1,000, leaving a surplus of 15,382 acres for the Crown.[1212] Like Matson's inquiry, it appears the Bell commission heard no evidence from Māori, whose rights were not investigated and who received no additional payment for the land, bought originally for £172 of goods – making a final return to Māori of just shy of twopence an acre. Great gains were made for colonists and the Crown from transactions that by rights should never have been approved, involving multiple discrepancies that included the issuance of pre-emption waivers for amounts of land far beyond that allowed by FitzRoy's proclamations.[1213]

According to our calculations, overall, the Matson and Bell inquiries resulted in the award of Crown grants for 14,400 acres under the October penny-per-acre regulations, with an additional 4,245 acres of scrip land. The Crown took some 20,877 acres as 'surplus' lands in the Mahurangi district (including Aotea and other gulf islands). The exact figure remains uncertain, however, because of subsequent Crown purchases of portions of the lands covered by waiver certificates.

6.7.2.4 *Case study: Crown handling of Māori occupation in the Kemp claims*

We have already mentioned Kemp's claims, in the sections above. We now explore them in more detail because they were the subject of particular debate between claimants and the Crown in our inquiry as to whether all Māori rights had been extinguished in the lands granted to him. The Crown's handling of Kemp's claims provides considerable insight into its approach to evidence of unextinguished rights at the time and the extent to which such rights were protected within the ratification process. As we discuss later in this chapter, the Crown's alleged failures in that regard would remain a matter of protest for Te Raki Māori for many years.

1212. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1837.
1213. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1791.

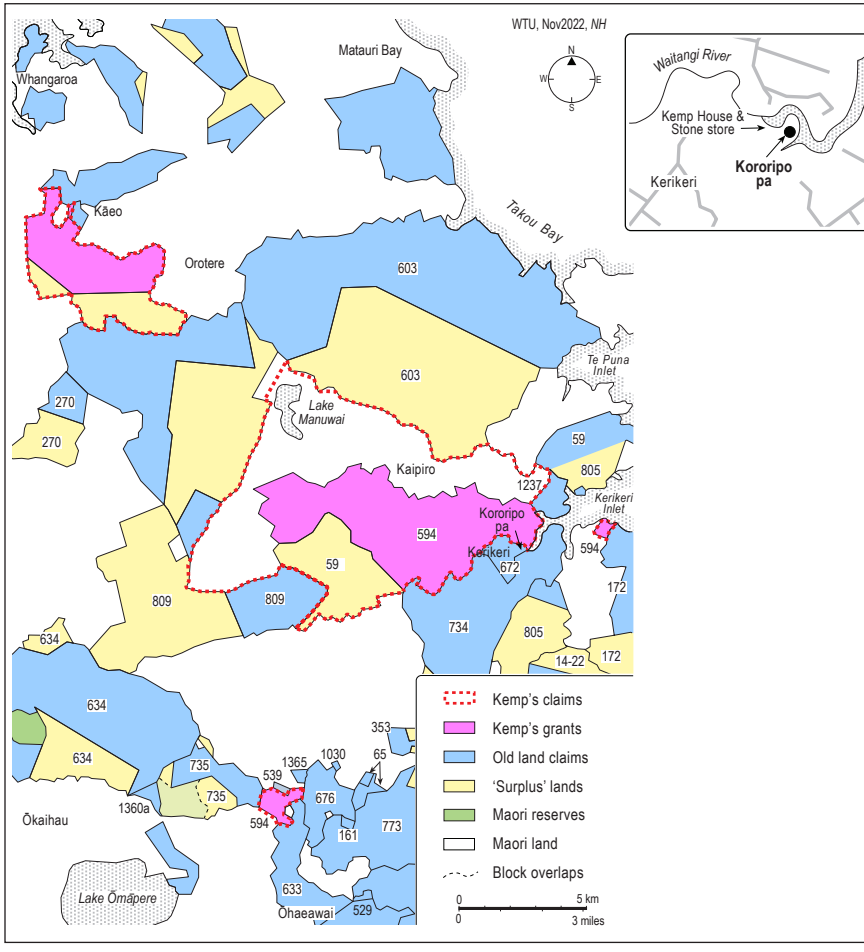
The Crown submitted to us that it was unaware of evidence that Māori continued to occupy any blocks that had been awarded to settlers.[1214] Questioned on this point by the Tribunal, with Kemp's claims as an example, the Crown later provided its analysis of his grants at Whangaroa and Kerikeri (OLC 599–602 and 594–598 respectively). The Crown argued that it was 'unclear' whether Māori remained in occupation. A block awarded to Kemp's son in 1859 did contain a three-acre 'Maori Cultivation' which had been identified in the original deed. One of Kemp's Kerikeri grants also contained Kororipo pā, though in that case the Crown submitted that it was 'not aware of evidence that [the] pa was occupied at this time.'[1215]

6.7.2.4.1 How much land was granted to Kemp and his family?

Kemp's claims in the Bay of Islands (OLC 594–598) were based on five deeds signed with Rewa and other Ngāi Tāwake rangatira between 1834 and 1839, for which the first Land Claims Commission recommended grants totalling 1,354 acres.[1216] He also brought claims for land at Whangaroa (OLC 599–602) based on agreements reached with Tītore, Tāreha, and others, for which the commission recommended grants totalling 2,284 acres. The aggregated grant to Kemp could not, however, exceed the maximum 2,560 acres.[1217] The award for Kioreroa (OLC 596), comprising 150 acres at Waimate, specifically noted a reservation – a three-acre cultivation.[1218] Governor FitzRoy increased the total acreage of Kemp's entitlement to 9,276 acres, split between the two regions: 5,276 acres for the Bay of Islands claims and 4,000 acres for those in Whangaroa. Kemp had also subsequently acquired two properties granted to James Hamlin in the Bay of Islands, totalling 87 acres.[1219]

Kemp's survey at the Bay of Islands for the second Land Claims Commission encompassed 7,125 acres, including 109 acres for the two Hamlin properties. Two portions totalling 95 acres (including 13 acres at Kororipo pā) were located within the area proclaimed under the Bay of Islands Settlement Act 1858; ultimately the land was not required, and a grant was therefore issued.[1220] The final entitlement for his Bay of Islands claims, based on the original awards by FitzRoy and various allocations and adjustments calculated on the area of survey and the fees paid, totalled 7,437 acres. But pending finalisation of the Bay of Islands settlement reserves and his claims at Whangaroa, Kemp had subdivided and surveyed the land at the Bay of Islands into 10 allotments for himself and his children. Bell

1214. Crown closing submissions (#3.3.412), p 52.
1215. Crown memorandum (#3.2.2677), p 15.
1216. Kemp had also purchased two of Hamlin's claims, bringing his Bay of Islands grants to a total of 5,363 acres. See Bell memorandum, 20 April 1859 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7460–7463).
1217. Bell report 20 April 1859 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7460–7462).
1218. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1556.
1219. Bell report 20 April 1859 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7460–7462).
1220. Tom Bennion, 'Kororipo Pa' report commissioned by the Waitangi Tribunal, 1997 (doc E7), pp 20–21.



Map 6.7: Kemp's Puketotara and Bay of Islands claims

endorsed the surveys on which the final grants were based. The total area was for 6,954 acres, of which 580 aces went to James Kemp senior.[1221]

The initial grants at Whangaroa had never been issued for reasons discussed later, but on eventual survey took in 4,464 acres. On Bell's calculations, taking into account what had already been surveyed and granted at the Bay of Islands, Kemp was entitled to 2,735 acres. This included an 'additional fourth' (301 acres) under section 26 of the Land Claims Settlement Act 1856 because Bell considered the missionary to have been unfairly penalised by the delay in settling his title 'by the default of Government'. On the ground, Kemp's eventual grant encompassed 2,722

1221. Bell report 20 April 1859 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7460–7461).

acres.[1222] The remaining 1,742 acres were taken by the Crown.[1223] By our calculation, Kemp personally received 3,302 acres and the other family members another 6,347 acres. We have been unable to account for the six-acre difference between our figure for Kemp's personal grants and that of 3,308 acres provided by the Crown.

6.7.2.4.2 Māori occupation

There were various indications and acknowledgements throughout the validation process in both regions that Māori continued to live on and assert rights in the lands being claimed by Kemp, although the exact locations generally were unrecorded. The Crown did very little to ensure that Māori on these lands were protected. Even the small reserve specifically excluded from the Kioreroa deed was not recorded in the survey plan and ended up being included within the boundaries of the grant that was eventually issued to Kemp's son, William Papillon Kemp, in 1859. This is acknowledged by the Crown in our inquiry, although – as with Kororipo pā – counsel also pointed out that it is 'unclear . . . whether the Maori cultivation was still in use' by this date.[1224] The pā had been subject of a deed signed by Hongi and Puru in October 1838.[1225] We observe that in the land court in the 1930s, Hone Rameka and others challenged the view that the pā was unoccupied and had been sold.[1226]

As discussed in section 6.3, it was common in pre-treaty times for missionaries to claim that they had purchased land while nonetheless allowing Māori to remain in occupation. Māori saw these arrangements differently: it was the missionaries who were allowed to occupy and use the lands; notably, Māori saw such allocations as providing for the missionaries' children, who were regarded as part of the hapū. While giving evidence to the first Land Claims Commission, Rewa spoke of allocating land at Puketōtara 'to Mr Kemp for his Son, who is named after me'. He added, 'The Land belonged to us & we have never sold it to any other person.'[1227] Kemp, in his evidence, also referred to that underlying intention, although he continued to regard the transactions as sales:

> I made all the purchases of Land in New Zealand for the benefit and use of my Eight Children; intending to put each of them in possession of a portion, upon their coming of age. The Chiefs, from whom I purchased the various tracts, perfectly understood that I did so, altho' the Children being infants, the deeds were made out in my name. I have lived Twenty Three Years in New Zealand, and all my Children

1222. Bell report, 21 April 1859 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7463–7465).
1223. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1585.
1224. Crown memorandum (#3.2.2677), p 17.
1225. Bennion, 'Kororipo Pa' (doc E7), p 12; Crown memorandum (#3.2.2677), p 15.
1226. Bennion, 'Kororipo Pa' (doc E7), pp 22–27.
1227. Evidence of Rewa, 29 December 1841 (Berghan, supporting papers (doc A39(m)), vol 12, p 7275).

have been born in the Island, and are considered by the Natives as belonging to their tribes.[1228]

Kemp later informed the Colonial Secretary that Māori had remained on the land, and had continued to cultivate it and cut timber whenever they chose, 'a system universally adopted in all purchases of the missionaries'.[1229]

6.7.2.4.3 Grey's handling of Kemp's grants

When FitzRoy brought Kemp's claims before the Executive Council in 1844, he made no attempt to provide for ongoing Māori occupation. Commissioner FitzGerald subsequently recommended awards of 5,276 in the Bay of Islands and 4,000 acres in Whangaroa. FitzRoy duly issued grants for the Bay of Islands claims but (apparently due to some administrative oversight) not for Whangaroa.[1230] Kemp's Whangaroa claim then became caught up in Governor Grey's campaign against the missionary purchases (discussed earlier in section 6.5). During three years of heated correspondence, Kemp sought recognition of his Whangaroa grants, and Grey repeatedly refused.

In 1847, Grey wrote to the Colonial Office insisting that the legality of these and other extended grants should be challenged. He eventually received the support he desired from the Secretary of State, informing Kemp in September 1847 that his awards were 'entirely null and void' and that Her Majesty's government had refused the grants being prepared for his Whangaroa claims. Grey proposed that Kemp surrender his Bay of Islands grants as well and obtain new ones to the maximum of 2,560 acres allowed by the law, to be selected in four blocks and surveyed by the Crown.[1231] The only restriction was that Kemp would 'not be allowed to include in the blocks . . . any Lands to which the Natives may establish a just claim, or which may be required for the use of the Natives'.[1232] Crown counsel pointed to this statement as indicating that Grey would only 'permit grants that *excluded* Maori cultivations and habitations' (emphasis in original).[1233] Grey had however given little thought about how to ensure that occupied sites within settler grants were to be protected, or how to establish what would be required by Māori for their sustenance. (We have already seen in the case of the Waitangi reserves that Grey did not back his criticism of the failure to protect such areas with effective action.)

1228. Evidence of Kemp, 20 January 1842 (Berghan, supporting papers (doc A39(m)), vol 12, p 7258).

1229. Kemp to Colonial Secretary, 26 January 1848 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7300–7301).

1230. Bell report, 20 April 1859 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7460–7462).

1231. 'Abstract of Documents and Correspondence' (Berghan, supporting papers (doc A39(m)), vol 12, 7386–7390).

1232. Kemp to Sinclair, 11 October 1847 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7291).

1233. Crown memorandum (#3.2.2677), p 16.

Kemp refused. He did not see the justice, he said, of reopening his claim to hear 'any objection that the Natives might be induced to make', as (in his view) they had already acknowledged that they had fairly sold the land. He therefore thought that further reserves were 'not required'.[1234] Expressing surprise that any grants issued by the Crown should not be legal, he rejected the Governor's proposal, except on condition that the surplus land be set aside for the 'moral and religious welfare of the Native race, and to be held in trust with the Church Missionary's property in New Zealand for that purpose'. He argued that it should not revert to Māori for it was likely to cause jealousy between those who had received payments as part of the original transactions and those who had not. Echoing Grey's earlier rhetoric, he warned of 'awful Calamity' and 'War & Bloodshed', and moralised that he would rather all the land be lost to his children than 'one drop of Human Blood . . . be shed on that account'.[1235]

Grey's response was equally moralising and uncompromising:

> the British Government should not permit any person illegally and unjustly to deprive the natives of land to which they may be entitled, more especially in the case of persons who were sent to this country with the most holy objects and purposes, and not just to acquire an influence over the natives and then to deprive them for a merely nominal consideration of large tracts of land, which might now afford them the means of raising themselves and their children to comfort and to the luxuries of life.[1236]

As to any surplus, this could not go to the missionaries even if held in trust for Māori, because it contravened what was allowed under the 1841 ordinance. Grey professed himself as 'happy to avail [himself] of the experience of those who [were] best acquainted with the country to do anything which the law may permit & which may be judged best for the interests of the natives with surplus land situated as that . . . claimed by Mr Kemp'. However, the Government had 'no power' to accede to his proposal because this would be a 'payment for the surrender of . . . illegal grants' to individuals who could not be admitted to have any claim. If Kemp did not accept the Government's conditions, Grey warned, the only course would be to 'place the affair in the hands of the attorney'. In essence, Grey thought that the land granted in excess of the statutory maximum should be returned to Māori; there was no mention of it being taken by the Crown at this stage.[1237]

Kemp continued to insist that his purchases were fair, had been acknowledged as such by both Māori and the commissioners, and that there could be no reason

1234. Kemp to Colonial Secretary, 11 October 1847 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7291–7294).

1235. Kemp to Colonial Secretary, 11 October 1847 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7293–7294).

1236. Grey minute, 3 December 1847, on Kemp to Colonial Secretary, 22 November 1847 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7297–7298).

1237. Grey minute on Kemp to Colonial Secretary, 11 October 1847 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7291–7294).

for grants to such long-term and established residents as the missionaries to be withdrawn or withheld. Having informed the Colonial Secretary that missionaries never forced Māori off the land they had purchased, he went on to claim that there had 'never been any disputes upon land' between Māori and missionary families, and that

> for the last thirty years every encouragement has been given by the Missionaries to the Aborigines to rear stock, for which purpose stock has been given them, they also have been taught to use them to till the ground, and encouraged to build regular houses, with the comforts of a Christian people.[1238]

Kemp was nonetheless more concerned with the interests of his family than those of Māori who had welcomed them onto the land and into their community. With his descendants' inheritance under threat, he failed to support Māori, who would find they had no legal rights even over the cultivations that had been excluded from the missionary grants, let alone those areas that were ultimately deemed to belong to the Crown as surplus. In the meantime, Kemp argued that the Governor could not 'deny a right to the families of the Missionaries freely admitted by the Aborigines to persons of New Zealand birth long before the Govt appeared in this Country, or ever contemplated such a movement'.[1239] Stirling and Towers summed up the impasse and the consequences for Māori:

> Neither Kemp nor Grey appeared to have a way to formally acknowledge the ongoing Maori interests in the land. On the one hand, Kemp wished to maintain exclusive rights to his granted area and have the CMS manage the surplus land for whichever Maori they decided should benefit by it. On the other hand, Grey sought to confine Kemp's exclusive rights to a smaller area and maintain the Crown's exclusive rights to the surplus land, some or all of which might be returned to Maori if he so decided. Meanwhile, there was no process to determine what rights Maori had maintained over the land or where they had maintained those rights.[1240]

6.7.2.4.4 Māori opinion turns against Kemp

Up to this point, Māori had seemed to support Kemp, although, as we discussed earlier, the record of the Land Claims Commission hearings must be read with caution. In the 1850s, Māori began to realise that Kemp and his fellows in the CMS were claiming 'far more than was ever sold to them' and protested that the missionaries would 'not allow them to retain possession'.[1241] In 1854, Tāmati Waka Nene asked the Governor to send a surveyor without delay because 'great' was the

1238. Kemp to Colonial Secretary, 26 January 1848 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7299–7303).

1239. Kemp to Colonial Secretary, 26 January 1848 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7299–7302).

1240. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1549.

1241. Nugent minute, 18 May 1854, on Tamati Waka Nene to Grey, 13 May 1854 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1550).

'mistake'.[1242] It is apparent, too, that Māori had been felling timber on some of the land being claimed at Whangaroa. Kemp complained of having sustained a 'very great' loss from the Government's failure to issue his grants, which had resulted in 'unprincipled Europeans' instigating Māori 'encroachments' on his property to cut timber for sale. In addition, a bad precedent was being set. According to Kemp, 'The natives [were] doing the same to other settlers seeing that I had no person to prevent their cutting of my land.' This, he informed the Government, was the 'source of much evil amongst natives and Europeans in the north.'[1243]

The substance of this allegation was repeated in a petition to the House of Representatives. Kemp drew their attention to a letter purportedly written by Te Ururoa (of Ngāi Tāwake) in 1848 asking permission to cut timber (something Kemp earlier claimed he always allowed) and which, he now argued, 'clearly show[ed]' that he had 'fairly purchased the Land.'[1244] This stated:

> Tenei ano taku korero atu kia koe, e mea ana ahau kia wakaae mai koe ki te tahi Rakau maku i nga rakau o te Paru, e pai ana tenei he mea inoi atu kia koe mehemea ka tahae ahau ka he, tena ko tenei mau te wakaaro kia tukua mai tetahi maku i o rakau kei te Para pu ano nga Rakau e hiahia nei ahau, e rua tekau rakau etahi mai I koe maku.

This was translated by Kemp as

> I have something here to say to you. I wish to obtain your consent to let me have some Timber, some of the Timber of the Paru, this is good because permission is asked of you, if I take your Timber unknown to you it will be wrong but as it is you must consider the matter and let me have some of your Timber. I wish for it from the Paru, let me have twenty Trees.[1245]

We interpret this statement differently. Te Ururoa can be seen as informing Kemp of his intention to take timber off the land that the hapū had allocated for the missionary and his family to use, while Kemp's disgruntlement at the loss he had incurred suggests that the timber was cut without his sanction – whether by Te Ururoa or Heremaia's people (Ngāti Uru and Ngāi Te Whiu) is unknown.[1246]

Other claims were being made. A 'young native' named Karuhorongia had objected to Shepherd's survey at Tiheru (part of an area disputed between Kemp

1242. Tamati Waka Nene to Grey, 13 May 1854 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1550).

1243. Kemp to Colonial Secretary, 8 March 1848 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7306–7307).

1244. Petition to House of Representatives, June 1854 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7327–7329).

1245. Letter from Ururoa, 9 August 1848, Petition to House of Representatives, June 1854 (Berghan, supporting papers (doc A39(m)), vol 12, p 7331).

1246. See Stirling and Towers on this point, 'Not with the Sword but with the Pen' (doc A9), pp 1576–1577.

and Shepherd) in nearby southern Whangaroa.[1247] According to Dr Rigby, this is what had alerted Rewa to a potential problem. Kemp's survey of his Puketōtara award, taking in 6,674 acres,[1248] had been presented to Bell in September 1857, but Rewa now accompanied the commissioner to Kerikeri to inspect the boundaries, to which he raised objections.[1249] On review of the deeds, Bell had discovered the omission of Tarata Rotorua and Tiheru, and a large block between the Waipapa and Rangitāne Rivers from the original claim area.[1250] He nonetheless had dismissed Māori objections as coming from 'young men' – who could petition the Governor for a 'small portion' to be returned – and announced the Government's intention to take any surplus land.[1251]

Objections were also raised to Kemp's survey of a number of his other claims. Pirika Pinamahue wrote to Bell about the 185-acre Kioreroa claim (OLC 596) at Waimate, complaining that 'Te Koki sold a small part to Kemp, but another part [she did] not because she, Te Koki, did not own it.'[1252] Hira Tauahika stated in another letter that 'we continue to quarrel with him' [Kemp] about 'our place, Te Ahikanae.'[1253] They were both advised to attend the commission's next hearing, which would be their last opportunity to raise any objections. Then, on finding that the survey was in accordance with the boundaries of the original deeds, Bell dismissed them, again observing that the complaints had come from 'young men chiefly' and were 'on the whole without any foundation'. Bell made no mention of the reserves that had been explicitly excluded from the original award for Kioreroa.[1254]

6.7.2.4.5 Bell's awards to Kemp at Whangaroa

The matter of Kemp's grants at Whangaroa remained unresolved. At first overlooked, they were then not issued because of Grey's opposition; Kemp had been unable to survey them; and Māori continued to utilise portions of the land described in the original deeds. When Bell sought to finalise Kemp's grants and take the rest as 'surplus' for the Crown, further evidence of unextinguished interests and ongoing occupation surfaced. Heremaia, whose objections to Shepherd's

1247. Bell file note, 17 March 1858 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1385).

1248. Kemp's plan gave a figure of 6,598 acres but was recorded by Bell as 6,674 acres. Stirling and Towers consider the latter figure as the more accurate; see discussion in 'Not with the Sword but with the Pen' (doc A9), p 1561.

1249. Daamen, Hamer, and Rigby, *Auckland District Report* (doc H2), p 92, fn 138.

1250. Bell notes, Kerikeri, 26 March 1858 (Berghan, supporting papers (doc A39(m)), vol 12, p 7429).

1251. Bell notes, Kerikeri, 23 and 26 March 1858 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7428–7429).

1252. Pirika Pinamahue to Bell, March 1858 [as translated by Dr Jane McRae] (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1554).

1253. Hira Tauahika to Bell, March 1858 [as translated by Dr Jane McRae] (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1554–1556).

1254. Bell memo, 23 March 1858 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1556).

Whangaroa claims are discussed in section 6.7.2.3, made similar allegations in the case of Kemp. When the inquiry into Kemp's Whangaroa case (OLC 599–602) commenced at Mangonui in October 1857, Bell addressed Te Ururoa and Te Morenga, along with 'other chiefs' who were in attendance from the Bay of Islands, informing them that 'the claim was about to be heard and that they would have ample opportunity of making any statement'. They replied that 'they had nothing to do with the [Whangaroa] land, and referred the Court to Heremaia and others who were then called upon . . . the Commissioner first directing the whole of the Evidence taken in the case before Commissioner Godfrey to be read over to them'.[1255] As Stirling and Towers pointed out, this evidence was exclusively that of Bay of Islands rangatira and did not include any testimony from Heremaia's people, who had not been involved in the original transactions.[1256] It implied that Bell had little idea about occupation patterns and rights in the region.

Heremaia told Commissioner Bell, 'The reason of my now appearing is that I now object to the sale of this land. The land is mine and no other man has any claim to it.' He then proceeded to detail his boundaries, which encompassed lands from Puketī north to Torohanga and Mangaiti. He did not dispute the rights of Te Ururoa or Te Morenga to make agreements about their pieces, but his land had been 'wrongfully sold' at Kororāreka and Kerikeri by those 'having a wish to procure European goods', and the transaction had not been witnessed by 'all the people'.[1257] Heremaia went on to request that 'a portion of this land . . . be given back on which my Children can live'.[1258] Hare Hongi, Rihari Te Kuri, and others indicated their endorsement of his evidence. It was also revealed that Heremaia's hapū had been taking timber from the Whangaroa land as well as cultivating a portion of it. As Henry Clarke, who had been engaged to survey Kemp's claims, and James Kemp junior reported in the next sitting held at Kororāreka on 24 March 1858:

> the Ngati Uru tribe had taken possession of about 120 acres within the original boundary of the claim, and were cultivating it. Considering the circumstances connected with the settlement of the Ngatiuru on that piece of land, we considered it better to leave it out of the survey, and it is accordingly not included in the Block.[1259]

It may be that this concession was prompted in part by a wish to gain Heremaia's consent to a road through Florance's scrip claim which was being negotiated at the same time. The agreement reached over these matters was put in writing: 'It is

1255. Court notes, Mangonui, 3 October 1857 (Berghan, supporting papers (doc A39(m)), vol 12, p 7424).
1256. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1577.
1257. Evidence of Heremaia, 3 October 1857 (Berghan, supporting papers (doc A39(m)), vol 12, p 7425).
1258. Evidence of Heremaia, 3 October 1857 (Berghan, supporting papers (doc A39(m)), vol 12, p 7426).
1259. Evidence of Henry Clarke, 24 March 1858 (Berghan, supporting papers (doc A39(m)), vol 12, p 7431).

land for us to work and will continue thus forever', and the road 'must be open, and right down to the Kaeo River.'[1260] Clarke also told the commission that, as they were walking over the block, Heremaia had 'admitted to us, entirely voluntarily, that a considerable quantity [of timber] had actually been removed by them in the last six or seven years; and referred to one place in particular from which 200 spars had been removed at one time.'[1261]

While Commissioner Bell accepted the exclusion of the 120 acres from the 4,238 acres encompassing Kemp's Whangaroa survey, he noted in his report of the following year that it was 'probable that more will be got.'[1262]

The final survey figure at Whangaroa took in an additional 226 acres, bringing the total to 4,464 acres.[1263] Although the location of this extra area was not identified, Stirling and Towers concluded that 'it can only have been taken from Ngati Uru and the lands they had never transacted and which they sought to set aside from Kemp's survey'.[1264] Counsel for the Whangaroa claimants also conceded that, in the absence of the original survey plan, it cannot be 'definitely determined' that the areas occupied by Heremaia's people were granted to Kemp rather than taken as surplus by the Crown. Counsel argued, however, that Kemp selected his grant in order to leave the more rugged southern portion of his claim to the Crown; on that basis, it was 'almost certain that the areas of [Māori] occupation lay within Kemp's grant'.[1265] This inference seems reasonable, but we have found no evidence regarding the exact location of the land in question.

The more important point, as Bryan Gilling also noted, is that 'lands occupied by Maori needed to be protected not only from being granted to settlers but from being taken by the Crown as surplus lands'. The Crown has focused on the distinction between those two possible outcomes, but we agree with claimant counsel that *who* took it 'matters much less than the fact that it was taken, especially when, as the [first] Old Land Claims Commissioners said, such occupation land . . . was supposed to have been reserved to them [Māori] "in every case"'.[1266] Although the land may not have ended up in the hands of the Kemp family, it did transfer out of those of Ngāti Uru.

Bell's attitude towards Māori stands in contrast to his sympathetic treatment of Kemp. As a result of delays caused by Grey's opposition, Crown indecision on core policy questions, and failures of process, the task of defending ancestral land rights now fell to a younger generation. The original Māori participants were often

1260. Heremaia Te Ara, Pumipi Waitua and Roro, 15 February 1858 [translation by Dr Jane McRae] (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1582).

1261. Evidence of Henry Clarke, 29 March 1858 (Berghan, supporting papers (doc A39(m)), vol 12, p 7432).

1262. Bell report, 21 April 1859 (Berghan, supporting papers (doc A39(m)), vol 12, p 7463).

1263. Bell report, 21 April 1859 and minute, 4 July 1860 (Berghan, supporting papers (doc A39(m)), vol 12, pp 7462–7463); Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 947, 1583.

1264. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1583.

1265. Submissions in reply for Whangaroa Taiwhenua (#3.3.499), p 63.

1266. Submissions in reply for Whangaroa Taiwhenua (#3.3.499), p 66.

no longer alive to testify to their understandings of the matter; but Bell's summary approach to the claims of their descendants as coming from 'young men' who could have no first-hand knowledge was a refrain in his reasoning alongside his repetition that the Crown owned the surplus under the law. In the case of Kemp, Bell acknowledged that referral of the grants to Commissioner FitzGerald had been 'illegal' – as the Privy Council had found in 1851 – but he nonetheless awarded him extra land to make up for the delay in their issue. He reasoned that only one had been 'in violation of Commissioners Richmond and Godfrey's Reports, the others were in conformity with them'. In his view,

> whatever illegality attached to that grant, was cured by the Quieting Titles Ordinance in 1849; and this being done [he could] not see the Government was justified in refusing any grant at all in the Wangaroa claim. For the issue of an illegal grant in one claim cannot deprive the claimant of his right to the fulfillment of the award in another.[1267]

6.7.2.4.6 The Crown's claims on the surplus

The Crown took 1,742 acres of surplus from Kemp's claims at Whangaroa. The assertion of its claim in the Bay of Islands was more complex. Bell had informed Māori that 'a large extent of land in addition to what the claimant had surveyed at Kerikeri . . . included in the Boundaries originally sold to him . . . would still be retained by the Crown.'[1268] But it made no attempt to survey the surplus land to the north of Kemp's grant, and there was no mention at all of the area to the south which also came within the boundaries of the original claim. Stirling and Towers noted,

> As far as Kemp and Ngai Tawake and Te Whiu were concerned, the area [outside the grants to Kemp and his family] was now Maori land; indeed, as far as local Maori were concerned it appeared to have always been Maori land, as they had continued to occupy it and had objected to Kemp's attempt to claim it. They had also objected to the Crown's claim – communicated through Bell – to land that they had excluded from Kemp's claim.[1269]

The Crown abandoned its claim to the northern surplus, and this would be put through the Native Land Court as the Pungaere block (7,184 acres) in 1868, when it was awarded to two owners who sold it to a private purchaser the following year.[1270] The failure to assert its claim of ownership seems to have been an oversight; the Lands and Survey Department later commented it could not 'discover how the Maori got this'.[1271] The story was different elsewhere. When, in 1875, Ngāi Te Whiu attempted to gain title to Te Mata block, located in the south and

1267. Bell report, 21 April 1859 (Berghan, supporting papers (doc A39(m)), vol 12, p 74634).
1268. Bell report, 20 April 1859 (Berghan, supporting papers (doc A39(m)), vol 12, p 7460).
1269. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1564.
1270. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1565.
1271. Report on OLC 595, no date (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1566).

west of Kemp's original claim, the Government's district officer, William Webster, informed Judge Henry Monro that it was Crown land – even though it had not been surveyed as such at the time of the Bell commission or successfully in the interim.[1272] Webster's statement appears to have been accepted by the Court, without question, the record simply noting: 'Te Mata surplus land – dismissed.'[1273]

Ngāi Te Whiu, dismayed at this turn of events and puzzled as to why the Government should have laid claim to one portion of their land and not the other, continued to live on the Te Mata block, utilising its resources, leasing timber cutting rights, and charging royalties for gum digging.[1274] This practice continued until 1889 when a Crown lands ranger investigated 'natives levying blackmail at Kerikeri', reporting the following year that 'Waihou HauHaus' were digging gum on Crown land at Puketī. During his inspection, the ranger also found that 'the Waimate Maoris [had] been leasing a large block at Puketotara marked as Crown lands'. He had made inquiries of one of Kemp's sons, who had informed him:

> the Maoris always believed they had the best right to Puketotara . . . Old Mr Kemp told the Maoris they could have the land that was cut off [his survey]. Peeti . . . one of the principal men who claims the land . . . said there was some dispute about the surveying which was never settled . . . [it was] sold by people who had no right whatever to do it . . . let the Government bring it before the Court and prove their title.[1275]

Since the Native Land Court could only hear claims to customary land, this was not an available option. Instead, Hōne Peeti and Ngāi Te Whiu, along with other leaders concerned about the Crown taking of surplus lands elsewhere in the region, would lobby, petition, and testify before multiple commissions over many decades, seeking the return of the land. We return to these efforts and the Crown's response in section 6.9.

6.7.2.5 *Why did the Crown implement the scrip policy?*

'Scrip' was a land order that enabled the holder to purchase a given value of Crown land, where it was available for sale, via a Treasury credit.[1276] The policy was developed as a solution to two related problems faced by the new colonial administration. The first was the Crown's concern about providing for the needs of dispersed settlement across the country. With that in mind, in December 1841 Governor Hobson had proposed some form of transferability of land grants, by which means settlers would be concentrated around Hokianga, the Bay of Islands,

1272. There was a survey of Te Mata in 1866 but it encroached on Kemp's land and was not approved. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1556–1567.

1273. Northern Native Land Court minute book, no 2, p 63 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1569).

1274. John Rameka Alexander (doc H7), pp 7–8.

1275. Crown Land Ranger to Humphries, Crown Lands, 20 May 1890 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1571).

1276. Alan Ward, *National Overview*, vol 1, p 47; Stirling and Towers, 'Presentation summary' (doc A9(b)), p [12].

and Auckland.[1277] Hobson dropped this proposal from the 1842 Land Claims Ordinance in light of settler protests, but his immediate successor, Shortland, saw scrip as a means of avoiding delay and saving expenditure on Government surveyors, who were in short supply, as well as ultimately broadening the land base owned by the Crown.[1278] Consequently, a 'Notice to Land Claimants' was issued in September 1842, in which scrip was offered to those 'who may prefer land in the immediate vicinity of the settled districts'.[1279] Proclamations followed in 1843 and 1844 to set out the opportunities for scrip holders to acquire land on the outskirts of Auckland.[1280]

The second problem facing the Crown was how to provide some form of title resolution for land claimants when circumstances precluded the immediate investigation of pre-treaty transactions. Initially, only settlers found to have valid claims to land were intended to be eligible to receive scrip,[1281] but when Godfrey found himself unable to investigate around 40 Mangonui claims because of conflict between the rangatira Pororua and Panakareao, he wrote to the Colonial Secretary in February 1844 advocating that scrip be paid in such circumstances.[1282] In part, this was put forward as a punitive measure by the commission to convey the message that uncooperative Māori communities would be deprived of their Pākehā settlers.[1283] The delay in resolving old land claims was an issue of growing official concern too, and the award of scrip at Mangonui became a precedent for the speedy resolution of other settler claims that remained unproven.[1284] The Crown would be able to claim its interests in the lands at a future date, even though the transactions for which scrip had been issued had not been investigated by the first commission. The full impact of the Crown's scrip policy was, however, not revealed to Māori until many years later when surveys were undertaken for the Bell commission.

Another important aspect of the new scrip policy was how the payment of orders of £1 for every acre claimed – the amount recommended by Lord Stanley when he wrote to Governor FitzRoy in August 1843 – and related to the minimum price set for Crown lands at £1 per acre. Stanley reasoned, too, that payment of scrip should be set at a rate according to acres claimed rather than the sum expended, because the same money would obtain far less land in the vicinity of Auckland; in his view, 'much the reverse of an encouragement.'[1285] It was

1277. Daamen, Hamer, and Rigby, *Auckland* (doc H2), p 106.
1278. Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 55.
1279. 'Notice to land claimants', 27 September 1842, MA 91/9 (cited in Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 55).
1280. Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 55.
1281. Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 56.
1282. Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 56.
1283. Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 56.
1284. For discussion of official concern see Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 56.
1285. Stanley to FitzRoy, 21 August 1843 (cited in 'Report of Royal Commission to inquire into and report on claims preferred by members of the Maori race touching certain lands known as surplus lands of the Crown', AJHR, 1948, G-8, p 31).

nonetheless extremely generous when compared to the threepence per acre that Chief Protector Clarke was instructed to pay for good agricultural land in 1841.[1286]

6.7.2.6 *What were the effects of the scrip policy?*

As Hobson initially conceived of it, scrip would be issued only to settlers who had properly investigated, valid claims.[1287] But in practice, scrip was awarded to numerous settlers whose claims had not been investigated, or whose claims had been investigated and rejected. FitzRoy intervened on several occasions to this effect, and the number of scrip awards grew once the Bell commission was established and claims were surveyed. The Crown has acknowledged that 'failing to investigate transactions for which "scrip" was given' was a breach of the treaty.[1288] Its position on the issue of scrip when claims had in fact been investigated is less clear.

In Hokianga, FitzRoy awarded scrip for five claims for which the first Land Claims Commission had declined to recommend a grant. Three were claims of John Marmon – OLC 312, OLC 313, and OLC 315 – which the first commission had declined after Marmon failed to appear.[1289] In another case, Gundry's OLC 209 claim, the problem was uncertainty about when the transaction had been made.[1290] It remains unclear why no grant was offered for White and Russell's OLC 517 claim.

In the Bay of Islands, De Sentis was awarded scrip for one of his Kororāreka claims (probably OLC 769), which was initially disallowed due to his failure to appear at the hearing.[1291] And at Whangaroa, Powditch was permitted to take scrip for a disallowed claim, which we will discuss shortly.[1292]

Scrip was also used for some Whāngārei claims where Māori interests had not been fully extinguished. The first commission had accepted Charles Baker's Mangakāhia claim (OLC 547), recommending an award of 1,316 acres. FitzGerald, to whom Baker's claims had been referred later, increased it to the 'entire quantity' of 5,000 acres he had claimed, with the caveat that he 'remove' the protest of Te Tirarau (who had not been party to the original transaction), or leave the disputed land out of his grant 'as he may choose'.[1293] On subsequently attempting to survey the grant, significant on-the-ground opposition from Te Tirarau meant that Baker was unable to take up the award. Ultimately, in 1865 he accepted £1,920 scrip in

1286. Donald Loveridge, '"An Object of First Importance" – Land Rights, Land Claims and Colonization in New Zealand, 1839–1852' (commissioned research report, Wellington: Crown Law Office, 2004) (Wai 863 ROI, doc A81), p 74.

1287. Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 56.

1288. Crown closing submissions (#3.3.412), p 2.

1289. Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 194–195.

1290. FitzGerald comment, 19 December 1844 (Berghan, supporting papers (doc A39(m)), vol 5, p 2434).

1291. Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 479; Francis Dillon Bell, 'Appendix to the Report of the Land Claims Commissioner', AJHR, 1863, D-14, p 59.

1292. Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 233–234.

1293. FitzGerald to Clarke, 31 October 1844 (Berghan, supporting papers (doc A39(m), vol 11, pp 6581–6583). Baker was also awarded a further 1,242 acres for his other two claims.

exchange for his 2,560-acre award.[1294] Similarly, the Crown awarded Salmon land in exchange for his 7,000-acre Whananaki claim (OLC 408),[1295] and scrip for Black and Green's 3,000-acre Tutukaha claim, both of which had been disputed by the Māori occupants.[1296]

When Hokianga scrip surveys were undertaken for Bell's investigation, he allowed six claims that had been rejected by the first Land Claims Commission, and a further 10 latent claims that had never been filed were resurrected by John White (who assisted Commissioner Bell in the district). No scrip was paid in regard to these 16 claims, so the subsequent increase in the Crown award was the result of what Bell and White deemed to be the extinguishment of customary title. Although the lands acquired in this manner could more properly be considered as 'surplus land', they were almost always merged on the ground with land acquired using scrip, so for practical purposes they have been included in our tally for this class of land.

The long delay in settling titles permitted by the exchange for scrip caused trouble for customary owners and has been acknowledged by the Crown as compounding the grievance caused by its taking of surplus land.[1297] For example, survey of the scrip land derived from Powditch's Whangaroa claims (mentioned earlier) did not occur until the 1870s, leading to confusion as to whether the areas in question had even been subject to a 'sale' arrangement. This had never been investigated by the first commission, while Bell only investigated the derivative claims.

Powditch had filed three Whangaroa land claims for investigation by the first Land Claims Commission: for the 140-acre Kaimanga block (OLC 383), the 1,080-acre Waitapu and Waireka block (OLC 384), and the 3,000-acre Paripari block (OLC 385). None was reported on by the commission as Powditch had been unable to pay the hearing fees. However, FitzRoy later agreed to the exchange of £1,500 for the entire Paripari claim.[1298]

Bell's investigation resulted in award of Kaimanga and part of Waitapu and Waireka to settlers who had purchased them off Powditch in the meantime, netting the Crown 95 acres of surplus land.[1299] How the commission disposed

1294. Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 357–358; Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 784–786, 789.

1295. Original document (Berghan, supporting papers (doc A39(m)), vol 8, p 4525). On page 4525 there is mention, as part of an account of the history of the land claim by Salmon, 'This was opposed by George Clark on behalf of the Kawakawa tribe'. On page 4533 is a note from George Clarke, Kororāreka, 2 November 1841: 'No 206 David Salmon 7,000 acres, Disputed by the Natives of Kawakawa who [wahitapued] it as a Native reserve. It is held in trust by Church Missionary Society – Deeds of trust in the Protectors Office/signed George Clarke.'

1296. FitzGerald note, 9 December 1844 (Berghan, supporting papers (doc A39(m)), vol 20, pp 11729–11730); Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 569.

1297. Crown closing submissions (#3.3.412), p 2.

1298. See Bell's report on derivative claims of William Powditch, 196, 196a, and 196b, 11 September 1861 (Berghan, supporting papers (doc A39(m)), vol 7, p 4140).

1299. Bell's report on derivative claims of William Powditch (Berghan, supporting papers (doc A39(m)), vol 7, pp 4135, 4140–4141); Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 767–768.

of the 3,000-acre Paripari claim is less clear but by the mid-1870s, the Crown considered itself to be the owner. When Wiremu Naihi, Wi Warena Tuoro of Ngāti Mokokohi,[1300] and others either accepted down payments or sent in title applications to the Native Land Court for portions of the Paripari claim (surveyed as Te Huia and Waitapu blocks), the Crown Lands Department lodged objections that they were 'Government land' on account of 'Powditch's claim', which had been investigated by the Bell commission. Judge Monro duly dismissed both cases before any testimony had been heard.[1301] In a subsequent application for Te Huia, solicitor Frederick Earl wrote to Chief Judge John Edwin Macdonald that he could find 'no evidence whatever of the title of the Government to the blocks in question'.[1302] Wi Warena Tuoro testified, acknowledging that the block had been 'sold to Europeans, but [he said] not by the proper owners'. However, when the Crown produced Powditch's deeds, Macdonald again accepted that the block was outside the Court's jurisdiction.[1303]

Similarly, the Crown was still surveying its Kohukohu and particularly dubious Motukaraka awards in the mid-1880s. At Kapowai, the Crown did not survey land (an exchange for the £2,560 it had paid in scrip) until 1892. The Crown's claim derived from an award to Whytlaw. recommended by Commissioner Godfrey to total 733 acres but which FitzRoy had increased to the maximum allowed by the ordinance.[1304] The whole peninsula only contained around 2,700 acres and was already subject to multiple grants of varying sizes to settlers and four successful Native Land Court claims, so it was little wonder that the Crown's attempt to take 2,170 acres was strongly resisted by Wiremu Te Teeti and others in 1894 (see section 6.9).[1305]

Under its policy, the Crown generally paid settlers £1 scrip for every acre awarded – an extravagant provision which it later sought to recover in land from Māori. On occasion, the Crown granted settlers far more in scrip than their Land Claims Commission awards justified. At Papakawau in Hokianga, for example, the settler Poynton claimed 2,550 acres (OLC 387–390); the commission recommended grants totalling 819 acres; yet the Crown subsequently awarded him £2,560 in scrip, covering the entirety of his original claim. Later, the Crown surveyed 2,572 acres (some 1,753 acres more than the commission's awards) and claimed it from Māori.[1306] A less extreme example, from Whāngārei, was that of the Awaru block. The claimant Peter Greenhill sought 2,500 acres (OLC 199); the

1300. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 837–838, 841, 843, 849–850; Taitokerau Maori Land Court minute books, 1865–1910, Northern minute book 2 (doc A49), pp 7726, 7732–7735.

1301. *Te Huia; Ota or Waitaha* (1876) 2 Northern MB 261 (doc A49), p 7735.

1302. Earl to Macdonald, 18 December 1884 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 848).

1303. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 849–850; Stirling and Towers, document bank (doc A9(a)), vol 5, pp 522–523.

1304. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 933–934.

1305. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 926, 932–933.

1306. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1252; see also Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 237–241.

commission recommended an award of 620 acres; yet the Crown paid Greenhill £2,500 and following that, surveyed and took 1,053 acres of scrip land.[1307]

When it came to awards of land, Bell's insistence on the boundaries as stated in the original deeds was designed to maximise the Crown's surplus to Māori prejudice, but given the wild exaggeration of the estimated sizes of some claim areas in many instances of scrip, the deed boundaries were their only safeguard. We particularly note the survey of Henry Pearson's OLC 379 scrip claim in Hokianga. Its purported area was 2,000 acres, for which Pearson received £1,594 in scrip, but on survey it was found to contain less than 78 acres.[1308] On the face of it, the Crown was the loser in such situations, but ultimately Māori paid a price as well, because the Crown consistently sought to take as much land as possible, either by making the best (for itself) of vagueness about boundaries, or by limiting the number and size of reserves. Commissioner Bell was almost apologetic in tone when he reported to Parliament in 1862 that he had only secured 15,446 acres from the scrip surveys as the return from the £32,000 plus paid out in scrip to settlers making claims in Hokianga[1309] As will be seen later, this attitude was to be evident in an even more extreme fashion at Motukaraka two decades later and was used to justify extending the Crown award there, via the re-imagining of the boundary.

6.7.2.7 *Application of scrip policy*

Figures for the areas that the Crown obtained as scrip land in the course of settling old land claims have been provided to the Waitangi Tribunal by Dr Rigby and by the Crown, both of which are set out in the following table.[1310] These were subsequently adjusted following careful scrutiny, and with the aid of Stirling and Towers' more detailed research on some of the problematic old land claims, particularly those in Hokianga. Although the Crown and/or Rigby's figures revealed the odd instance of accidental inclusion (such as 340 acres for OLC 284, located in the Kaipara inquiry district) or omission (such as 2,560 acres for OLC 738), for the most part the adjustments represent the reinterpretation of surplus land as scrip land – in which case a corresponding alteration has been made to the surplus acreages. In other instances, later surveys showed that the actual area taken did not match the area nominally acquired; for example, the Crown acquired 1,053 acres instead of the 2,500 acres of scrip land provided for by its OLC 199 payment (see below).

These figures represent land acquired by the Crown as a result of scrip exchanges but incorporate a number of areas included in the survey for which scrip had not

1307. Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 136–137.

1308. Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 229–230; Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1152.

1309. 'Report of the Land Claims Commissioner', 8 July 1862, AJHR, 1862, D-10, p 7.

1310. Calculated from Barry Rigby, 'Corrections Requested by Crown counsel to Tribunal Commissioned Validation Review on Te Raki Land Claims, Pre-Emption Waiver Claims and Pre-1865 Crown Purchases (A48, A51, A53)' (doc A48(e)), p 4. The Crown's figures were based on the work of Brent Parker: Crown closing submissions (#3.3.412), paras 9–10, 18–19.

	Bay of Islands	Hokianga	Mahurangi	Whangaroa	Whāngārei and Mangakāhia	Total
Crown (OLC and pre-emption waiver)	2,672	14,008	3,925	3,605	0	24,210
Rigby (OLC and pre-emption waiver)	2,672	14,029	3,925	0	3,605	24,231
Rigby (OLC only)	2,352	14,029	0	0	3,605	19,986
Waitangi Tribunal (OLC only)	2,419	13,829	0	5,272	1,818	23,338

Table 6.10: Scrip awards in Te Raki inquiry district.

been issued. It is to be noted also that not all lands for which scrip exchanges were made ended up being taken by the Crown.

Scrip was given in 48 instances, or about one-third of all old land claims in the Hokianga district. Areas from a further 10 claims never previously filed, plus six claims which had been disallowed, were also integrated into scrip surveys.

In 1857, Kemp estimated the Crown's entitlement to land in Hokianga, based on areas that had been claimed by the recipients of 46 scrip exchanges, to be more than 75,000 acres.[1311] In the end, the Crown acquired just 13,829 acres from the Hokianga scrip surveys undertaken in the late 1850s, which encompassed 48 of the 50 scrip claims listed in the table preceding. Subsequently, the Crown award was boosted by the around 570 acres secured in satisfaction of OLC 971,[1312] and the vast expansion in the Crown's OLC 1034 taking at Motukaraka (from 67 acres to more than 3,000 acres) after the resurvey of the boundary in the 1880s (as detailed later).

Elsewhere in our inquiry district, many of the scrip payments on land were invisible because of later Crown purchase activity. In the Whāngārei and Mangakāhia taiwhenua, £4,625 scrip was given in exchange for three land claims (OLC 96, 543, and 547), which according to the estimates provided by settler claimants, collectively encompassed 26,000 acres;[1313] however, in all three cases the issue of scrip

1311. Enclosure to Kemp to Chief Commissioner, Land Purchase Department, 11 February 1857, AJHR, 1861, C-1, p 17.

1312. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1289–1290.

1313. Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 65–66, 348–349, 357–358; Francis Dillon Bell, 'Appendix to the Report of the Land Claims Commissioner', 1863, AJHR, 1863, D-14, pp 7, 42.

effectively became down payments for subsequent Crown purchasing.[1314] Many of the Bay of Islands and Whangaroa scrip claims overlapped each other and also required further Crown payments to the Māori owners. Sometimes, the ultimate disposal is unknown. In other cases, as in Thomas Spicer's claim (OLC 435), the sketch map was so vague that the Crown may have been unable to convert its interests into land.[1315] Ultimately, the Crown was able to claim lands for only five Bay of Islands scrip claims: OLC 114–115, OLC 172, OLC 174, and OLC 520.[1316] Notably, the Crown acquired 509 acres for the capital at Russell after James Clendon was given £10,000 scrip for land at Papakura (a small fortune) in exchange for his claim (OLC 114–115).[1317] This was for land for which Pōmare, Kiwikiwi, and the other owners had received goods in payments estimated at £178 9s.[1318]

Considerable uncertainty also surrounds the Crown's acquisition of scrip land at Whangaroa, reflecting the complexity of the situation on the ground. Crown counsel put forward a figure of 3,605 acres, based on Rigby's assessment of scrip, surplus, and pre-emption waiver land within the inquiry district.[1319] Whangaroa counsel submitted a figure of 4,813 acres reached by adding together the claims of McLiver, Powditch, and Florance in the surveys of the Waitapu and Te Huia blocks.[1320] We consider this to be accurate, with the exception of the area obtained in exchange for McLiver's scrip. The Whangaroa claimants assessed this at 785 acres, but the survey was for 459 acres.[1321]

6.7.2.8 *Bell's investigations into scrip claims*

At Hokianga, where the Bell commission sat for a period during March 1858, much of the evidence provided by local rangatira concerned the boundaries of private claims.[1322] Two years earlier, Makoare Taonui and others had written to the Governor asking for the Hokianga land claims to be resolved through surveying, so that they might attract Pākehā settlers to the district.[1323] From the Crown's perspective, the prospect of surveying its own Hokianga scrip lands also promised to make available a large area of land for its disposal. William Clarke, son of the former Protector of Aborigines George Clarke, was duly appointed as the surveyor

1314. Lands and Survey file 2173 (Stirling and Towers, document bank (doc A9(a)), vol 5, pp 495–519; Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 789–792.

1315. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 810–811.

1316. Rigby, 'Corrections' (doc A48(e)), p 4.

1317. Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 89.

1318. Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 86–89.

1319. Rigby's calculation included the acreage for Whāngārei (which had been accidentally transposed into the Whangaroa column of his summary table). Rigby's analysis has not been able to identify with certainty any Whangaroa scrip land.

1320. This area is alluded to in a note on the survey plan (OLC Plan 69) of Spickman's OLC 878–880 grant; see submissions in reply to Crown closing submissions for Whangaroa claimants (#3.3.499), pp 58–60. It should be noted that the Waitapu and Te Huia blocks (783 acres and 1470 acres respectively) were counted by Rigby as surplus land rather than scrip land, which accounts for part of the discrepancy between the two figures.

1321. Stirling and Towers, document bank (doc A9(a)), vol 5, p 519.

1322. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1106–1112.

1323. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1123–1124.

OLC	Claimant	Scrip awarded by first commission and FitzRoy	Acres surveyed and retained by Crown after Bell commission
12	Henry Richard Oakes	£300	69 acres 3 roods
40	John Anderson	£1,000	3,895 acres
315	John Marmon	£250	
461	Alexander Thompson	£1,825	
519	William White and George Frederick Russell	£6,099	
41	Robert Angus	158 acres (changed to £50 by Grey)	2,572 acres
479	Patrick Walsh	£280, plus 70 acres elsewhere	
387	Thomas Poynton	Poynton was given £2,560 for his claims in OLCs 386–391 and Thomas Hunt was given £400 for OLC 391	
388	Thomas Poynton		
389	Thomas Poynton		
390	Thomas Poynton		
391	Thomas Poynton		Not included in scrip survey
386	Thomas Poynton		328 acres
123	Denis Browne Cochrane	£500	
517	William White and George Frederick Russell	£250	
50	John Baker	£722 between this and another claim	944 acres (out of 1,957 acres surveyed)
811	Robert Anwyl	No scrip (abandoned)	
82	Thomas Cassidy	£1,053	105 acres
83	Thomas Cassidy	£1,000	380 acres (reduced to 317 acres after Crown cuts out 63 acres for later grant)
87	William Nicholas and Edward Chadwick	£467	393 acres
208	William Richardson Gundry	£463	
94	Alexander Chapman	£54	340 acres (out of 350 acres surveyed, remainder being 10 acres for OLC 836 grant)
176	Samuel Egert	£214 10s	
209	William Richardson Gundry	£500	
95	Alexander Chapman	£136 10s	173 acres 2 roods

OLC	Claimant	Scrip awarded by first commission and FitzRoy	Acres surveyed and retained by Crown after Bell commission
447	Henry Ashford Strout and Henry Harrison	£340	
190	Edward Fishwick	£1,200	959 acres
191	Edward Fishwick	£80	
467	William Trusted	£42	
1044	Baron de Thierry	£110	
242	Robert Hunt	£2,560	533 acres
272	James Kelly, James Philip Lloyd, John Baker, and Thomas Hollingsworth	£1,958	475 acres
468	Pierre Piene Tuite	£174	
275	John B La Court and James H La Court	No scrip paid	No grant made, 37 acres reverted to Crown
312	John Marmon	£200	324 acres
313	John Marmon	£200	
318	Richard Mariner and Francis Bowyer	£1,500	
352	George Nimmo	£200	181 acres
378	Henry Pearson	£80	10 acres 3 roods 20 perches
379	Henry Pearson	£1,594	77 acres 1 rood
402	George Frederick Russell	£251	335 acres
514		No scrip paid	Nil (87 acres later reverted to Māori ownership)
515	William White	£1,000	814 acres
540	William Young	£640	
1043	Baron de Thierry	£1,500	
Unnumbered Wairere claim	William White	No scrip paid	176 acres
624	Joseph William Wright	£1,500	389 acres
625	Joseph William Wright	£100	18 acres
706	James Honey and Edward Parker	£200	24 acres 3 roods
966	Thomas Mitchell	No scrip paid	No grant made, 271 acres reverted to Crown
971	Matthew Marriner	£950	Not included in scrip survey
1034	Thomas McDonnell	£2,560	67 acres (later increased on resurvey to more than 3,000 acres)

Table 6.11: Scrip awarded in the Hokianga taiwhenua

for the Hokianga scrip lands, while John White was employed nominally as the interpreter for Māori who were pointing out boundaries. His role in practice was far greater. We might expect him to have been disqualified for this appointment by his vested interest in holding up settler claims, since £7,000, or about one-fifth of the scrip the Crown had exchanged in relation to the Hokianga district, had been shared between his uncle, William White, and his father, Francis White. Beyond the general supervision that Bell provided, there does not seem to have been any effort by the Crown to address this issue.[1324]

Bell sent detailed instructions to White on 4 October 1858. After giving the reasons for White's selection – '[Y]our own acquaintance with the position and extent of the several claims at Hokianga' – the instructions explained that his 'principal duty' was 'to see that the boundaries surveyed agree with those stated in the evidence by the chiefs, and that while on the one hand the government obtains all that was duly sold to the old claimants, no encroachment whatever takes place on native land'.[1325]

In order to prevent disagreements, White was to call upon an assembly of rangatira who would nominate one or more individuals to vouch for the survey line as it was being cut. The resulting survey would be final and not able to be questioned.[1326] With respect to reserves, Bell observed:

> While I was at Hokianga the chiefs in several instances requested that reserves might be made for them within the boundaries of the government lands, where such a reserve includes any pa or actual cultivation you are authorised to get the same laid off at the time the survey of the claim is being made, but when the land wanted for a reserve is not actually occupied, you will explain to the natives that they must make a specific request to it in writing to the Governor, which you will transmit to me for His Excellency's orders.[1327]

Another instruction revealed that Bell was also expecting the scrip survey to take in exceptional cases, including those for which payments were incomplete and had not been investigated by the first commission:

> In the case of a few old claims never brought before the former commissioners but which the Natives agreed to give up to me, it was stated that small portions of the payments originally agreed upon still remained due. As there are no papers to refer to in such cases, it will be necessary you should take down in writing full particulars of any demand that may be made.[1328]

1324. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1081, 1264.
1325. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1132.
1326. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1132.
1327. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1134.
1328. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1135.

Bell additionally authorised various measures for reducing the cost and duration of the survey, such as not cutting boundaries between scrip claims and allowing Māori owners to exchange areas located within them.[1329]

Bell's instructions gave the impression that he had made arrangements with Māori for all of the scrip lands, and that the surveys would be completed without difficulty, but it turned out that was not the case at all. Once the surveys began, Māori responded in a variety of ways. Apart from physically obstructing the survey – this was met by Bell and White with a mixture of economic pressure and appeals to authority (discussed later) – Māori had two main options: to ask for reserves to be set aside or to propose a land swap. Despite his instructions to White, Bell seems to have been opposed to land exchanges when Māori sought them in their own interests, though he was willing to approve them when they benefited the Crown by reducing survey costs. Māori offered only one exchange during the Hokianga scrip surveys: an attempt to retain Tangatapu, scrip land on the Mangamuka River which Māori still occupied.

As we discussed earlier, the first Land Claims Commission had rarely stipulated that reserves should be made when recommending awards. This reflected the shortcomings of the legislation under which it operated, the lack of timely surveys, and the limited testimony elicited from Māori witnesses at hearings.[1330] Instead, the commission had relied on a general recommendation that all pā, kāinga, cultivations, and wāhi tapu should be excluded from grants, and a pragmatic resolution between claimants and Māori 'vendors' when boundaries were pointed out to private surveyors, as recommended by the commission.[1331]

In the case of scrip claims, reserves had to be negotiated between the Māori 'vendors' and the Crown. Bell and White had been given an almost blank canvas in the matter and, as we have observed, were anxious to maximise the return for the Crown. The example of Pearson and other settlers, who had been awarded scrip for thousands of acres when in fact their claims totalled only tens, increased the determination of Bell and White to keep reserves for Māori to a minimum. Stirling and Towers' analysis has shown that at least 23 requests for reserves were made to White during the Hokianga scrip survey. Of these, 14 were for reserves within awards recommended by the first commission, while the other nine were in respect of lands that White had brought into the scrip surveys from claims that had previously been found wanting, or via unheard claims that he had revived.[1332] In only one of the previously investigated claims, OLC 191, had the first commission recommended the establishment of a reserve; White rejected that recommendation.[1333]

White was prepared to recommend that a reserve be made in only 10 of the 23 cases. Of these, two were considerably smaller than requested (in one case, seven

1329. Stirling and Towers, document bank (doc A9(a)), vol 8(a), pp 468, 471–474.
1330. Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 24.
1331. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 317, 325–326.
1332. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1296–1297.
1333. Original document (Berghan, supporting papers (doc A39(m)), vol 4, p 2245); Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1297.

acres was granted when 40 acres had been sought; and in the other, nine acres was granted versus 24 acres requested). The combined area of the 10 surveyed reserves was 221 acres, or less than 1.5 per cent of the area encompassed by the Hokianga scrip surveys.[1334] The two largest reserves White accepted, each of 40 acres, were for Rai (the son of Pāngari) and Te Kaingamata; both had been active in opposing parts of the Ōrira scrip survey where they had demanded the return of all the land encompassed in the disallowed claims. White's stated rationale was that Rai and Te Kaingamata had both been left landless by sales undertaken by their relatives, but Stirling and Towers surmised that his real motive was to dampen opposition when the Government's right to the land was particularly questionable, based as it was on claims that had been initially rejected.[1335] (We return to the Ōrira survey in the following section.)

Elsewhere in Hokianga, White declined or reduced reserves even where cultivations, kāinga, and urupā were found, notwithstanding Bell's instructions that these areas be surveyed off.[1336] At Te Pukahau on the Mangamuka River (Cassidy's OLC 82 claim), Māori requested a 40-acre reserve; White recommended reservation of the seven-acre portion containing an urupā but not the remaining lands which included cultivations. At Pākanae, he turned down the request of the kaiwhakawā (native assessor) that his courthouse be set aside.[1337] White's attitude was even more reprehensible in the conduct of the Matakaraka scrip survey on the Waimā River, where he not only turned down Mohi Tāwhai, Arama Karaka, and Tapu's request for a reserve as compensation for an incomplete payment,[1338] but he also steadfastly rejected the granting of a one-acre reserve for two urupā on the grounds that it would deprive the surrounding property of a landing spot. Rangatira continued to raise this matter in later years, with White going so far as to claim that the urupā were not genuine.[1339] Nor did obtaining White's endorsement, difficult as that was, guarantee ultimate success. At Rāwene, White had agreed to three reserves of three acres each (as opposed to the total of 24 acres that had been sought), but the eventual Crown award, a decade on, reduced their size to around one acre each (we discuss this further later). According to Stirling and Towers, most of the 'miserly allowance' recommended by White 'was not actually granted to Maori.'[1340]

Māori continued to experience similar difficulties long after the completion of the 1859 scrip survey. When a 20-acre urupā reserve and a five-acre reserve for a kāinga were requested from the Crown's survey of Marriner's claim at Kohukohu (OLC 971) during the mid-1880s, officials restricted their area to just seven acres;[1341] meanwhile, at Motukaraka, officials required that adjacent Māori land be provided

1334. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1297.
1335. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1311.
1336. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1311.
1337. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1300.
1338. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1297; Berghan, supporting papers (doc A39(m)), vol 9, pp 5462–5463.
1339. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1303–1308.
1340. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1298.
1341. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1291–1294.

in exchange for equally small reserves. Similarly, it took the Native Land Court to set aside the 10-acre Ota block from the Waitapu block for a customary owner still in residence.[1342] Although it is not clear what became of the wāhi tapu that William Powditch had requested to be reserved from his Paripari claim, it appears that this land became part of the Te Huia block.[1343] While the history is complicated by a later Crown purchase, it is also worth noting that the Crown failed to make any reserves at Whananaki, where it exchanged scrip for Salmon's OLC 408 claim, despite knowing that it contained cultivations, urupā, and a pā.[1344]

6.7.2.8.1 Ōrira scrip survey, Hokianga

The largest of the Hokianga scrip surveys directed by John White was Ōrira – an area of 3,895 acres made up of nine claims, five of which were invalid or had been disallowed.[1345] It occupied most of the coastal hinterland east of the Ōrira River between Umawera and the Waihou River, as well as taking in a lesser area on the western side of the river.[1346] The land encompassed by the survey was also a valuable source of kauri timber, a factor of which the Crown took advantage to secure as much acreage as possible.[1347]

The largest Ōrira claim by far was the 10,000 acres applied for by William White and George Frederick Russell (OLC 519). In spite of the range of Māori interests held in the block, which was reflected in the overlapping transactions entered into by Pāngari and Taonui respectively, the first Land Claims Commission had found White and Russell's claim to be based on a valid purchase, with a total payment up until January 1840 of just over £845. In May 1843, it had recommended the maximum award of 2,560 acres; had this limit not been in place, the award based on the payment would have been 3,901 acres.[1348] William White pleaded for an increased award, emphasising that the collective debts owed to him by Māori at Ōrira – these had accrued through advances on cut timber – stood at more than £2,000. Governor FitzRoy responded by offering £2,000 scrip to William White and £1,901 to Francis White in exchange for the claim interests. This exchange was not taken up, and following consideration by FitzGerald, FitzRoy increased the scrip offer to William White to £4,099, an option he accepted. Francis White's share in the claim (which was assigned to one F Burdekin) was taken in land instead; because Governor Grey rejected Governor FitzRoy's increase of the claim beyond

1342. *Ota* (1882) 6 Northern MB (doc A49), p 41.
1343. William Powditch to Colonial Secretary, 20 June 1845 (Berghan, supporting papers (doc A39(m)), vol 7, pp 4026).
1344. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1773.
1345. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1153, 1191.
1346. The only exceptions were John Grant and John Marmon's claims, which occupied the coast between the two river mouths: see Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1194, 1196, 1208, 1282.
1347. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1080–1082.
1348. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1082–1084.

the 2,560-acre limit applied in 1843, Burdekin received 1,280 acres (or half of this maximum) while £160 scrip was given in compensation to Francis White.[1349]

Three other Ōrira claims had also been acquired by the Crown in exchange for scrip, namely those of John Anderson (OLC 40), John Marmon (OLC 315), and Alexander Thompson (OLC 461). Thompson's 'Puparahaka' claim had the largest estimated area, of 1,800 acres, which earned the derivative scrip claimants (John Taylor, Thomas Nesbitt, and A E Dudley) a combined payout of £1,825, while John Anderson had received £1,000 scrip in exchange for his 1,000-acre claim. Like the OLC 519 claim, both OLC 40 and OLC 461 were based on transactions that were found valid by the first Land Claims Commission.[1350] In contrast, no land grant had been recommended by the first commission for Marmon's 250-acre claim; he had failed to appear at the first hearing, and then when the case was reheard by Commissioner FitzGerald, he only had one Māori witness (Raumati) to the deed. FitzGerald was nevertheless amenable to the Crown taking over Marmon's claim in return for £250 scrip.[1351]

The remaining claims used to build up the Crown award at Ōrira were much flimsier and although incorporated into a scrip survey, were essentially 'surplus land', as no scrip had been paid by the Crown to acquire them. Only Egert's claim (OLC 177) had been heard by the first commission where it was found invalid after Taonui gave evidence that the transaction was finalised in April 1840, three months after Governor Hobson's arrival. No evidence had been put before the commission regarding Thurlow and MacDonald's claim (OLC 464), while Eleanor Baker's (OLC 1031) for 60 acres had been withdrawn before it was heard. The other two claims, those of Monk and Makin, had never been filed, although the transactions entered into by Monk also seem to have just post-dated Hobson's arrival, which again should have invalidated them for the purposes of extinguishing customary title.[1352] However, the combination of Bell's determination of claim boundaries,[1353] together with White's assertions of personal knowledge of the transactions, was regarded as sufficient for the Crown to claim ownership. (White disclosed, for example, that Pāngari had told him of a payment from Egert.[1354]) Notwithstanding Māori protest, White also arbitrarily included a large unclaimed area of river-bend mudflats adjacent to the Monk claim in the Crown's survey.[1355]

To ensure acquiescence among Māori owners at Ōrira, White and Bell relied on a combination of coercion and demands for them to defer to Crown authority.

1349. Evidence, Godfrey and Richmond report, 30 May 1843 (Berghan, supporting papers (doc A39(m)), vol 27, pp 15969–15970, 15993–15995); Francis Dillon Bell, 'Appendix to the Report of the Land Claims Commissioner', 1863, AJHR, 1863, D-14, p 39.

1350. Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 19–20, 294–295.

1351. Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 195; Berghan, supporting papers (doc A39(m)), vol 6, pp 3409–3413.

1352. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1192–1195.

1353. Evidence of Wiremu Hopihana Tahua and Rawiri [Whane Ringomutu], Hokianga, 11 March 1858 (Berghan, supporting papers (doc A39(m)), vol 22, pp 12550–12551); Statement of a claim, Hokianga, 7 December 1840 (Berghan, supporting papers (doc A39(m)), vol 26, p 15231).

1354. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1192.

1355. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1195.

Commissioner Bell's hui at Ōrira in March 1859 set the tone; he promised to allow Māori to retain timber-cutting rights, but only if they would accept his interpretation of claim boundaries.[1356] This threat had been employed in the preceding month when Te Kaingamata and others disputed the line between Whakaoma and Ahukawaka which cut through the middle of a large tract of kauri forest. In response, Bell let it be known that he would threaten Pākehā timber merchants with prosecution for trading in stolen timber if Te Kaingamata did not give up on the proposed boundary, which would have seen the Crown's boundary skirt around the edge of the forest.[1357] It is possible that Bell's threat was even more coercive and extortionate; it may have affected the cutting of timber on the Māori side of the survey line as well, since the Crown's land provided the obvious point of access.[1358]

White and Bell also promoted the notion that they were carrying out the expressed wishes of the Governor; any questioning of their decisions by those whom White dismissed as 'slaves and children' was an affront to the Governor's mana and contrary to the findings of the first Land Claims Commission.[1359] This tactic was exemplified by White's invitation to Arama Karaka Pī to attend a hui about Ōrira in March 1859. Pī had no rights in that land, but White called on him nonetheless to quell any complaints against the Crown's takings on the west side of the river. During the hui, White represented Bell's message as coming directly from the Governor. Informing the hui that he would not allow it to be 'dealt with as though it meant nothing', he rudely interrupted a number of speakers and refused to listen to 'disorderly' kōrero or 'twaddle' about unextinguished rights.[1360]

At least three reserves were sought from the Ōrira scrip lands, two by Te Kaingamata and one by Rai, both of whom had been opponents of White's survey.[1361] One of Te Kaingamata's requests, for a reserve of unknown size from Baker's claim area, was rejected by White, but he supported the other for 40 acres from the area of Monk's claim (unfiled and therefore unnumbered) which, like Baker's, was on the west side of the Ōrira River. The other known request, from Rai, resulted in White recommending the reservation of the entire 40-acre contribution to the Ōrira survey that the Egert claim represented.[1362] Stirling and Towers considered this a strategic move; by offering these reserves, White was able to soften Māori opposition to the survey and avoid scrutiny of the Crown's right to take

1356. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1204–1208.

1357. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1200–1204. For a map of the alternative survey lines, see Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 138.

1358. Russell's interpretation was that the stopping of the timber 'coming through' was meant to apply to the timber on the scrip land (Moore, Rigby, and Russell, *Old Land Claims* (doc H1), pp 140–142), although as a timber merchant would have had no way of being certain which side of the survey line the timber was cut from, there may have been little difference between a prohibition against one and a prohibition against both.

1359. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1141–1142, 1200, 1205–1206.

1360. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1205–1207.

1361. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1192, 1198–1200, 1311.

1362. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1311.

them in the first place.[1363] The claims of both Egert and Monk should have been invalidated.

6.7.2.8.2 Pukahau scrip survey, Hokianga

The crescent-shaped Pukahau scrip block of 328 acres encompassed land derived from five scrip claims, as well as an adjacent area that had been Māori land, offered to the Crown as part of a proposed exchange for land elsewhere on the Mangamuka River.[1364] Of the five scrip claims, only three had been investigated by the first Land Claims Commission. It had deemed the adjoining OLC 123 and OLC 386 claims to be valid purchases and had initially recommended grants of 240 acres and 100 acres respectively. The OLC 123 recommendation was amended to 500 acres after the disallowance of the Land Claims Ordinance 1842, while that for OLC 386 remained unchanged.[1365] The claimants (Cochrane and Poynton) had gone on to accept scrip worth £500 and £100.[1366] The other claim heard by the first commission, OLC 517, was unusual in that William White had been unable to produce the deed – it had reportedly been lost in the 1840 wreck of the barque *Aurora* at Kaipara. Nevertheless, the commission, persuaded by witness evidence that the purchase had been valid, had recommended an award of 250 acres.[1367] George Frederick Russell, who had purchased the claim from William White in 1843, had later accepted FitzRoy's offer of £250 scrip.[1368]

The remaining two latent claims, which were never lodged with the first commission, accounted for more than half of the surveyed area shown on John White's sketch plan. The Puriritahi claim of John's father, Francis White, was the larger of the two and appears to have accounted for around two-fifths of the block.[1369] As Stirling and Towers noted, Bell's examination of this claim for the second commission did not extend beyond having Hōhepa Te Ōtene, Kaio Te Ōtene, and Wi Pātene describe the boundaries.[1370] The other latent claim was William White's.[1371] It is not clear from the available evidence what investigation, if any, Commissioner Bell might have made independently to establish either its extent or the circumstances of the alleged purchase. The final component of the scrip survey was the six acres of land given up by Te Ōtene, Wiremu Patene, and others in the vain hope of retaining the 11-acre Tangatapu block which the Crown had claimed

1363. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1311.
1364. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1266–1267, 1301–1302.
1365. Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 100, 237.
1366. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1152.
1367. Turton, *Maori Deeds of Old Private Land Purchases*, deed 255, Mangaraupo, p 230.
1368. Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 316.
1369. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1266–1267, 1302.
1370. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1267.
1371. Evidence of Thomas Cassidy, 21 December 1842 (Berghan, supporting papers (doc A39(m)), vol 7, pp 4148–4149; William White to Richmond, 12 December 1842 (Berghan, supporting papers (doc A39(m)), vol 7, p 4154.

through the scrip exchange for OLC 378; as noted earlier, the Crown ultimately took both areas.[1372]

6.7.2.8.3 Rāwene scrip survey, Hokianga

The survey of the Rāwene claims represented the Crown at its most acquisitive in the Hokianga scrip survey. Here, the Crown award was expanded by use of abandoned and latent claims, and negotiation with John Montefiore. The combined Rāwene awards of the first Land Claims Commission had only totalled 988 acres; the scrip survey added another 969 acres.[1373] Notable among the latent claims at Rāwene was that of Captain Herd which dated back to the New Zealand Company's visit in 1826. The first commission had commenced its own investigation into the transaction 'on behalf of the government', though the company had not filed a claim.[1374] The Government, we observe, could have no standing as a claimant for a pre-1840 transaction. When Chief Constable Tuite had first drawn the commission's attention to the site, Richmond had responded that 'he could not legally enter into the investigation of any land claim' unless he received orders from the Governor, which he thought unlikely as no claim had been made.[1375] Nonetheless, in December 1842, he took evidence on the claim since, as he subsequently informed the Colonial Secretary, it appeared to him that it was 'admirably adapted for the site of the Government Town.'[1376] The commission concluded that between 50 and 60 acres had been sold, even though the claim had been abandoned by the New Zealand Company,[1377] and Taonui had received no part of the payment, despite endorsing the transaction, while Mohi Tāwhai had opposed it altogether. Richmond had dismissed Tāwhai's resistance, describing him as 'a very inferior chief', whose claims were 'groundless.'[1378] Chief Protector George Clarke reported several months later that he had no doubt Tāwhai had a claim but thought that his interests at Ōkura could be disposed of by a payment.[1379] As Stirling and Towers commented, it is difficult to see the commission as a 'neutral and impartial body' in light of these actions.[1380] There was no redress to be had from the second

1372. See White, Report of Proceedings in Hokianga, 8 August 1859, OLC 4.4 (Stirling and Towers, document bank (doc A9(a)), vol 6, pp 3156–3157); Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1215–1216, 1300–1301.

1373. The Crown had paid only £361 in scrip but expanded its acquisition through the use of abandoned and latent claims. See Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 50, 57; Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1246–1247.

1374. Richmond report, 17 April 1843 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 282).

1375. Tuite to Colonial Secretary, 7 February 1843 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 282).

1376. Richmond to Colonial Secretary, 17 April 1843 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 282).

1377. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 283.

1378. Richmond memo on evidence n d. and report, 17 April 1843 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 284–285).

1379. Clarke minute, 2 June 1843 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 285).

1380. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 281.

Land Claims Commission; Bell insisted that the land should be given up, despite Tāwhai's objections and unextinguished interests.[1381] It is apparent that Tāwhai was induced to accept the Crown's claim in return for the promise of a Crown grant for a small reserve, the size of which was then whittled down – an experience shared by other rangatira.

Separate claims from William and Francis White contributed about one-third of the surveyed area, yet neither claim had ever been filed for hearing – and what was more, William White's claim should have been regarded by John White as invalid, as he knew that his uncle had never completed the payment.[1382] John White pointed to the undisturbed occupancy by Butler of part of Rāwene as evidence of a property transaction having occurred, and reported that this had been confirmed by an unnamed rangatira.[1383] Mohi Tāwhai sought the return of the entire invalid claim, as his rights had never been extinguished nor the land transacted by him.[1384] This was just the sort of 'exceptional case' that Bell had sought authority to rule on in his 1858 memorandum to Parliament and subsequently enabled in 1858 by section 15 of the Land Claims Settlement Extension Act.[1385] In addition to taking land for the Crown, White also sought to take more than 1,000 acres of harbour foreshore on the basis that it lay in the mouths of rivers, and the adjacent land claims could be extended to the river centre-line.[1386]

Given the evidence of unextinguished Māori interests at Rāwene, it is unsurprising that there were numerous requests made for reserves to be cut out of the area surveyed for the Crown. The ultimate award to Māori was even more miserly than what John White had been willing to allow. White's report of proceedings shows that Mohi Tāwhai had requested a reserve of 18 acres at Herd's Point, and Arama Karaka Pī and Papahurihia (Te Atua Wera) had also requested land. Having recognised that Kataraina Kohu (daughter of Te Whareumu and the wife of John Bryers) was cultivating part of the area Mohi Tāwhai had requested, White should have returned this land to Māori in accordance with his instructions. Instead, he was prepared only to give Mohi Tāwhai, Arama Karaka Pī, and Papahurihia three acres each.[1387] Kataraina Kohu's rights as Mrs Bryers are discussed further at section 6.7.2.12.

Mohi Tāwhai had also called on White to abandon the Crown's claim to the foreshore and mudflats, as well as to Rangiwhakataka (for which Butler had made no payment to him), but to no avail.[1388] Wi Hopihona Tahua, meanwhile, applied directly to the Governor for land at the point, but White rejected this appeal outright, arguing that he could have no claim on the land when his father, Muriwai, had sold it; added to which it was the only location where wharf access could be

1381. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1247–1248.
1382. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1250–1251, 1266.
1383. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1250.
1384. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1312.
1385. Bell, 'Memorandum of the Chief Commissioner of Land Claims', AJHR, 1858, C-2, pp 3, 4.
1386. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1249.
1387. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1247–1248, 1311.
1388. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1312.

provided to the rest of Rāwene.[1389] Ultimately, the only reserves provided by the Crown were two one-acre grants to Mohi Tāwhai and the son of Arama Karaki Pī, in 1870.[1390]

6.7.2.8.4 Motukaraka, Hokianga

The Motukaraka claim (OLC 1034) was the largest of all the old land claims in this inquiry district. It was also one of the last Hokianga scrip claims to be resolved from the Crown's perspective (the others from the post-1859 surveys were OLC 50, 391, and 971). In January 1843, the first Land Claims Commission had heard Thomas McDonnell's claim for some 50,000 acres on the north side of the Hokianga River, which was based on his payment of goods, worth £404 5s in 1831, to Whatia, Taonui, and others.[1391] When it came to the boundary, McDonnell asserted that it ran from Waihoehoe Creek across to Toromiro. Taonui endorsed McDonnell's evidence but Whatia disputed it, maintaining that the area covered by the agreement only extended from Tokatorea (which was just to the east of the Motukaraka Peninsula) rather than Waihoehoe.[1392] These competing views were recorded on a sketch plan which, although undated, was drawn in the same hand as the minutes taken at Richmond's Motukaraka hearing.[1393] Evidence was heard from five rangatira who argued that they had not consented to the alienation of their interests at Motukaraka.[1394] Commissioner Richmond eventually reported that there were more than 30 Māori residents at Motukaraka who 'strongly opposed' the sale.[1395] He validated it nonetheless – even though McDonnell was unable to produce the original deed.[1396] Two factors may have weighed in McDonnell's favour: he had spent a further £400 on buildings and other improvements; and Taonui's evidence that McDonnell had allowed Māori to continue cultivating the land if they did not cause him trouble.[1397] Ultimately, Richmond recommended that McDonnell be granted the standard maximum award of 2,560 acres, provided there was 'that

1389. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1248–1249.

1390. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1314–1315.

1391. Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 627; Francis Dillon Bell, 'Appendix to the Report of the Land Claims Commissioner', 1863, AJHR, 1863, D-14, p 76.

1392. Evidence of Thomas McDonnell, 6 June 1843 (Berghan, supporting papers (doc A39(m)), vol 22, pp 12608–12609); Evidence of Taonui, [6] June 1843 (Berghan, supporting papers (doc A39(m)), vol 22, pp 12611–12612); and Evidence of Whatia, 7 June 1843 (Berghan, supporting papers (doc A39(m)), vol 22, pp 12612–12614).

1393. Plan of Motukaraka, no date. (Berghan, supporting papers (doc A39(m)), vol 22, p 12633).

1394. Evidence of Atua, Hone Koherangi, Turau, Chapman and Paul Kaipuke (Berghan, supporting papers (doc A39(m)), vol 22, pp 12614–12619).

1395. Statement by Richmond, 18 November 1844 (Berghan, supporting papers (doc A39(m)), vol 22, p 12605).

1396. Statement by Richmond, 18 November 1844 (Berghan, supporting papers (doc A39(m)), vol 22, p 12605).

1397. Evidence of Thomas McDonnell, 6 June 1843 (Berghan, supporting papers (doc A39(m)), vol 22, p 12609); Evidence of Taonui, [6] June 1843 (Berghan, supporting papers (doc A39(m)), vol 22, p 12612).

quantity included in the boundaries stated in the report'. These were the more restricted boundaries accepted by Whatia.[1398]

Just over a decade later, in April 1856, McDonnell petitioned Parliament, complaining that local Māori had only accepted his occupation of about 200 acres of the area awarded. After reviewing the situation, the select committee appointed to report on his petition determined that he should be issued a grant for this lesser area, while the remainder should be valued, and the Governor authorised to give him scrip as compensation.[1399] McDonnell's Motukaraka claim subsequently formed part of Bell's discussions about scrip claim boundaries in March 1858. Hokianga rangatira, who had continued to occupy the land, acknowledged Whatia's boundary (from Tokatorea, across the ridge that formed the peninsula spur, to Toromiro).[1400] This area proved to contain only 67 acres when surveyed by White.[1401]

This was not a satisfactory result for the Crown, and its surveyors returned to Motukaraka in 1885, intent on recovering the 2,560 acres to which they thought it was entitled. Given that the first Land Claims Commission had put the eastern boundary at Tokatorea, officials chose to re-interpret Whatia's line. By placing a new 'Tokatorea' adjacent to Okuao, it accorded almost with McDonnell's original claim.[1402] This imaginative reconstruction of the boundary proved a tremendous boon to the Crown, taking in more than 3,000 acres including the rich Wairupe and Huahua valleys.[1403] There was fierce opposition from the customary owners (identified as Ngāi Tūpoto, led by Pairama; and Ngāti Here, led by Nui Hare) when first canvassed in 1878, and again in 1885, but officials once more threatened to confiscate timber proceeds to quell any resistance.[1404] Stirling and Towers noted that, in the 1920s, these owners (or at least their descendants) would seek redress from Parliament, but the Sim commission of inquiry of 1927 merely relied on the Crown opinion proffered in 1885 of its rights to the land.[1405]

The Crown's taking of much more Motukaraka land than the first commission had been willing to grant was exacerbated by its ruthless policy towards granting reserves. The continuing occupation of Motukaraka was reflected in the number of cultivations (nine) and wāhi tapu (five) identified in the 1885 survey.[1406]

1398. Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 627; original document (Berghan, supporting papers (doc A39(m)), vol 22, p 12604).

1399. Commissioner Richmond report, 18 November 1844, Abstract of Correspondence and Documents of Thomas Mcdonnell (Berghan, supporting papers (doc A39(m)), vol 22, pp 12652–12653); 'Report of the Select Committee on the petition of Capt. McDonnell, R. N.', *Votes and Proceedings of the House of Representatives*, 23 May 1856.

1400. Report by Bell, 9 March 1858 (Berghan, supporting papers (doc A39(m)), vol 22, pp 12637–12638).

1401. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 877–878.

1402. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1334, 1342–1344.

1403. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1344–1347.

1404. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 878–880, 1336–1337, 1347.

1405. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 949–950.

1406. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 880.

As had been the case in the Hokianga scrip survey a quarter of a century earlier, officials again tried to minimise the size of the reserves that would be needed. For example, when reserves for two wāhi tapu encompassing 65 acres were sought, officials offered only seven acres adjacent to an existing three-acre cultivation.[1407] What made the approach even harsher at Motukaraka was the stipulation of officials that three acres of surrounding Māori land should be given up for every acre that the Crown set aside for cultivations.[1408] The outcome of this apparently arbitrary policy was that the Crown added 156 acres of Māori land to its holdings in compensation, on top of a survey error that provided it with another 46 acres. In return, the Crown granted five wāhi tapu (four of 10 acres, and one of two acres) and nine cultivations, with a combined area of 65.5 acres. This insistence on a land exchange weighted so heavily in the Crown's favour was far removed from Taonui's testimony 40 years earlier about the original understanding of the Motukaraka community: that they had been assured that they would not have to give up their cultivations when their land was 'sold'.

6.7.2.9 *Bell's 'final' report*

In 1862, as his work as commissioner drew to a close, Bell tabled a 'Final Report of the Settlement of the Land Claims', acknowledging that it was premature to describe it as such since there were still matters that had to be considered by the Legislature. His report was, he said, a 'summary of sufficiently complete information [to allow the House to decide] on all the points which ought to be considered in any proposed measure this session.'[1409] Māori were not included in this assessment, nor in the concerns of the colonial Legislature. They were barely mentioned by Bell at all.

He proceeded to summarise the 'state of settlement' of land claims, including overall numbers and location, payments made, areas surveyed, the way the claims were disposed of, and quantity of land awarded, and scrip and debentures issued. The report also discussed the Crown surplus: how much land the Crown had acquired, and Bell's views on its right to claim that land as opposed to the settlers who had undertaken the original transactions. He was in no doubt as to the Crown's prerogative. His view was that the British government had consistently denied the right of its subjects to buy land in New Zealand and keep all they had acquired; its policy on the matter had been clearly stated by Normanby and Gipps, and had been expressed within the ordinances of 1840 and 1841, which had been accepted by 'the great body of claimants' willing to abide by the limitation of 2,560 acres 'in consideration of the exchange . . . of an English title for a precarious occupation under the law of the strong arm.'[1410] He also thought that when FitzRoy had raised the question in 1843, Lord Stanley had expressly declared that land in

1407. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 880, 882.
1408. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 881–882.
1409. 'Report of the Land Claims commissioner', 8 July 1862, AJHR, 1862, D-10, p 3.
1410. 'Report of the Land Claims Commissioner', 8 July 1862, AJHR, 1862, D-10, p 17.

excess of the grant would 'revert' to the Crown. He considered this to be 'conclusive against Governor FitzRoy's contrary opinion'[1411]

Bell also argued against any further general provision for old land and pre-emption waiver claimants since they had not suffered any injustice that had not already been repaired. The 1856 and 1858 statutes had 'operated as a great relief' and had 'substantially fulfilled the liberal wishes and expectations' of Parliament in passing them. Claims to properties that had been 'utterly void for any purpose whatever' had been exchanged for defined grants. Claims that had been disallowed under Governor Grey's 'exterminating process' had been admitted and compensation paid for the delay in their settlement. Claims that had lapsed had been heard in instances of real default and awards made. Boundaries had been settled, family arrangements validated, and grants issued to the children or heirs of the original claimants. Land that had been abandoned by the original purchasers had been secured to public use. Bell himself had offered settler claimants every advantage within his power:

> Taking as a rule for my guidance the desire constantly expressed in both Houses during the discussions of 1856 that a liberal interpretation should be given to the Act, I have in every case awarded as much as I felt empowered to do, and have sincerely endeavoured to satisfy the claimants while I guarded the public interest.[1412]

In sum, the colonial endeavour had been greatly advanced:

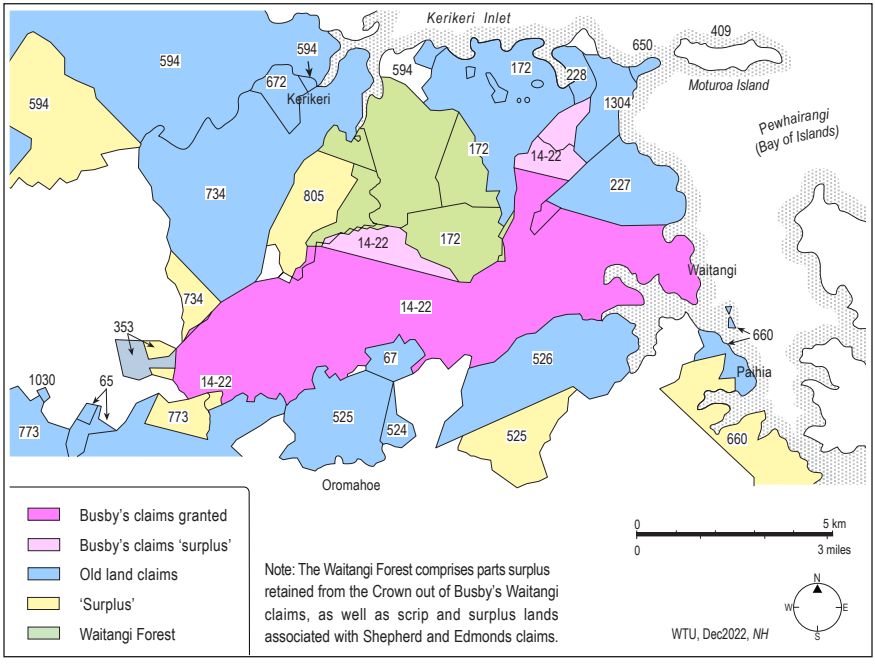
> A country which six years ago was almost unknown except to the few people residing there, has been mapped and made available for settlement. Compensation has been granted where land was taken possession of for the Crown upon the strength of the extinction of native title.[1413]

He praised the settlers for their 'fairness and moderation'.[1414] Again, he said nothing about Māori.

There remained, however, a number of 'unsettled' claims – by Bell's accounting 12 in all – that he considered 'special' cases requiring further legislative provision.[1415] Included amongst these were Busby's claims at Ngunguru and Whāngārei.[1416] Unacknowledged were Busby's claims at Waitangi and numerous other less notable cases, including those of the children of inter-racial marriages.

Busby's claims went to arbitration and in other instances (outside our inquiry district), special Acts were passed to resolve the issues that remained outstanding for the settlers concerned. Otherwise, it fell to Bell's successor, Alfred Domett (who had chaired the 1856 select committee on land claims) to deal with any other

1411. 'Report of the Land Claims Commissioner', 8 July 1862, AJHR, 1862, D-10, p 18.
1412. 'Report of the Land Claims Commissioner', 8 July 1862, AJHR, 1862, D-10, p 6.
1413. 'Report of the Land Claims Commissioner', 8 July 1862, AJHR, 1862, D-10, p 15.
1414. 'Report of the Land Claims Commissioner', 8 July 1862, AJHR, 1862, D-10, p 6.
1415. 'Report of the Land Claims Commissioner', 8 July 1862, AJHR, 1862, D-10, pp 3, 9, 16–17.
1416. 'Report of the Land Claims Commissioner', 8 July 1862, AJHR, 1862, D-10, pp 9–11.



Map 6.8: Busby's Waitangi claims.

Source: Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1518–1520.

matters that were still unresolved and, in Te Raki, preventing the 'safe' transfer of the Crown's surplus and scrip to the Auckland Province. Despite his experience in land administration, Domett soon confessed himself to be overwhelmed by the voluminous files and unable to make out what had been promised to Māori in the way of Crown grants[1417] Increasingly, the solution was to refer these matters to the Native Department and the Native Land Court for their advice. Ultimately, clean-up legislation was passed in 1878 to deal with any claims that settlers had failed to prosecute before the Bell commission (see section 6.7.2.13).

6.7.2.10 *Settlement of Busby's claims*

Although Commissioner Bell focused on Ngunguru and Whāngārei in his report to the House, none of Busby's extensive claims had been fully settled. He had refused to accept the statutory limit of 2,560 acres, arguing that his transactions, which he considered legitimate purchases, had been made while Māori sovereignty was undisturbed, and that he (and others like him) should be able to retain the whole of what had been acquired. He objected likewise to the Crown's claim to the surplus and rejected the authority of Bell.

1417. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1324.

Busby's nine contiguous claims at Waitangi comprised more than 10,000 acres. Busby had moved onto the land at Waitangi in 1833, initially on the strength of a deed he had acquired from William Hall. Hall had taken up residence there in 1815, with his wife and Thomas Kendall, and by permission of Waraki and Ngāti Pou, but had been driven out the following year by a series of muru.[1418] Busby soon found himself the subject of a muru too, purportedly committed by Reti, whose ongoing conflict with Busby we discussed in our first report.[1419]

Clearly, Hall's deed was insufficient to provide a secure occupation, and Busby entered into a series of nine deeds between 1834 and 1839 with a total of 31 individual rangatira. Hōne Heke (Ngāi Tāwake, Ngāti Tautahi, and Te Māhurehure) and Reti (Ngāti Rāhiri) had been among the signatories of the first deed, while Te Kēmara (Ngāti Rāhiri and Ngāti Kawa) signed six of them. Te Tao, Parangi, and Te Arapiro were also prominent participants in these arrangements.[1420] Busby had been obliged to make multiple payments and in the later instances of OLC 18, 20 and 21, based on deeds signed in 1839, promises of reserves were made.[1421] The areas concerned were set aside from the land to go to Busby and could not be 'sold' to other Pākehā. According to Te Tao, who was recalled by the commission after Busby mentioned the matter, the 'deed . . . makes the land mentioned in it sacred to him, but he cannot sell the land'.[1422] Busby referred to these reservations at the treaty debates as 'reconvey[ing] . . . both habitations and cultivations' to Māori.[1423]

We reproduce here a tabulated summary compiled by Bruce Stirling, showing the date and signatories of Busby's deeds, the area he claimed, what he was awarded under the first commission, and what was later surveyed.[1424]

Busby now considered himself to own all the land along the left bank of the Waitangi River for some 13 kilometres from its mouth and inland north along the ridgeline separating the Waitangi and Kerikeri areas.[1425] OLC 22, based on a deed signed with Te Kēmara and others, covered a small area on the right bank of the Waitangi River.[1426]

Busby had also signed deeds for extensive tracts of land in the Whāngārei district. The resulting claims were:

- OLC 23 for 25,000 acres at Bream Bay based on a deed signed in December 1839 with Tirarau, Motutara, Amo-o-te-riri, Tirikiriri, Te Karekare, Tutahi, Iwitahi, Wakaariki, Pou, Kawanui, Tauwitu, Toro, Kahanui, Hamiora, Maru,

1418. Stirling, 'From Busby to Bledisloe'(doc w5), pp 38–394.
1419. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 134–135; Stirling, 'From Busby to Bledisloe'(doc w5), p 41.
1420. Stirling, 'From Busby to Bledisloe'(doc w5), pp 55–56.
1421. Stirling, 'From Busby to Bledisloe'(doc w5), pp 49–51, 63.
1422. Evidence of Te Tao, 2 February 1841 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1466).
1423. Colenso, *The Authentic and Genuine History of the Signing of the Treaty of Waitangi*, p 21 (cited in Phillipson, "Bay of Islands Maori and the Crown' (doc A1), p 129).
1424. Stirling, 'From Busby to Bledisloe'(doc w5), p 55.
1425. Stirling, 'From Busby to Bledisloe' (doc w5), p 52.
1426. Stirling, 'From Busby to Bledisloe' (doc w5), pp 53, 55.

OLC	Date	Māori involved	Claim (acres)	Award (acres)	Survey (acres)
14	June 1834	Heke, Tuhirangi, Rete, Inake, Te Arapiro, Hau, Toua, Reha, Peia (Peha?), Tahitua, 'other tribes'	270	270	228
15	November 1834	Hepetahi, Tao, Pokai, Kemara, Marupo, Aka, Hau	25	25	25.5
16	November 1835	Toua, Peha, Taitua	500	500	482.5
17	November 1835	Te Kemara, Te Tao, Parangi, Te Wakarua, Taro, Puhiahia, Te Hauhau, Te Puri, Repa, Ngoua, Tuhirangi, Peia, Te Arapiro, Ihirau (or Wierau), Haimona Pita	2,000	217	858.25
18	July 1838	Te Kemara, Ngoua, Parangi, Te Arapiro, Puhiahia, Inake	80–100	100	267.5
19	February 1839	Te Kemara, Ngoua, Wierau, Te Arapiro, Puhiahia, Parangi, Hakopa	60	60	161.25
20	February 1839	Toua, Peha, Taitua, Te Tao, Tiutiu	1,500	868	1,576.5
21	March 1839	Te Kemara, Te Tao, Parangi. Te Arapiro, Wierau, Wakarua, Te Kaka, Haratua, Hauhau	5,000	1,074	6,741
22	November 1839	Te Kemara, Te Tao, Haratua, Pepene Paparangi, Te Oki, Parangi, Panapa	150	150	247.5
Total			9,605	3,264	10,588

Table 6.12: Summary of Busby's Waitangi claims.

Porihoro, Umangauku, Te Haungarei, Te Rore, Hori Tipoki, Tipene Hari, Paora Kaitangata;[1427]

- OLC 24 for 15,000 acres at Waipū based on a deed signed in January 1840 with Tutahi, Toru, Tauwhitu, Haro, Parihoro, Ngahuru, Pona, Wakataha, Pukarahi, Te Mahia, Ponahia, Tiakiri, Kaikou;[1428]
- OLC 1324 (with co-claimants, Gilbert Mair and John Lewington) for 40,000 to 50,000 acres at Ngunguru based on a deed signed in January 1840 with

1427. Berghan, 'Northland Block Research Narratives' (doc A39(a)), p14.
1428. Berghan, 'Northland Block Research Narratives' (doc A39(a)), p15.

Mohi Repa, Noa Taiatikitiki, Taiumau, Wiremu Patene Repa, Te Inu, Poka, Tuwaia, Kawanui, Hiku, Pukohu, Te Kuwa, Hawenua, Ingaro, Rongo, Kiharoa, Nga te Hau, Tora, Pakitai, Watarau, Titari, Puhatai, Uawa, Ruakiri, Maurioho, Anaana, Piihi, Hipi, Te Puki, Papahewa, Haki, Hone, Tamati Muri, Hekaraka, Karere, Tapiora, Hori Wiremu, Tiro, and Matangi.[1429]

These deeds also contained provisions for reserves along similar lines as those at Waitangi.

We discussed the nature of Te Kēmara's evidence before the first Land Claims Commission regarding the transactions with the CMS missionaries in section 6.3. The record of the examination of Māori witnesses for Busby's claims was similarly brief and formulaic, confirming little more than the deeds had been read out and signed, that the signatories had a right to 'sell', and that payments had been received; even so, the meaning of that testimony is doubtful. All the Waitangi claims except OLC 22 were heard in a single day, and the latter on the next. Stirling points out that it is not clear whether Māori were even present when Busby gave his evidence.[1430]

The commission awarded Busby a total of 3,264 acres at Waitangi with the proviso that his total grants not exceed the statutory maximum of 2,560 acres. In 1844, FitzRoy waived the limit and increased the grants to the 3,264 acres that the commission had recommended.[1431]

The Whāngārei claims – OLC 23 and OLC 24 – were disallowed because Busby had, as the commissioners reported, 'peremptorily declined making any further attempt to prove the integrity of his purchase' and had refused to produce any Māori witnesses.[1432] Busby argued that 'he would not, by producing them, give even an indirect sanction to the principle advanced by the Governor & Legislative Council that lands sold by the Natives to private persons were vested in the Queen.'[1433] The Governor withdrew the claims from the commission, informing Busby that they could not be resubmitted for investigation – a step approved by Stanley. The Ngunguru claim (OLC 1324) was not entertained at all because the transaction had taken place after the January 1840 proclamation.[1434]

Over the next three decades, Busby attempted to secure the full extent of the land he claimed. In the meantime, as we discussed at section 6.3 with reference to wāhi tapu at Te Karaka (within OLC 14), Māori continued to assert rights in the land supposedly sold, maintaining kāinga at Te Puke as well.[1435] Mahi Te Uaua

1429. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1605–1606.
1430. Stirling, 'From Busby to Bledisloe' (doc W5), pp 58–59.
1431. Bell memorandum, 16 August 1861 (Stirling and Towers, supporting papers, doc A9(a), vol 3, p 1697; Stirling, 'From Busby to Bledisloe'(doc W5), pp 62–6.
1432. Report of Commissioners, 29 January 1840 (cited in Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 14).
1433. Bell memorandum, 16 August 1861 (Stirling and Towers, supporting papers (doc A9(a)), vol 3, p 1697).
1434. Bell memorandum, 16 August 1861 (Stirling and Towers, supporting papers (doc A9(a)), vol 3, p 1697).
1435. Stirling, 'From Busby to Bledisloe' (doc W5), p 64.

and other local Māori challenged Busby's rights during Bell's hearings, but their objections were dismissed out of hand.[1436] At Whāngārei, the Crown set about purchasing land within Busby's disallowed claims.[1437] Busby, for his part, appealed to a variety of Crown officials and took more direct measures as well. In 1854, he prosecuted a settler for trespass who had purchased land at One Tree Point from the Government. He lost the case but inserted a notice in the newspapers warning settlers from acquiring the lands he claimed at Waipū and Ruakākā.[1438] He also attempted to sell a portion of the land to a friend, issued further warnings through the newspapers, and threatened Whāngārei Māori with prosecution for 'conspiracy'.[1439]

He appeared before the Bell commission in September 1857 but refused to recognise the validity of the Land Claims Settlement Act 1856, surrender the Crown grants for his Waitangi claims, or produce his survey plan, despite the generous allowances to which he would be entitled under that legislation.[1440] His grants were repealed as a result.[1441]

The 1856 Act did not provide for disallowed claims to be reinvestigated. However, section 12 of the Extension Act 1858 allowed for a grant to be made (or scrip paid) in cases where the Crown had subsequently acquired land to which the native title was proved to have been extinguished prior to 1840. According to Stirling and Towers, it was Bell rather than Busby who instituted proceedings under this provision, asking the Government (in 1861) to consider whether its purchases at Waipū and Ruakākā had been facilitated by Busby's earlier payments.[1442] The question was referred to the former Native Land Purchase Commissioner J G Johnson, who reported that there had been both a pecuniary advantage of £400 and a political one, in that Busby's dealings had been 'instrumental in extinguishing the Ngapuhi land league – which then prohibited the sale of land in this district'.[1443] Although Busby's claims had lapsed, Bell recommended that he be compensated for his expenditure in partially extinguishing native title. The Legislative Council, however, rejected the Land Claims Bills 1862 and 1863 in which Bell had proposed a clause be inserted to allow Busby the benefit of section 12 of the 1858 Act.[1444]

In the meantime, Busby had also purchased the interests of Mair and part of Lewington's holdings at Ngunguru. In 1859, he sought compensation for the claim on the basis that he had lost out from the delayed investigation and from being denied access to the timber that had been removed over the ensuing years.

1436. Stirling, 'From Busby to Bledisloe' (doc w5), pp 67–68; Stirling and Towers, 'Not with the Sword but with the Pen' (doc a9), pp 1510–1512.

1437. Stirling and Towers, 'Not with the Sword but with the Pen' (doc a9), pp 1610–1614, 1617–1618.

1438. Stirling and Towers, 'Not with the Sword but with the Pen' (doc a9), pp 1619–1622.

1439. Stirling and Towers, 'Not with the Sword but with the Pen' (doc a9), pp 1623–1625, 1654.

1440. Stirling and Towers, 'Not with the Sword but with the Pen' (doc a9), pp 1509–1510.

1441. Bell memorandum, 16 August 1861 (Stirling and Towers, supporting papers (doc a9(a)), vol 3, pp 1697–1698).

1442. Stirling and Towers, 'Not with the Sword but with the Pen' (doc a9), pp 1622–1623.

1443. Johnson to McLean, 16 September 1861 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc a9), pp 1613–1614).

1444. Stirling and Towers, 'Not with the Sword but with the Pen' (doc a9), pp 1622–1623.

Although successive Governors had rejected Busby's efforts to have the Crown recognise his claim, Bell thought that he had a right to have it investigated.[1445]

Bell was clearly swayed by the prospect of the Crown obtaining a substantial acreage of surplus land should Busby's claim at Ngunguru be validated. His investigation, held at Auckland in June 1859, confirmed that the deed agreement had been entered into after the proclamation of January 1840 – and the payment not completed until 1841. The testimony of Noa Taratikitiki, Tuwhaia, and Moihi Te Peke also revealed that the initial arrangement had been made with rangatira at Waimate and had been only reluctantly accepted by the people at Ngunguru the following year. Nor did the witnesses accept the extensive boundaries claimed by Busby.[1446] When he and Mair finally went to Ngunguru, Busby maintained that Māori had tried to confine the transaction to a small area at Waiotoi for a timber mill, because they had 'heard that the government intended only to give to the claimants a part of what they had bought from the natives'. In response, they had 'marked out the portion which we were to have, determining that they and not the government should have the surplus'.[1447] Whether Bell believed Busby's explanation is unrecorded, but he certainly didn't believe the Māori witnesses. He considered their evidence as 'not very satisfactory' and it 'most likely' that Busby would be able to survey a much larger area than they would admit, should he make the attempt.[1448]

Busby disputed the commissioner's interpretation of the 1858 legislation, arguing he should be awarded compensation assessed on the price he had paid (a figure he had inflated) rather than on 'the quantity of land the natives may now be willing to give up'.[1449] At an impasse, Bell agreed to Busby's proposal that the matter be submitted to the Supreme Court for a decision, not on matters of fact, but as to how compensation should be calculated under the 1856 and 1858 Acts. The chief justice agreed with Busby that it should be based on expenditure rather than the area found to have been purchased, but also that Bell could refuse to accept the figures claimed by Busby and could exercise his powers at his discretion. Busby next appealed to Governor Thomas Gore Browne and then to the Secretary of State for the Colonies, arguing that Bell was acting in an unjust and arbitrary manner, but he met with no success.[1450]

Busby was unwilling to undertake the requisite survey because he wanted any compensation to be located at Waitangi rather than at Ngunguru, while Bell proposed that the Government undertake the survey itself while having others done

1445. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1626.
1446. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1624–1625, 1627–1629, 1633–1635.
1447. Evidence of Busby, 25 July 1839 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1634–1635).
1448. Bell memorandum, 16 August 1861 (Stirling and Towers, supporting papers, doc A9(a), vol 3, p 1698).
1449. Busby to Bell, 16 January 1860 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1637).
1450. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1638.

in the same locality. Land purchase commissioner Searancke undertook the task in 1862. According to him, the 'whole of the natives' gathered to discuss the matter. Moihi Te Peke recalled that Busby and Mair had wanted to secure exclusive access to the area's timber rather than take possession of the land itself. Under these circumstances, he 'absolutely refused to allow Mr Busby's claim to a single acre'.[1451] Searancke believed that Busby had probably intended that the land be given up to Māori for cultivation and not absolutely, but he also accepted that they had not intended to sell such an extensive area since they had 'sold' portions of the same land to other settlers a short time previously.[1452]

Ultimately, after what he described as nearly a 'month's obstinate perseverance', Searancke persuaded Mohi and his hapū to cut out 1,032 acres 'in consideration for the goods received by them'.[1453] However, another £50 would be required to seal the matter; money supposedly to compensate them for a cask of bad tobacco they had returned at the time of the original transaction. Although approved by Bell, it is not clear whether this sum was ever paid.[1454] Searancke was also able to acquire the surrender of another 125 acres nearby – possibly the site of the old sawmill – for £15, which he represented as a 'present for pointing out the boundaries . . . [rather] than as a payment for the land'.[1455] Bell reported that Searancke, acting under his instructions, had made 'every effort' to 'get as much land' as he could for Busby.[1456] But by this stage, the commissioner had come to the conclusion that Busby was not entitled to compensation in scrip since Searancke's investigation had shown that the supposed justification for it – that the land had been stripped of its timber during the delay in validation – was untrue; he proposed that Busby (Lewington was now deceased) be awarded the land instead.[1457]

Still not satisfied, Busby continued to contest the disposal of his claims. In 1867, the Government, wishing to settle the troublesome and long-standing dispute, passed the Land Claims Arbitration Act in order to determine whether Busby was 'entitled to any and if any to what quantity of land' in respect of his claims, and whether he had 'suffered special damage' relating to them.[1458] If a majority of the three arbitrators found in his favour, they could recommend Crown grants for land within the original claims that remained unsold, and scrip for any other lands, as well as for any damages.

The arbitrators (Busby's lawyer, Samuel Jackson; Daniel Pollen; and James Mackelvie) reviewed the papers and heard evidence from a variety of officials over

1451. Searancke to Bell, 9 July 1862 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1640).

1452. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1628–1629, 1640.

1453. Searancke to Bell, 31 August 1862 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1645).

1454. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1650.

1455. Searancke to Bell, 12 May 1863 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1651).

1456. Bell report on Ngunguru claim, 31 March 1864 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1652).

1457. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1653.

1458. Land Claims Arbitration Act 1867, s 5.

the course of three months, but not from Māori.[1459] They found in the applicant's favour by a majority of two, with Pollen dissenting. They deemed Busby to be entitled to 9,374 acres within the boundaries of his various Waitangi claims as delineated on the plans drawn on the Crown grants issued in 1844. Why that figure was awarded as opposed to the 10,420 acres he had surveyed is not entirely clear but likely related to the portion already granted to another settler (Hingston) and (as discussed later) the three reserves that Busby had supposedly 'reconveyed' to Māori. He was also awarded a staggering £14,200 in special damages in connection with his Ngunguru claim, and a further £22,600 for those at Whāngārei and Waitangi.[1460] The final deal, struck between Busby, the New Zealand Government, and the Auckland provincial government in 1870, saw Busby receive £23,000 in cash in exchange for surrendering his claim to the £36,800 he had been awarded in scrip and for renouncing his claim to any grant of land at Whāngārei (so that the two Ngunguru parcels of 1,032 and 125 acres were retained by the Crown).[1461]

The award at Waitangi stood. Nothing in the arbitration findings had referred to the reserves, but in a subsequent letter to Busby, Jackson and Mackelvie stated that they had awarded him 'the Bay of Islands [Waitangi] land only, from which we withheld small portions you re-conveyed to the Natives'.[1462] Moore, Rigby, and Russell pointed out that we do not know what the arbitrators thought they had withheld: 'According to the available survey information, they "withheld" nothing.'[1463] They suggested that since the survey plans did not record any reserves, the arbitrators may have thought that the reserves were located outside the surveyed and granted area.[1464]

In fact, Busby considered there to be no reserves at all, even though (as we discussed earlier) his correspondence had clearly indicated that Māori had continued to occupy 'his' land seasonally for fishing and despite building whare there. In 1870, Busby informed Alfred Domett, who had taken over as commissioner in 1864, of the nature of his purchases and requested that his grant be issued in one block. He maintained,

> In every case the land purchased by me from the natives was purchased absolutely and without any reservation whatever. This will appear from the certified copies of the original deeds which, as well as copies of the original leases granted by me at Wangarei and the Bay of Islands were delivered to [Land Claim] Commissioners . . . I have always therefore considered that I was entitled to grants without any reservation whatever on the Government being satisfied that the natives entitled to the leases were in possession of them, and enjoyed the right of occupation which continued only so long as they continued to occupy.

1459. Arnold Bruce Maunsell (doc T19), p 23.
1460. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1515–1516, 1657–1659.
1461. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1660–1661.
1462. Jackson and Mackelvie to Busby, 15 October 1868, AJHR, 1869, D-11, p 4 (cited in Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 70).
1463. Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 70.
1464. Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 70.

> With regard to the reservation at a place called Otuwhere or Wharengarara in the grant of 5,000 acres, this right ceased within two years of the date of the purchase, having been abandoned by the natives and never afterwards occupied. But their only representation lately preferred a claim for it before the Native Land Court which was dismissed by the Court, and afterwards relinquished by the claimant as will appear by the original documents enclosed Nos. 2 & 3.
>
> The other reservation in the grant called Te Puke has been occupied by the descendant of the parties to whom it was leased, and their right of occupation therefore still exists: but it is a right of occupation only, held from me, and ought not to interfere with the integrity of the grant.[1465]

There was no investigation in 1870 of what the Māori understanding was, and any intention of the arbitrators that the reserves should be protected was immediately forgotten by the Crown which took the 1,046 acres excepted from Busby's grant for itself.[1466] Busby's son, who was a surveyor, submitted a rudimentary plan, later requesting its return so that he could fill out the details. Enclosed with Busby's letter to Domett were several supporting documents:

- a statement from Hare Wirikake, dated 1 December 1868, relinquishing his claim to the Otuwhere reserve, that: 'E hoa e Te Pukipi [*sic*]. Kia rongo mai koe kua mutu taku totohe ki a koe mo Otuwhere – ara mo Wharengarara – Hera matu, kua rite a mana korero, ko mita Wiremu Puhipi – ko te mutunga tenei ake ake';[1467]
- a statement from Judge Maning confirming that the Otuwhero reserve was identical to land brought to the Native Land Court in 1866 (no 93);
- a register entry recording the dismissal of the Otuwhero claim on two successive non-appearances by the claimant; and
- a copy of a deed reconveying a piece of land to Tona (or 'Toua') and party.[1468]

Rather than cutting out the lands as originally reserved, Busby's survey set aside two areas (one of 460 acres in three parcels and the other of 586 acres) adjoining Crown lands.[1469] In November 1870, Busby submitted his plan of his Waitangi grant showing the excepted blocks of 'surplus' that the Crown endorsed. Moore, Rigby, and Russell summarise the final disposal: 'Busby got 9,374 acres, the Crown got 1,010 acres, and Maori got nothing.'[1470]

6.7.2.11 *Polack's island claims*

When Polack's claim to the island groups, discussed at section 6.6.2.11, came before the second Land Claims Commission, he again asked for the survey

1465. Busby to Dommet, 6 May 1870 (cited in Moore, Rigby, and Russell, *Old Land Claims* (doc H1), pp 70–71).
1466. Stirling, 'From Busby to Bledisloe' (doc W5), pp 69, 74.
1467. Wirikake statement, 1 December 1868, encl Busby to Dommet, 6 May 1870 (cited in Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 71).
1468. Moore, Rigby, and Russell, *'Old Land Claims'* (doc H1), p 71.
1469. Stirling, 'From Busby to Bledisloe' (doc W5), pp 69–70.
1470. Moore, Rigby, and Russell, '*Old Land Claims*' (doc H1), p 73.

requirement to be waived; Bell refused and declared he would publicise an intention to survey in the *Maori Messenger* so that any Māori objectors could come forward. Meanwhile, the Native Secretary and land purchase commissioner Rogan advised the commissioner of claims to Taranga and Marotere (Hen and Chicken Islands) preferred by Kaipara and East Coast Bays Māori. Bay of Islands land purchase commissioner Kemp, when asked to look into the situation at Tawhiti Rahi (Poor Knights Islands), reported to Bell of claims preferred by Māori from his district but stated that he doubted them, as he believed Polack's purchase had extinguished their rights.[1471] In his opinion, any claim to the islands by Māori was 'scarcely desirable.'[1472]

The report of the commission showed no settlement was reached on Polack's claims. Stirling and Towers commented that the Crown had long since assumed ownership of Tawhiti Rahi, Taranga, and Marotere on the basis of Polack's 'severely deficient claim, so it was not about to return the islands to those Maori who had never sold them.'[1473] Bell had instead directed Māori objectors to C O Davis to arrange compensation. As a former interpreter in Polack's transaction and agent in many pre-emption waiver claims, he was hardly a disinterested choice. But by the time the final report of the commission was completed, the financial settlement asked of him by Bell had not been reached, and a decision on the evidence of Māori claimants like Tawatawa and Kairangatira was deferred until Domett took charge.[1474]

Identified as Hoterene (also known as Tawatawa), Paratene Te Manu, Te Matenga (Tamaki), and Reupena (Puni), the claimants to the island groups involved in Polack's pre-emption waiver transaction gave their evidence to the commissioner on 20 July 1864. Also present were Māori claimants to Aotea, believed by Davis to be satisfied with a proposed settlement of £10, likely supplied by Thompson, to whom Polack had by this time sold his claim. Davis was confident there would be no difficulty in granting the other islands to Thompson. Tawatawa told the court that while he had received payment for the three groups, he had not been party to Polack's transaction, to which he had long objected, but he challenged the Crown's appropriation of Taranga (Hen Island) in particular, as it had never been part of any dealings. Kairangatira's representative, Reupena, consented to granting Thompson the remaining islands.[1475]

The following day, Domett made his recommendations. Taranga, having been included in error in the claim, was ratified as Māori land, while the other island groups were to be granted to Thompson. After adjustment for the cost of survey, Thompson's grant came to 1,739 acres –the total extent of the islands plus 400 acres in scrip. The many breaches by Polack of the pre-emption waiver proclamation – not the least being the issuance of three certificates for a single transaction,

1471. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 564, 1814.
1472. Kemp to Bell, 14 May 1861 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 564).
1473. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 564.
1474. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 564–565.
1475. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1816–1817.

as described earlier – remained unconsidered by Domett. In sum, after a flawed transaction, a failure of protections, a defective ratification process, and an unjustified assumption of Crown ownership, the islands, with the exception of Taranga, were lost to Māori.[1476]

6.7.2.12 *Settling the 'half-caste' claims*

Of the claims heard by the first Land Claims Commission, only a few cases revealed that the 'sale' of land to settlers had involved the 'purchaser' marrying into the hapū, and settlers rarely sought title for gifts. Instead, they typically continued to live on the land by 'sufferance' of the hapū, with children inheriting their rights through their mother.[1477] This does not mean that officials, missionaries, and other contemporaries were unaware of the practice; Henry Williams, Charles Terry, Ernest Dieffenbach, Willoughby Shortland, and Bishop Selwyn were amongst those who commented on it and on the question of how the rights of the children of interracial marriages should be provided for in law. As evidence of the 'inevitable progress of amalgamation'[1478] and considered 'highly worthy of every just encouragement',[1479] the consensus was that some form of provision should be made for the children of Māori-Pākehā unions, both in terms of education and recognition of land claims.[1480]

In other colonies – Canada and Australia – specific provision was made within the land reservation system for the wives and children of interracial marriages. In New Zealand, title had to be sought by the settler father and would be issued solely in his name; that changed only when women were widowed, or else as the children of such marriages came of an age to pursue their own claims deriving from the earlier land arrangements reached between their father, their mother, and her whānau.

A rather half-hearted provision was made for their possible claims under the Land Claims Settlement Act 1856. Section 54 stated:

> And whereas there are cases in which aboriginal native women have men not being aborigines, and there are children of such marriages, and there are also other children where the maternal parent only is of the Native race: And whereas various transactions in land have taken place in reference to such persons, and it is expedient that inquiry should be made into such cases with a view to make a just provision for the

1476. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1817.

1477. Charles Marshall to Native Minister, 29 March 1878 (cited in Angela Wanhalla, *Matters of the Heart: A History of Interracial Marriage in New Zealand* (Auckland: Auckand University Press, 2013), p 54).

1478. George Augustus Selwyn, A Charge Delivered to the Clergy of the Diocese of New Zealand, at the Diocesan Synod, in the Chapel of St John's College, On Thursday, September 23, 1847 (London: F & J Rivington, 1850), pp 76–78 (cited in Wanhalla, *Matters of the Heart*, p 52).

1479. Shortland to Whittaker, 6 May 1842 (Wanhalla, *Matters of the Heart*, p 53).

1480. Dieffenbach approved of intermarriage but thought the land should 'remain the property of the women and children'. See Ernst Dieffenbach, *Travels in New Zealand; with Contributions to the Geography, Geology, Botany, and Natural History of that Country*, 2 vols (1843; Christchurch: Capper Press, 1974), vol 2, p 152 (cited in Wanhalla, *Matters of the Heart*, pp 54 n, 179).

> same: Be it therefore further enacted that the Commissioners appointed under this Act shall make full inquiry into all such cases, and report the evidence taken and their opinion thereon to the Governor.

The following section defined 'Governor' as 'the Officer for the time being lawfully Administering the Government of the Colony of New Zealand'. In practice, this seems to have meant the Native Land Court.

By the late 1850s, Māori were becoming aware of the effects of the Crown's ratification process and its claim to surplus and scrip lands, and sought to use the mechanism of the second Land Claims Commission to ensure that their intentions when marrying settlers were given effect: that land would be retained within the hapū bloodlines, and that provision would be made for any future children. Māori had not thought that specific reserves for the mothers and their children were needed in the deeds they signed. Women and children now found that the Crown's claim to scrip, survey, and its parsimonious approach to reserves had disrupted the occupation rights previously provided by their Ngāpuhi relatives. Given the opportunity, Māori grandparents and hapū leadership attempted to create the documents so valued by Pākehā by sending in statements to the commission specifically 'gifting' lands and attempting to use its procedures to protect the rights of their kin, a tactic that met with limited success.

Although customary marriages had underpinned many of the transactions that had taken place between Māori and settlers, the claims of the children were at the end of the queue in the Crown's validation process. Such claims would subtract rather than add to the Crown estate and were not a priority for Bell. He was, in any case, tasked only with reporting the evidence and his opinion to the Government. As noted earlier, Bell's 'final report' had listed the issuance of grants to the heirs of the original claimants as one of commission's achievements, but he failed to mention the many outstanding claims for or from the children of interracial marriages.

Despite the combined efforts of Bell and White (in Hokianga), this was another matter left to Domett and, in light of the many complications, for the Native Land Court to resolve. In March 1873, George Fannin, the clerk of the Land Claims Commission, suggested that a Native Land Court judge be appointed (under section 5 of the 1856 Act) as an assistant land claims commissioner for the Province of Auckland, to examine and report on any outstanding claims so that they could be 'proceeded with judicially'. Any claims not prosecuted after they had been advertised for hearing could then be disallowed. Since most of the unsettled claims – 'many of which [were] half-caste' – concerned lands in Hokianga and the Bay of Islands, Fannin suggested that Maning be appointed and 'finally determine those of the half-caste claims to which the Native Land Acts apply'.[1481]

Numerous claims concerning the children of Hokianga whānau were dealt with in this way, including those of Bridget Cassidy, Annabelle Webster, Hori Karaka (George Clarke) at Kohukohu, Hardiman at Ohopa, and Mary Marmon; also the

1481. Fannin memorandum for Land Claims Commissioner Domett, 21 March 1873 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p1320).

children of Kohu and Bryers; of Taonui's daughter and Anderson; and of Makareta Kauari and W R Gundry. We now discuss a number of these cases.

The marriage of Makoare Taonui's daughter to the sawyer John Anderson at Ōrira was revealed only during the examination of the transaction at 'Warewarekauri' (OLC 40) by the second Land Claims Commission in 1858. When Taonui raised the question of the rights of his two grandsons,[1482] Commissioner Bell said that he would 'recommend the Governor to reserve a piece of the land for them', but there is no record of this occurring.[1483] The attempt by Ururoa to make provision for his grandchildren, the progeny of the union of his daughter, Raupane, to Henry Davis Snowden, with whom he had signed several land deeds, also failed, despite wide hapū support for an allocation of land for the children at the time of Bell's investigation. In 1858, Ururoa and other leaders sent in a written deed of gift that made specific provision for them – a piece of land called 'Totara' at Lake Mawhe. While there was some discussion about other rights in a portion of that area, Hare Hongi gave evidence that he, Ururoa, Hira Te Puna, and others had intended that the land be set aside in this way, and that the matter had been resolved.[1484] Once Bell's final report was tabled, the claim lay dormant. One of the sons later pursued the matter, and the claim was referred to the Native Land Court in 1870, but although he could produce the 1858 deed gifting 'Totara', by this stage the former consensus had broken down. The claim was contested and disallowed. Maning reported to Domett that the deed was not, 'taken with the other circumstances of the case, now for the first time, fully understood, sufficient to give him title.'[1485]

In another case, the existence of a Māori wife, Makareta Kauari, was revealed in 1859 only when the Crown attempted to survey the land it claimed as a result of its scrip arrangements with W R Gundry. Ngāi Tūpoto attempted to ensure that Makareta, now widowed, was provided for, sending a signed document to the Land Claims Commission that confirmed an allocation of land at Paraoanui. This stated: 'We together . . . agree to the word of our chief Tereti Whatiia, who is now dead, with respect to the land for Makareta Kauari (the widow of Gundry) for her son Wiremu and his younger brothers.'[1486] Located on the Motukaraka Peninsula and outside Gundry's original claim at Kohi, the land had been chosen 'on account of Mrs Gundry having a claim there'.[1487] The claim, if validated, would eat into the Crown's scrip at Motukaraka, and Bell did nothing to advance it further. Like

1482. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 121, 404, 1138–1141; Berghan, 'Northland Block Research Narratives' (doc A39(a)), p 20; Berghan, supporting papers (doc A39(m)), vol 1, p 314.

1483. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1140.

1484. Evidence of Hare Hongi, 30 March 1858, OLC 1357 (Berghan, supporting papers (doc A39(m)), vol 26, p 15256).

1485. Maning to Domett (Berghan, supporting papers (doc A39(m)), vol 26, p 15234).

1486. Te Uruti and others, Hokianga, 17 March 1859, OLC 1370 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1332).

1487. White memorandum, 1 August 1859 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1333).

several others of a similar character, it lay dormant. When the claim was called in January 1880, no one appeared, and it was declared to be abandoned.[1488]

However, Mohi Tāwhai's efforts to have land set aside for the family of Kohu (Mrs Bryers) by a deed of gift had better success. During the complex negotiations to sort out the Crown's claim to scrip lands at Hokianga (discussed at section 6.6.2.7) and of local rangatira to have reserves set aside, Mohi Tāwhai and other rangatira (Tiro, Pororua, Hohepa Kiwa, Hoera Tuhiparu, Ihaka, Pehi, and Neho) sent in a statement to the commission:

> This is the document of our consent giving the land for our grandchildren and for our children, the children of Kataraina Kohu and Joe Bryers . . . This is our true consent, giving this land is a free gift of love to these children, to be a permanent possession for them and their children for ever.
>
> Ko te pukapuka tenei o to matou whaka ae tanga ki te whenua mo a matou, mokopuna, moa matou tamariki, mo nga tamariki a Kataraina Kohu, raua ko Ho Paraea . . . Ko tamatou whaka ae tanga pono tenei, he mea tuku aroha atu anei whenua e matou, mo enei tamariki, hei kainga pono ratou, mo ratouriri hoki a muri ake nei.[1489]

The land to be gifted was Otautu, as Kohu was of a senior line and had a claim 'in all the land at Waima, the portion to be given to them was to be in full [recognition] of all her claims'. Bryers paid for the survey in 1859, but Tāwhai's statement 'sat in Bell's office until February 1861, when he filed it with other "half-caste" claims'.[1490]

No further steps were taken until, in 1865, White advocated that something be done, stating 'unless it is, the Maori people will not be so wishful to do justice to half-cast[e]s in respect to land claims on account of their mothers, if they see the government neglect to take action when it is given.'[1491] Domett acknowledged that the survey and issue of grants for this and similar claims were sadly lagging, and in some danger, it would seem, of being neglected altogether. He minuted White's memorandum:

> I do not know *why* such promises or engagements . . . *are not always* (or have not been *always of late years*) been *immediately fulfilled*. There can be no doubt of the extremely ill effect neglect to fulfil them must have on the natives concerned. The records of the Old Land Claims office are so voluminous, and *every one* in my office is

1488. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1334.

1489. Mohi Tawhai and others, Waima, deed of gift, 31 October 1859, translated by E W Puckey for Native Department, OLC 1367 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1323).

1490. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1323.

1491. White memorandum, 26 August 1865. OLC 4/11 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1324).

so entirely new to the work concerned, that it's impossible for this officer to make out any such engagements. [Emphasis in original.][1492]

In this instance, Domett directed that the promised Crown grants be issued to Bryers' sons, but still nothing was done by the Government. 'Instead,' Stirling and Towers commented, 'it was left to Maori to claim the land through the Native Land Court and it was not until November 1871 that 316 acres at Otautu was granted to Charles Bryers alone by the Native Land Court.'[1493] Judge Maning confirmed that the title for Charles was 'in full satisfaction of all his claims and those of his family to the lands at Otautu,' adding that 'both Charles Bryers and his family being Ngapuhi chiefs of the highest standing amongst the natives, have many other claims in the Bay of Islands district.'[1494]

This tardy treatment of the claims generated by Māori, as they sought to ensure that the underlying intent of marriages they had arranged be carried out, contrasts with the concern to settle the claims of Pākehā, for whom detailed legislation and many concessions had been made. Bell had boasted in 1862 that he had done everything in his power to award as much land as he could to settlers while securing the 'public interest' and that it was an 'unquestionable truth' that the Acts of 1856 and 1858 had 'operated as a great relief' to them.[1495] The claims made by Māori for the children did not meet with anything approaching this consideration by Parliament or the commission, even though 'amalgamation' was encouraged. Ten years after Bell reported, officials were still debating what to do about them and in the end, did very little. The returns indicating the 'final' disposal of claims show that in addition to awards authorised by Domett to the children of Thomas Maxwell at Motutapu and those of Berghan at Mongonui, subsequent Native Land Court investigation had resulted in grants in only five instances: for the Cassidy children, Charles Bryers, Annabella Webster in Hokianga, Anna Cook, and the 'half-caste' children of Robert Kent (held in trust by George Clarke) at Waimate.[1496]

6.7.2.13 *Old land claims 'definitely settled'*

In 1878, the Land Claims Final Settlement Act was passed to close off any old land claims that remained unsettled by Bell and Domett. If the claimants had not prosecuted them to a final issue by 31 December 1879, they would be judged by a land claims commissioner to have lapsed. The original Bill had a schedule attached that was criticised by Bell in the Legislative Council as reviving claims to 'hundreds of thousands of acres' barred by the 1856 Act, even though the architect of the measure, Robert Stout (then Attorney-General), had inserted a clause in committee

1492. Domett minute for Rolleston, 8 September 1865, on White memorandum, 26 August 1865. OLC 4/11 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1324).

1493. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1325.

1494. Maning, Hokianga, to Commissioner Woodhouse, 28 May 1872, OLC 1367 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1325).

1495. 'Report of the Land Claims Commissioner', 8 July 1862, AJHR, 1862, D-10, p 15.

1496. 'Return of Land Claims Finally Settled since 8th July 1862', 1878, AJHR, 1878, H-26, pp 5–6, 8–10.

explicitly stating that inclusion in the schedule would not be deemed to have this effect.[1497]

The schedule was omitted from the final measure, as was a clause stating that any land the claim to which had lapsed would be 'deemed to be waste lands of the Crown, freed from the right, title, or interest of any person whomsoever'.[1498] Two returns – one titled 'Return of Land Claims Finally Settled since 8th July 1862' and the other, 'Final Return of Land Claims Definitely Settled since 20th August 1878' – were tabled before the House of Representatives. Te Raki claims predominated in both. The former listed 40 claims in Te Raki that had remained unsettled at the time of Bell's departure, including Busby's.[1499] The latter return, which was tabled in 1881, listed a further 58 claims which were either granted; deemed to have lapsed and thus regarded as 'surplus'; or if uninvestigated in the earlier stages of the validation process, as was the case for most of the children's claims, sent to the Native Land Court for determination.[1500] Most of these were also deemed to have lapsed, thus, we presume, reverting to the status of 'native land' in the eyes of the Crown.

6.7.3 Conclusions and treaty findings: legislation, the validation process, scrip, and surplus lands

We find that the Crown policies and practices that resulted in the appropriation of some 51,980 acres of 'surplus land' from old land claims and a further 221,168 acres from pre-emption waivers were in breach of the treaty and its principles. This much has been conceded by the Crown, but on specific and limited grounds. It conceded that the surplus lands policy had 'failed to ensure any assessment of whether Te Raki Māori retained adequate lands for their needs'; that in some cases it had taken decades to assert title or its claim to the surplus lands; and that it had awarded scrip without properly investigating the pre-treaty transactions.[1501] As a result of these flaws in its old land claims investigations, the Crown conceded that some hapū lost vital kāinga and cultivation areas (but did not specify which).[1502] It made similar concessions with regard to the retention of the 'surplus' from pre-emption waiver claims. While we welcome these acknowledgements of treaty breach, our findings are grounded differently. We also note the Crown's general insistence that grievances be proven on a case-by-case basis. For that reason, we have discussed how those losses occurred in some detail.

In our view, the underlying basis on which the Crown's claim to surplus lands was founded was in breach of the treaty and its principles. The policy was grounded in the Crown's assertion of sovereignty and its accompanying assertion of the underlying or radical title to all New Zealand lands, subject to the 'burden'

1497. Supplementary Order Paper, 13 August 1878; Bell, 21 August 1878, NZPD, vol 28, 1878, p 359.
1498. Land Claims Final Settlement Bill 1878.
1499. 'Return of Land Claims Finally Settled since 8th July 1862', 1878, AJHR, 1878, H-26, pp 1–10.
1500. 'Final Return of Land Claims Definitely Settled since 20th August 1878', 1881, AJHR, 1881, C-1, pp 1–5.
1501. Crown statement of position and concessions (#1.3.2), p 52.
1502. Crown closing submissions (#3.3.412), p 2.

of customary rights as it was expressed in colonial law. We found in chapter 4 that the assertion of sovereignty was in breach of the treaty and its principles. It followed that the assertion of radical title was also in breach and so, too, must be the Crown's expropriatory processes (for if the root is planted in breach, so will the fruit be tainted).

The surplus lands policy was moreover inappropriate to the circumstances of New Zealand and it was implemented in breach of promises made to Māori during the Tiriti debates and on subsequent occasions. The personal and mutable character of the pre-1840 transactions meant that there was no basis for the Crown to claim an unencumbered right to any part of that land. No agreement had been reached with Māori about its retention by the Government. The Crown's claim to own the surplus as a right of kāwanatanga had not been raised by Hobson when it ought to have been, if such was the intention. In fact, Hobson had seemed to promise the opposite: he said the Crown would return Māori lands that had been unjustly acquired, a pledge that Māori understood as meaning that their understanding of pre-treaty transactions would be enforced. Later, as Māori became aware of the Crown's intentions, Governor FitzRoy promised to return the surplus lands. As we set out in chapter 5, through this and other commitments, FitzRoy gained himself allies among Ngāpuhi, whose support was to prove critical during the war that followed. Although the Crown has argued that FitzRoy's undertaking to return the surplus land was ambiguous and made without official sanction, we do not agree. The promise was recorded and although not directly communicated to the Colonial Office, the information was available to it in the reports enclosed with FitzRoy's despatches. Additionally, Stanley's 1843 responses to FitzRoy left the Governor with discretion to return lands, at least when Māori were in occupation or had some other just claim. In any event, in our view Māori were entitled to rely on the commitment FitzRoy had made to them. For many years afterwards, they continued to occupy the 'surplus' as they wished, unaware that, in the eyes of the Government, it did not belong to them.

That the Crown still considered itself to own the surplus lands was not communicated to Māori until the late 1850s, when the deed boundaries and settler grants were surveyed, and the Crown claimed its portion. In our opinion, it is extremely doubtful that such a claim could have been made in the first years of the colony without causing outrage; certainly, FitzRoy and the missionaries thought that it could not, and later expressed the view that their assurances on this and other matters had prevented a more general Ngāpuhi uprising. Nor had any such claim been explicitly communicated to Māori in the years between the Northern War and the establishment of the Bell commission. Professor Boast described the Crown's revival of its claim to surplus lands as 'devious' in the context of Muriwhenua; we endorse this opinion in the case of the Te Raki region also.[1503] The incentivising of the Pākehā claimants to survey the outer boundaries of their pre-treaty claims was clearly intended to identify the surplus and secure it for the Crown, which exploited the personal relationships so essential to the original transactions to its

1503. Boast, 'Surplus Lands' (Wai 45, doc F16), p 161.

own advantage. It was thought that survey by settlers known to Māori would be more acceptable to them and less expensive to itself.

We consider the Land Claims Settlement Act 1856 and Extension Act 1858 to be in breach of both the Tiriti guarantee of tino rangatiratanga and the article 2 guarantees of the English text, as well as the principle of equity. These Acts were intended to maximise benefits to the Crown and settlers at cost to Māori, while denying Māori rights that were extended to Pākehā. In particular, settlers were given an opportunity to have uninvestigated and disallowed claims endorsed, with very little scrutiny, while Māori were unable to have the findings of the first Land Claims Commission re-examined and their unextinguished interests recognised if a grant or scrip had been issued. There were other flaws as well. There was no requirement to provide Māori with adequate reserves, a critical omission given the earlier reliance of the first commission on their allocation within the lands left out of the settler grants. The legislation also omitted any requirement for conditions on which the original transactions had been affirmed (such as joint-use and trust arrangements) to be respected and upheld. These measures were enacted without any opportunity for Māori to express their views on the settler grants or the Crown's right to the surplus.

Bell and White then applied the legislation in a manner that exacerbated its flaws. As noted earlier, the legislation encouraged claimants to survey the entire area covered by the original deeds, even if they knew that Māori continued to occupy and use the land, but Bell turned the screw further. He almost invariably insisted that claimants complete the full survey, even when they were prepared themselves to compromise with Māori and respect the old, underlying understandings, at least to some degree. Bell also did his best to make awards to settlers even for claims that were 'irregularly acquired', previously disallowed, or not even investigated by the first commission. That he did so cannot be attributed solely to the strictures of the law; Bell himself had promoted the 1858 amendment to facilitate the progress of claims that were otherwise invalid. As a result, Pākehā could revive their claims under certain circumstances, whereas Māori were stuck with earlier adverse decisions.

The relentless prosecution of the Crown's interests by the second Land Claims Commission in a situation in which Māori had been completely disempowered was in breach of all the Crown's undertakings to actively protect them in ownership of their lands as long as they wished to keep them. It was far removed from Māori understandings that they would enjoy equal partnership with the Crown and would engage with the Crown to ensure that their rights were respected.

The consequences were deeply felt in the cases of scrip claims in Hokianga, where many such exchanges for lands elsewhere had occurred, and Māori had received none of the expected future benefits that had underpinned the original transactions. In some instances, the Crown claimed scrip lands without any investigation of the original claim or when it had been disallowed. When the Crown came to define the lands it believed it had acquired in exchange for scrip, officials were anxious to maximise the returns for its early expenditure for settler benefit. Scrip issued at £1 per acre so that settlers could acquire Crown lands in Auckland

was considered a debt on Hokianga lands that the Crown regarded as sold, but which it had failed to survey or utilise in any way that would indicate to Māori that they were no longer owners of the land under new laws that ignored tikanga. In some instances, scrip had been issued by FitzRoy without proper inquiry, but this failure remained unaddressed by the Land Claims Settlement Acts.

White took a leading role in negotiating boundaries, even though he was hardly a disinterested party, given the close involvement of his family in the original land arrangements. There were clear instances in which Māori owners were bullied into accepting the Government's survey, which was arranged to its advantage despite plainly expressed Māori opposition that dated back to the original hearings and had been revived with the Crown's subsequent claim to ownership. As the Crown has acknowledged, it failed to assess the adequacy of land remaining to Māori, and requests for reserves were almost always rejected or at best, reduced in size, even when kāinga, wāhi tapu, and cultivations were at issue. Even when recommended, actual grants of reserves often failed to materialise. The basis of the policy was inequitable, and its flaws exacerbated by the way it was applied.

The Crown also took the 'surplus' derived from its pre-emption waiver policy in Mahurangi and the gulf islands, notably Aotea. For all of Governor Grey's criticisms of FitzRoy's waivers and the purchases conducted under them, the measures he introduced to sort out questions of title were addressed to settling Pākehā claims. These transactions were validated in much the same way as the old land claims had been, with no more effective protection of Māori interests than could be provided by the Protector of Aborigines. The original intention to restrict the acreage that could be acquired by settlers under waiver exception certificates and to reserve occupied sites and tenths was largely ignored both at the time of the transaction and during the validation process that followed. Once settlers' claims had been resolved through the mechanisms provided under the Land Claims Ordinance 1846 and the Land Claims Settlement Act 1856, which specifically enabled waiver claims disallowed for non-compliance with regulations to be reopened (unless the Crown had already on-sold the land concerned, on the mistaken assumption that the native title had been fully extinguished), it took the rest of what had been surveyed. This included land supposed to be set aside as tenths for Māori benefit.

By taking the 'surplus' lands from old land claims, the Crown clearly acted inconsistently with the plain meaning of article 2. It claimed ownership of that land by reason of a sovereignty and a title that we consider to have been asserted in breach of the treaty and its principles. We have also already found that the initial validation of transactions as conveying freehold title was in breach of the principles of partnership, and recognition and respect, and its guarantee of te tino rangatiratanga. We have explained earlier (at section 6.4.3) why we think the granting of land to settlers, overriding Māori law, was effectively a raupatu, in breach of the property and control guarantees of the treaty. Those validations were never re-examined or overturned, enabling the Crown to take the land that was deemed to have been transacted but had not been granted to settlers, and contrary to what Māori had been specifically promised by the Queen's representative. In

our view, the taking of that surplus can only be seen as an effective confiscation of some 51,980 acres from pre-treaty land arrangements undertaken under tikanga.

We find, therefore, that the Crown was:

- in breach of te mātāpono o te tino rangatiratanga, as well as te mātāpono o te houruatanga me te mātāpono o whakaaronui tētahi ki tētahi; and that
- by failing to honour promises that such land would return to Māori, the Crown disregarded its duty to act in the utmost good faith, and breached te mātāpono o te houruatanga/the principle of partnership.

An additional 21,168 acres were taken by the Crown from the waiver transactions entered into in 1844 when it could at least argue that the British law applied. As Grey acknowledged, it was doubtful still that Māori fully understood the effect of the arrangements into which they were entering, yet validation proceeded while, at the same time, intended protections were disregarded. Rather than the limited purchases contemplated by FitzRoy, in some cases very extensive acreages were alienated, much of it kept by the Crown once settlers' claims had been dealt with. The Crown also kept the land when settler waiver claims were disallowed for failing to meet survey and other technical requirements. By failing to ensure that the title of all Māori customary owners had been fully extinguished and to ensure that Māori retained sufficient reserves, or to fulfil its obligations to set aside tenths, the Crown further expanded the area it claimed as surplus. None of this was rectified by the Bell commission or the legislation under which he operated.

We consider the Crown's pre-emption waiver policy and its retention of surplus resulting from transactions arranged under its direct supervision to be:

- in breach of te mātāpono o te tino rangatiratanga and the principle of active protection/te mātāpono o te matapopore moroki.

The Tiriti agreement and partnership required the Crown to recognise and respect Māori customs and tino rangatiratanga, actively protect their rights to land and resources, and ensure they maintained an economic base so that they had the opportunity to develop on an equitable footing into the future. The surplus land policy applied in respect of both old land claims and pre-emption waiver purchases contravened all those guarantees.

We find, therefore, that the Crown:

- breached te mātāpono o te tino rangatiratanga; the principle of partnership/te mātāpono o te houruatanga; the principle of mutual recognition and respect/te mātāpono o te whakaaronui tētahi ki tētahi; the principle of mutual benefit and the right to development/te mātāpono o te whai hua kotahi me te matatika mana whakahaere; and te mātāpono o te matapopore moroki/the principle of active protection.

The Land Claims Settlement Act 1856 and Extension Act 1858 did not require the commissioner to examine the workings of the first Land Claims Commission. Section 15(2) of the 1856 Act prohibited the rehearing of claims for which awards had been made – these could be adjusted only – and scrip lands specifically could not be investigated, even if they remained unexamined by the first commission. In contrast, the legislation extended many advantages to settlers and to the Crown itself. Pākehā claimants could have cases revisited in certain circumstances and

were offered survey incentives designed to maximise their awards and the 'surplus' available to the Crown.

We thus find the Land Claims Settlement Act 1856 and Extension Act 1858 to be:

- in breach of te mātāpono o te tino rangatiratanga, as well as te mātāpono o te mana taurite me te mātāpono o te matapopore moroki/the principles of equity and of active protection.

There was no requirement in that legislation that adequate reserves be set aside out of the areas deemed sold and awarded to settlers or taken by the Crown as surplus. In fact, the only mention of reserves was in section 8 of the 1858 Extension Act, which dealt with what the Crown would do should Māori be willing to give up a reserve originally made for their occupation within the exterior boundary of a claim or grant. In our view, it would have been better to have returned the surplus to Māori, but reserves might have been easily set aside out of the extensive areas of surplus lands the Crown claimed as its own.

We find the Crown's failure to do so was:

- in breach of the principle of active protection/te mātāpono o te matapopore moroki.

The Acts were passed without any opportunity for Māori to express their views on either how settler grants were to be resolved or the Crown's right to take the surplus. The legislation enabled commitments that the surplus would 'return' to Māori to be ignored.

In this respect, we consider the legislation also to be:

- in breach of te mātāpono o te whakaaronui tētahi ki tētahi me te mātāpono o te mana taurite/the principle of mutual recognition and respect, and the principle of equity.

The Crown failed to institute an impartial and fair process whereby Māori who had been adversely affected by the defects in the first ratification procedures could gain redress. Instead, the second Land Claims Commission, under a single Pākehā commissioner, Francis Dillon Bell, exceeded its function of defining European grants and Māori reserves. Bell acted to obtain as much land from Māori as he could for the Crown and suggested legislative amendments and gazetted rules for that purpose. He refused to hear Māori properly on the question of unextinguished rights and reserves. The result was that, over the objections of Māori, shared occupancy arrangements were brought to an end, while the reserves that were recognised by Bell were minimal and made without regard to comparable equities.

We find, therefore, that Māori hapū were prejudiced by these actions and omissions which deprived them of lands in which they had legitimate rights, and that this was:

- in breach of te mātāpono o te tino rangatiratanga, te mātāpono o te mana taurite/the principle of equity; te mātāpono o te matapopore moroki/the principle of active protection; and te mātāpono o te whakatika/the principle of redress.

In the case of scrip, the Crown has acknowledged that its investigation of the validity of the claims fell short of what was required of a good treaty partner. Some

claims for which scrip had been awarded remained uninvestigated or had been disallowed, but the Crown asserted a right to those lands nonetheless. Commissioner Bell and his delegate, White, also pressured and on occasion, threatened Māori owners into accepting their interpretations of what lands had been transacted. The scrip surveys followed the pattern set by Bell generally, with officials taking deliberate and sometimes questionable steps to gain as much for the Crown as possible, securing land well in excess of the original award. In the case of Motukaraka and Waitapu, the Crown claimed land (by falsification of boundaries) to which it clearly was not entitled.

We consider the Crown, by these actions, to be:

- in breach of article 2 guarantees of tino rangatiratanga over lands and resources, and in breach of te mātāpono o te tino rangatiratanga.

Reserves of wāhi tapu and cultivations were only reluctantly recommended, and the provision for Māori was derisory as the Crown sought to maximise the return on its earlier issue of scrip on extremely generous terms to the settlers concerned.

We thus find the Crown's scrip policy to be:

- in breach of te mātāpono o te matapopore moroki me te mātāpono o te mana taurite/the principles of active protection and equity, resulting in prejudice to Māori throughout the inquiry region but, in particular, to hapū based in Hokianga, who lost 14,029 acres by this means.

The disparity between how Pākehā and Māori were treated within the later stages of the Crown's validation procedures was highlighted by the awards ultimately received by missionaries such as Shepherd and Kemp and settlers such as Mair and Busby. Bell undertook a protracted examination of the missionary awards but dismissed Māori protests as coming too late, even though survey had been long delayed, and there had been no way of knowing what land was being claimed. In contrast, the earlier missionary promises of sharing the land, the 1851 Privy Council decision that grants awarded beyond the statutory limit must fail, and FitzRoy's earlier commitment that surplus lands would return to Maori were all discounted. In the end, both missionaries and Crown gained thousands of acres of land, while Māori retained only a handful of acres as reserves. Settlers such as Mair and Busby were also treated with a great deal of sympathy within the later stages of the Crown's validation process, despite the questionable nature of their claims and disregard of rules that might have offered at least some protection to Māori. In contrast to his usual practice, Bell was willing to rely on a verbal agreement over documentation when it favoured Crown and settler interests (in Mair's case), and at Waitangi his investigation of Māori occupation was cursory. Their understanding of what had been reserved to them was sought neither by Bell nor by any official, the commissioner, or the arbitrators. Despite Busby's refusal to acknowledge his authority under the Land Claims Settlement Act 1856, Bell actively promoted his interests with the Government (under the Extension Act of 1858). In the end, Busby was awarded an enormous sum for damages that had not actually been inflicted and in the case of Ngunguru, for a transaction that was illegal.

We therefore find the Crown to be:

- in breach of te mātāpono o te matapopore moroki me te mātāpono o te mana taurite/the principles of active protection and equity.

The disposal of the claims of children of marriages between Māori women and settlers (the 'half-caste claims') also contrasted with the treatment of settler claims. The potential to have provision made for the mothers and their children under the Land Claims Settlement Act 1856 proved illusory, they were among the last claims to be examined, and few grants were issued despite promises to the contrary. We find the Crown again to be:

- in breach if te mātāpono o te matapopore moroki me te mātāpono o te mana taurite/the principles of active protection and equity.

By all these actions the Crown deliberately minimised the lands retained by Māori while maximising those to be awarded to Europeans or to be taken as scrip and surplus. We think the Crown in doing so acted neither in good faith nor with fairness.

In summary, we find the Crown – because of its legislation privileging settler and its own interests over those of Māori; its failure to ensure that problems arising from the first commission were dealt with and rectified in a fair and timely manner; its failure to ensure that hapū were left with sufficient lands; and by reason of its scrip and surplus land policies – to be:

- in breach of te mātāpono o te tino rangatiratanga, te mātāpono o te mana taurite/the principle of equity; and te mātāpono o te whakatika/the principle of redress.

Te Raki Māori were prejudiced by these policies and practices which resulted in extensive loss of land and hapū autonomy, and an insufficient economic base for their future sustenance and development. The long-term legacy was the embitterment of hapū and the undermining of their relationship with the Crown that te Tiriti had embodied.

6.8 Did the Crown's Response to Māori Petitions and Protest Meet its Treaty Obligations?

6.8.1 Introduction

In section 6.7, we noted Bell's assertion, after a hearing at Kororāreka, that Māori had been 'perfectly satisfied' with his rejection of all of their concerns, including those about lands 'sold' by the wrong owners, and the Crown's failure to protect reserves or shared-use arrangements and to return the surplus.[1504] This assertion is doubtful to say the least; it was not corroborated by any other evidence and it was contradicted by subsequent Māori actions, including applications to the Native Land Court, and ongoing petition and protest. Māori discontent over the 'surplus' began as soon as the Crown attempted to seize control of those lands, was unappeased by a number of inquiries in the twentieth century, and has been strongly expressed in this forum.

1504. Bell minutes, 13 October 1857, OLC 5/34 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 691).

Several claimant groups, including Ngāti Hine, Te Kapotai, Ngāti Rāhiri ki Waitangi, Ngāti Manu, Ngāti Rehia, descendants of Pumuka, and hapū of Whangaruru, raised concerns about this issue, in particular focusing on Ōpua,[1505] Kapowai,[1506] Kororipo pā,[1507] Te Manawaroa,[1508] Motukaraka,[1509] and Motumaire and Motuorangi (islands off-shore from Paihia).[1510] These were far from the only areas retained by the Crown as a result of its old land claims and 'surplus' land policy but were the particular subject of claims, petitions, and protests.

Claimants told us that despite Māori protest, the Crown continued to assert ownership of the surplus land and sold much of it to settlers, in so doing putting it beyond recovery. These failures compounded the Crown's earlier breaches in declaring the pre-treaty lands to be permanent sales. After years of delay, the Crown enforced its claim to the surplus, often despite ongoing Māori occupation.[1511] In the claimants' submission, the responses of the Crown, including the various parliamentary commissions that investigated their petitions about these lands, did not adequately address the central issue: that it had not been sold at all. The Crown did not recognise and enforce Māori rights; instead, it forced Māori into compromises and (in the case of the Myers commission) paid inadequate compensation through the inappropriate mechanism of the Taitokerau Trust Board.[1512]

The Crown did not make specific submissions on these particular cases but did defend the performance of the various parliamentary commissions, specifically:

- the Houston commission (1907) which investigated petitions concerning Puketōtara, Kapowai, Ōpua, and Waimamaku no 2;
- the Native Land Claims Commission (1920) which investigated two petitions relating to surplus lands at Kapowai and Puketōtara;
- the Sim commission (1927) which inquired into petitions relating to Puketī (part of Crown purchase of Mokau block), Wheronui, and Motukaraka; and

1505. Closing submissions for Wai 49 and 682 (#3.3.382(b)), pp 29–38; closing submissions for Wai 120 (#3.3.320), pp [19]–[22]; closing submissions for Wai 354 and others (#3.3.399), pp 168–174; closing submissions for Wai 1445 (#3.3.343), pp 11–12.

1506. Closing submissions for Wai 1464 and 1546 (#3.3.395), pp 27–39.

1507. Closing submissions for Wai 492 (#3.3.311), pp 3–12; closing submissions for Wai 1314 (#3.3.396), pp 12–15.

1508. Closing submissions for Wai 1384 (#3.3.286(b)), pp 81–82.

1509. Closing submissions for Wai 549, 1526, 1728, and 1513 (#3.3.297(a)), p 52.

1510. Closing submissions for Wai 2244 (#3.3.326), pp 13–14; closing submissions for Wai 49 and 682 (#3.3.382(b)), p 32; closing submissions for Wai 354 and others (# 3.3.399), p 138; and closing submissions for Wai 1445 (#3.3.343), p 10. The islands were originally awarded to the CMS and subsequently treated by the Crown as surplus. Māori brought a claim to the islands before the land court in the 1940s and were initially awarded title by Judge Acheson but that decision was overturned by the Appellate Court, See Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 952–962.

1511. Closing submissions for Wai 49 and 682 (#3.3.382), pp 33–36; closing submissions for Wai 354 and others (#3.3.399), pp 144, 170.

1512. For criticism of Myers commission, see claimant closing submissions (# 3.3.222), pp 35–37; closing submissions for Wai 2371 (#3.3.327), p 13; closing submissions for Wai 1508 and 1757 (#3.3.330(d)), p 151; closing submissions for Wai 69 and 682 (# 3.3.382), pp 33–36.

- the Myers commission (1946) which inquired into petitions and claims to the Crown's title to surplus lands and which reconsidered the blocks scrutinised by the earlier inquiries.[1513]

In the Crown's submission, the Myers commission was 'in substance, . . . adequate, detailed . . . and principled'.[1514] As a result of its inquiry, compensation of £47,150 4s was duly paid to the Taitokerau Maori Trust Board for all Northland claims, and another £735 10s for Aotea (Great Barrier Island). Counsel made no comment on the adequacy and the appropriateness of this action.[1515]

6.8.2 The Tribunal's analysis

6.8.2.1 *Decades of protest: 1860–1907*

In the wake of the second Land Claims Commission, Te Raki Māori continued to protest the expropriation of surplus lands and sought their retrieval through many avenues, to no effect. Tacit resistance, like the peaceable occupation of land and obstruction of surveys, could no more help them than the Native Land Court process or the lobbying of Government officials, when all responses to Māori claims to Ōpua, Kapowai, Motukaraka, and elsewhere were predicated on the assumption that their interests were long since extinguished and that the Crown's ownership of the 'surplus' was unassailable in law. Māori also approached the Crown directly by means of petitions to the House of Representatives, but most were dismissed with little consideration, the refrain the same: that the lands in question belonged to the Crown.

We turn first to the case of Ōpua. Before the first Land Claims Commission, the Church Missionary Society claimed all the land between Ōpua and Te Tii, an area totalling some 1,700 acres. Māori witnesses pointed out that they occupied much of this land and that their arrangement with Henry Williams provided for their ongoing use. In 1851, the CMS had accepted a grant for a total of 733 acres, including unspecified Māori reserves which the CMS did not subsequently survey. In all, the area between Te Tii and Ōpua contained 'a lot of unextinguished and undefined Maori interests'; indeed, the bulk of this land remained under Māori customary occupation and use.[1516] According to Stirling and Towers, the Bell commission did not look into this question; the commissioner simply assumed that the CMS claim had been settled in 1851, and that the balance belonged to the Crown. Māori continued to live upon on the land for many years, but the Crown ultimately claimed its 'surplus', ignoring the Māori occupation and protest.[1517]

During the 1860s and 1870s, Land Purchase Commissioner Henry Tacy Kemp acknowledged that Māori continued to live on the lands between Te Haumi and Ōpua; and this was also recognised by the Native Land Court in 1868 and 1872.[1518] However, in 1880, the Crown sought to assert its claim on the ground by

1513. Crown closing submissions (#3.3.412), pp 78–80.
1514. Crown closing submissions (#3.3.412), p 82.
1515. Crown closing submissions (#3.3.412), p 83.
1516. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 303–305, 885.
1517. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 304–305, 686, 885.
1518. Stirling, 'Historical Report on Taumarere River' (doc W8), pp 70–71.

attempting to extend the Kawakawa-Taumārere railway through to Ōpua. It also planned to build a town and a deep-water port – these infrastructure plans were aimed at enabling coal shipments from a privately operated Kawakawa mine.[1519] But Māori still claimed rights in these lands, and so began a series of protests. In 1880, the Ngāti Hine leader Maihi Parāone Kawiti attempted to stop the construction but was threatened with a fine.[1520]

In May 1881, Hirini Taiwhanga of Ngāti Tautahi wrote to the Native Minister protesting over the railway and the Crown taking lands between Ōpua and Te Haumi. Taiwhanga, a qualified surveyor, had been sacked by the Crown after he surveyed Ōpua and a number of other contested blocks for Māori. He wrote that Ōpua had never been sold to the CMS, so the Crown had no claim to it; in fact, Māori had entered an agreement with Henry Williams that they would not transfer their rights in the Paihia lands to other settlers. This was a completely different understanding to an outright sale of the land. Taiwhanga therefore asked the Crown to pay for any land taken for the railhead, while also expressing concern about land extending to the low-water mark to be taken for a railway station and wharf.[1521] He later warned that direct action could be taken through occupation of the site if 'you and your government do not devise some means in accordance with the law whereby this long-standing trouble of many years past can be satisfactorily settled'.[1522] The Government rejected his claim for redress and refused to enter into further correspondence.[1523]

Subsequently, Ngāti Hine and Ngāti Manu sent two petitions seeking to have their rights recognised. The first, in September 1881, was signed by Maihi Parāone Kawiti and 40 others and sought a commission of inquiry to examine their grievances about the taking of 'surplus' lands at Ōpua, including foreshore land for the Taumārere-Ōpua railway extension. This, the petitioners said, was land they had always occupied and used, and that the Crown had unlawfully taken twice over,

1519. Stirling, 'Historical Report on Taumarere River' (doc W8), pp 76–77; Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 306, 885. Other witnesses also referred to these developments including Peter McBurney, 'Northland: Public Works and other Takings: c.1871–1993' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2007) (doc A13), pp 213–219; David Alexander, 'Land Based Resources, Waterways and Environmental Impacts' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2006) (doc A7), pp 118–119; and Armstrong and Subasic, 'Northern Land and Politics, 1860–1910'(doc A12), p 938. The Kawakawa Mining Company had been operating since the late 1860s, taking coal by tram or train to Taumārere. The mining operation was settler controlled and Māori saw few benefits. Ngāti Hine Māori had also protested the construction of the tramway from Kawakawa to Taumārere.

1520. Ngati Hine evidence for Crown breaches of te Tiriti o Waitangi, 2014 (doc M24), pp 51–52.

1521. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 888–889; Stirling, 'Historical Report on Taumarere River' (doc W8), p 76. Taiwhanga and Renata Te Pure had interests in Takauere, a block at the Te Haumi end of the peninsula.

1522. Hirini Taiwahanga, Kaikohe, to Minister of Native Affairs, 24 August 1881 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 888).

1523. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 888.

by treating the CMS claim as a sale, and by taking the surplus.[1524] On inquiring into the petition, the Native Affairs Committee denied Māori any further consideration, concluding that 'the Opua land had been purchased by the CMS as part of a larger trust for Maori', and lying as it did beyond the allotted 773 acres, the surplus land was vested in the Crown. The terms of the trust were not considered.[1525] Stirling and Towers argued that, by examining only the evidence heard by the two Land Claims Commissions, 'it was a foregone conclusion that this petition would fail'.[1526]

In the year that followed, Kawiti again sought a forum for their claim, writing a series of letters to ministers. He argued that the land should be placed before the Native Land Court so its true ownership could be determined,[1527] and challenged the Crown to produce his father's signature on a deed for Ōpua.[1528] The question, according to Hare Puataata, was whether 'we are in the wrong, and the pakehas who purchased from our parents are in the right, so that the acquirement of that land by the Government may be free from difficulty'.[1529] James Stephenson Clendon, who was sent by the Government to investigate, was told by one of the Williams family that Māori had sold the land and then occupied it as tenants. This led Clendon to conclude that Kawiti and other senior rangatira had recognised the sale in their lifetime, and that this was 'sufficient to show that the alienation had been complete and that he [Maihi Parāone Kawiti] could not have any real claim to it'.[1530] Phillipson commented, 'Clendon failed to see that the chiefs' recognition of the transaction might have meant something else altogether.'[1531] Explanations and protests were all to no effect. The Crown continued to insist that it owned the land and auctioned much of it off in 1883, so putting it 'completely beyond any claim'.[1532]

The Ōpua example is one of many in which Māori protested against the Crown for taking surplus lands. Rebuffed at every turn, Te Raki Māori nonetheless raised their concerns whenever they could. Although the Rees–Carroll commission of 1891 was in no way focused on this issue, when it sat at Kawakawa on 4 April, Māori seized the chance to voice their grievances regarding Ōpua and other nearby lands. When asked by Commissioner William Rees why he believed the lands should be returned, Te Atimana Wharerau told of their history. Hone Peeti

1524. Ngati Hine evidence for Crown breaches of te Tiriti o Waitangi, 2014 (doc M24), pp 51–52; Stirling, 'Historical Report on Taumarere River' (doc W8), pp 71–73; Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 884–885.

1525. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 884.

1526. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 885.

1527. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 888.

1528. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 175.

1529. Puataata to Bryce, 22 October 1883 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 175).

1530. Clendon to Lewis, Whāngārei, 10 October 1887 (cited in Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 175).

1531. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 175.

1532. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 889.

of Te Whiu also spoke of the loss of Puketōtara (OLC 595) through Crown processes.[1533] Even though the question of surplus lands did not fall under the remit of the commissioners, Rees assured Māori that he would ask for an appropriate inquiry to be made into the claims.[1534]

When the report of the Rees–Carroll commission was published, it contained a section, 'Complaints Against the Government', in which the issue of surplus lands was clearly identified:

> it was stated by many influential chiefs that the government had in the North – especially in the Ngapuhi country, and both on the East and West Coasts – taken land to which it had no right by purchase, cession, or conquest, and dealt with it as Crown lands. The evidence shows that this accusation was made not generally, but with utmost particularity.[1535]

Not only did rangatira identify such blocks in every district but they offered also to 'name very many other cases if the Commissioners desired it'.[1536] Although the Rees–Carroll commission did not ask for an investigation of the matter, their report clearly indicated its need. No such commission of inquiry transpired for many years.

The issue of unextinguished interests in surplus lands was not to fade away but became a familiar topic throughout the 1890s and into the new century. In 1891, Hone Peeti travelled to Wellington to raise the matter with the Government. He met the Minister of Lands, John McKenzie, along with three members of the House of Representatives: James Carroll (Eastern Maori), Robert Houston (Bay of Islands), and Epairama Te Mutu Kapa (Northern Maori). The *New Zealand Herald* reported that 'For many years the native tribes of Whangaroa and the Bay of Islands have had a grievance regarding what are known as surplus lands taken by the Government . . . which they claim belong to them.' They had been 'petitioning the House for a considerable time' on these matters. They 'did not wish to disturb Europeans who were settled on surplus lands by right of purchase from the Government' but wanted an inquiry into their claims, and compensation should they be shown to be valid.[1537] Houston told the meeting that the grievance caused ill feeling, which was regrettable since Māori–settler relations in the north were otherwise amicable. McKenzie responded by promising to visit the north and inquire into the matter more fully, but there is no record of that occurring.[1538]

1533. See John Rameka Alexander (doc H7), pp 7–8.
1534. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 890.
1535. 'Report of the Commission appointed to inquire into the subject of the Native Land Laws', AJHR, 1891, G-1, p xiii (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 890–891).
1536. 'Report of the Commission appointed to inquire into the subject of the Native Land Laws', AJHR, 1891, G-1, p xiii (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 890–891).
1537. 'Parliamentary News', *New Zealand Herald*, 4 September 1891, p 5.
1538. 'Parliamentary News', *New Zealand Herald*, 4 September 1891, p 5.

'We then Found that the Government Claimed the Surplus Land . . .'

'There was a dispute long ago with regard to some land that was handed over by our people to certain Europeans. At that time no surveyors had arrived in New Zealand. At length the Europeans arranged with our old people as to the portion of land they should have and as to the portion that should be returned to our old people. . . . The surveys were made, and a portion went to the Europeans and a portion came to us. But the Government made no such claim to the portion that came to us as they did in subsequent cases, by calling it 'surplus land' . . . nothing was done until 1889 when we again brought the case before the Court and we then found that the Government claimed the surplus land, and we also saw that it was marked as Crown land . . . We have been thinking about and seeking to understand why . . . the Government should take our land from us in this way . . . we have sought and sought hard but are quite unable to discover any reason to justify the Government in what it has done. Therefore we think it is but right that the land that was wrongly included in this purchase should be returned to us. In all the times past we have worked this land, used it, dwelt upon it and leased portions of it and yet now we find there is this trouble about it.'

—Hōne Peeti to Rees Commission, 1891[1]

1. 'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws', AJHR, 1891, G-1, pp 63–64 (John Rameka Alexander (doc H7), pp 7–8).

Māori frustration continued, and in 1894 several further petitions were sent to Parliament. Four dealt with the issue of surplus lands, including one from Reihana Moheketanga and 47 others seeking return of the Ōpua land. The other petitions were from Wiremu Te Teti and 43 others, Rewiri Hongi and 11 others, and Hone Peeti and four others.[1539] While information about their content is scant, they differed from previous letters and petitions in that they asked for 'either the return of the lands, or the payment of compensation for them', not an inquiry.[1540] They were treated as a package by the Government. Reihana Moheketanga's petition, relating to Ōpua and tracts of CMS land nearby, called for 'these lands of ours be returned to us.'[1541] The petition was rejected by Auckland Commissioner of Crown Lands Gerhard Mueller: 'I cannot see that natives can now set up or establish a claim to land so long held by the Crown.'[1542] Not only did the land belong to the

1539. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 896.
1540. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 896.
1541. Typescript of petition of Reihana Moheketanga and 47 others (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 897).
1542. Mueller to Surveyor-General, 28 July 1894 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 897).

Crown but it had already been subdivided. Mueller dismissed another of the petitions the same day because it concerned land at Kapowai that had been acquired by the Crown from the old land claimant, Whytlaw, in 1844, in return for £2,560 in scrip.[1543] Of the 3,000 acres claimed, Mueller noted that 2,170 had been surveyed, though actually no such survey had been completed by the time of the second Land Claims Commission, a circumstance he failed to consider. Rather, he recited Bell's mantra, first circulated in the late 1850s: 'I may add that the younger natives are now persistently setting up claims to Crown land which were sold by the former generation.'[1544]

The 1894 petitions had a better reception once they reached the Native Affairs Committee, which acknowledged that 'these grievances have been of a very long standing' and required settling 'once and for all'. When it recommended that 'a Royal Commission should be appointed to inquire into the allegations set forth in the above petition[s]', it seemed, finally, that Te Raki Māori would get what they had wanted for so long.[1545] Yet another 13 years would pass before the Government acted on this recommendation.

In the meantime, Māori continued in their quest for fair treatment. Taniora Arapata wrote a letter of protest for Whangaroa Māori, listing both Crown purchases and surplus lands in which they had unextinguished rights and interests, among them Waitapu, long considered surplus from one of Powditch's claims. Though presented with 'ample evidence' about the lands by a William Matthews, who assisted in the protest, the official response was dismissive: 'it's no use carrying on the correspondence.'[1546] This did not stop Matthews and others again writing to the Department of Lands, this time about unextinguished rights within Brind's old land claim in the Bay of Islands.[1547]

Puhipi Pene and others likewise attempted to defend their interests at Waiaua (Tākou Bay), mounting a claim in 1897 in the Native Land Court. This land was part of the original Philip King claim (OLC 610–611), subsequently transferred to Eleanor Stephenson. The boundaries had been in dispute since the first Land Claims Commission. Land originally contested by Māori had initially not been surveyed but had later been included by Bell, increasing the total acreage to far more than had ever been claimed or granted.[1548] Also of importance to Māori were the Opiako wāhi tapu and Haimama pā, which had been excluded from the initial grant to King but taken in by the new survey for Bell. Deemed beyond the scope

1543. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 897, 926.
1544. Mueller to Surveyor-General, 28 July 1894 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 897).
1545. 'Reports of Native Affairs Committee', AJHR, 1894, I-3, p 10 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 898).
1546. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 899.
1547. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 899.
1548. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 900–901.

of the Court, given that this no longer concerned customary land, it was again described by officials as 'a very old grievance.'[1549]

Complaints expressed at a local level by Māori about old land claims and surplus lands were met with equally scant attention from officialdom. The press alluded to one such instance in 1893, when Māori wrote to the Crown Lands Office regarding long-standing grievances over land at the mouth of the Whananaki Inlet (OLC 408) which had been claimed by Salmon from the 1830s onwards, and later taken by the Crown as scrip land. In 1893, settlers selected some of the area for a cemetery reserve, even though Māori were still in occupation and assumed themselves to be the owners.[1550] The *New Zealand Herald* remarked: 'It is not considered that their protest will be allowed to stand in the way of the progress of Whananaki.'[1551] The Crown would indeed establish a 10-acre cemetery reserve and an adjacent recreation reserve. As Stirling and Towers observed, 'The two reserves took in most of the peninsula on the south side of the entrance to the inlet. There was nowhere left for Maori.'[1552]

In 1895, Māori were able to address Premier Richard Seddon directly when he visited the north as part of a nationwide tour. There was limited time at the Waimā meeting, and when the complex question of surplus lands was raised, the Premier proposed making a written record of grievances for consideration by Wellington officials, a pen-and-paper approach rejected by Hone Peeti because 'a mere exchange of words' would not do.[1553] Peeti described the numerous attempts by Māori to have long-held grievances addressed regarding surplus land taken from the Puketotara block, of especial importance to his hapū, as his correspondence with the Rees–Carroll commission and petition of 1894 attested.[1554] Objections stretched back to the initial transaction; the case had twice been taken to the Native Land Court; petitions to Parliament had produced unkept promises of action; finally, the claim had been aired at the Rees–Carroll commission. All attempts had failed. Peeti addressed Seddon: 'I think it is only right in the case of this surplus land that the Natives and their descendants should be allowed to participate in them. I want you, as the head of this Government, to give full consideration to the claims of the Natives.'[1555]

1549. Assistant Surveyor-General to Auckland Chief Surveyor, 20 July 1897, and Auckland Chief Surveyor to Assistant Surveyor-General, 20 August 1897 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 900–901).

1550. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 901.

1551. 'Country News', *New Zealand Herald*, 15 November 1893, p 3; Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 901.

1552. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1776.

1553. 'Pakeha and Maori: A narrative of the Premier's trip through the Native Districts of the North Island', 1895, AJHR, 1895, G-1, pp 34–35 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 903).

1554. The Puketotara block is examined in detail by Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 851–2, 936–943.

1555. 'Pakeha and Maori', AJHR, 1895, G-1, p 36 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 905).

Seddon replied that he was unaware of the particulars of the Puketotara block, but promised to investigate the papers further. On the issue of surplus lands in general, he believed the source of the problem to be the 'constant holding over of titles';[1556] in other words, 'the failure to define the extent of unextinguished Maori interests at the time of the first Land Claims Commission'.[1557] Seddon concluded: 'Hence what I urge upon the Natives and Europeans, and all concerned, is that the sooner we ascertain the titles to all the land, the sooner we shall be able to do justice to all parties. You may rest assured I will go into the matter most carefully, because I desire to do what is just.'[1558] This was a significant admission, after decades of official denial, that there might be a grievance to be investigated and addressed.

Hone Peeti again asked for the appointment of a tribunal or inquiry 'to go into the question on both sides'; that is, one empowered to assess the claims of Māori to surplus lands and also to examine the validity of those of the Crown. Peeti asked for an inquiry because the colonial politicians had done nothing: 'It is futile to approach Parliament by way of petition. Nothing comes of it.'[1559] Nothing came of this approach, either.[1560]

Four years on, Te Raki Māori approached Seddon again. The occasion was a meeting in March 1899 at Waitangi, one of several held around the country between representatives of Crown and Māori, primarily to discuss the Government's proposals for land law reform as Māori demands for a separate Parliament grew (see chapter 11). The Governor, Lord Ranfurly, led the Crown party, with Premier Seddon and Native Minister Carroll in attendance. After the welcome and preliminary speeches from both sides were concluded, Ranfurly and then Seddon spoke, unanimous in their message. Māori were advised that Parliament was the forum for settling their claims as '[it] is useless for you to hold meetings year after year regarding grievances that are things of the past, and which cannot now be remedied'. While Seddon assured Māori 'that their appeal to Parliament [would] not be in vain', the outcome would rest on their 'conduct' and abiding by the laws of the country.[1561]

The next day, discussions with Seddon, led first by Hōne Heke Ngāpua, turned to surplus lands again. Heke reminded the Premier that Parliament's Native Affairs Committee had on several occasions recommended inquiries, but none had been held. He therefore repeated the request. Some of the land had since been sold to

1556. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 905.
1557. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 906.
1558. 'Pakeha and Maori', AJHR, 1895, G-1, p 36 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 905).
1559. 'Pakeha and Maori', 1895, AJHR, 1895, G-1, p 36.
1560. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 906.
1561. Notes of meetings between His Excellency the Governor (Lord Ranfurly), the Rt. Hon. RJ Seddon, Premier and Native Minister, and the Hon. James Carroll, Member of the Executive Council representing the Native Race, and the Native Chiefs and people at each place, assembled in respect of the proposed Native Land Legislation and Native Affairs generally, during 1898 and 1899 (Government Printer: Wellington, 1899), p 68 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 908).

settlers, and Māori did not want an inquiry into those lands; however, 'there are still large areas in the hands of the Crown'. Māori believed this land was theirs, since they had never sold it; yet the Crown insisted the land belonged to it; 'therefore it is a claim between two, which should be investigated and settled'.[1562] Hone Peeti also addressed Seddon, reminding the Premier of his 1895 advice to detail any claims in a petition to Parliament, and asking what had come of their earlier efforts to gain redress.[1563]

In reply, Seddon gave the Crown's much-repeated stance on surplus lands, stating that 'the Government would not admit that there had been any error on its part'.[1564] But while Māori had no equitable claim to these lands, Seddon explained that as a response to increasing landlessness among the population, an argument might be possible for their expedient return. In other regions this sort of provision was already being made:

> I think it would be an act of grace on the part of the State if it were to give to the tribes and hapus of those who claim to have given these surplus lands – if they were to give the landless Natives of the different tribes and hapus those surplus lands, if it were possible to allocate them. I will therefore submit your representations to my colleagues.[1565]

Stirling and Towers commented that, at best, this 'act of grace' was 'the strongest basis the Crown was prepared to admit for any Maori claim to surplus land'. In effect, Seddon was denying all Māori claims to the land while 'holding out the prospect that land could be offered as some sort of welfare programme, designed not so much with justice in mind but to relieve the government of the potential burden of landless and impoverished Maori'.[1566] Seddon either misunderstood or rejected the expressions of hapū rangatiratanga on which Māori petitions for the return of land were grounded. Carroll echoed Seddon's view in 1904. Asked by Heke if, as part of a Crown 'stock-take' of Māori landholdings, it would examine whether any Māori had been made landless through the Crown taking surplus lands in Northland, Carroll was dismissive of any Māori claims: 'the appropriation by the Crown does not seem unreasonable'.[1567] In spite of this, Carroll concluded the 'stock-take' would indeed consider 'landless natives', and that 'sufficient areas to cultivate and occupy will be provided for them'.[1568]

By directly approaching the Premier and his Native Minister, Te Raki Māori had elicited undertakings that the Government might be prepared to return a portion of the surplus lands to those in need. In this, their persistent requests for a

1562. Notes of meetings, pp 72–73.
1563. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 909.
1564. Notes of meetings, pp 72–73.
1565. Notes of meetings (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 910–11).
1566. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 911.
1567. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 912.
1568. cited, in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 913.

commission to examine their legal rights to the land had been sidestepped, but after decades of trying to retrieve what was theirs, it must have seemed like a very small step in the right direction.

While Seddon and Carroll were making this minimal promise, civil servants and the courts continued to enforce the Crown's view that it legitimately owned the lands. Several incidents from around the turn of the century support this conclusion. One concerned a large area of surplus land north of Kerikeri Inlet, which the Crown had acquired from the Bateman and Shepherd claims (OLC 59 and 805 respectively). Māori continued to live there after the award was made, but ultimately the land seems to have been transferred into private hands. In 1903, one Kīngi Te Ngahuru was arrested and charged with trespass for occupying the land he had lived on for decades. Hōne Heke Ngāpua raised the issue in Parliament, explaining that the land was 'never sold by his elders'. Carroll promised to enquire into the matter, but there is no record of his doing so.[1569]

The other two incidents concerned intransigence on the part of Crown officials, who were unwilling even to provide Māori with information about the surplus lands.[1570] In 1901, in response to a request by Hōne Heke Ngāpua, the House of Representatives asked the Department of Lands to supply a return showing the specifics of each block of surplus land. The department refused, Under-Secretary William Kensington calling it 'impossible' and citing several dubious reasons. The undoubted logic for refusing is found obscured in the fine print: 'any attempt to comply with the return would only lead to false premises and also lead to a feeling of insecurity of tenure by the northern settlers.'[1571]

Another instance surfaced in 1905, when Native Land Court Judge Herbert Edger wanted to consult a copy of Turton's *Maori Deeds of Old Private Land Purchases in New Zealand* for a hearing into the Rawhiti block which had ties to Clendon's 1830 Manawaora transactions. He had previously borrowed a copy several times from the office of the Auckland chief surveyor, but on this occasion was denied. It had been 'withdrawn from circulation', because 'it is misleading to persons who do not understand the circumstances under which it was completed. Every time natives are allowed to peruse it shoals of petitions follow'.[1572]

Instead, Judge Edger was directed to get the information he wanted from Wellington or to sight the original deeds. He persisted in his attempt to access a copy locally, noting its lack was a costly inconvenience to the Court and all participants in the hearing. The Justice Department responded – inaccurately – that the book contained no information on Clendon's claims.[1573] With the page reference to Clendon's deed to hand, Edger was quick to refute this, prompting an apology

1569. 'Rangitaane Station', 21 October 1903, NZPD, vol 126, p 654; see also Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 901.

1570. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 916.

1571. Kensington to Minister of Lands, 27 May 1902 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 915).

1572. Sheridan minute for Justice Under-Secretary Waldegrave, 25 January 1905 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 916).

1573. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 917.

from the department for its obstructiveness. Nonetheless, Justice Secretary Frank Waldegrave informed the judge that the book would not be made available to anyone: 'we have had and are having so much trouble over these ancient transactions that I have fully made up my mind not to let these mischievous books out of my own possession.'[1574]

6.8.2.2 *Three attempts at remedy: Houston commission 1907, Native Land Claims Commission 1920, and Sim commission 1927*

It was not until 1907 that the official inquiry recommended by the Native Affairs Committee in 1894 was finally convened. Robert Houston was appointed as commissioner to investigate surplus lands north of Auckland that had been the subject of seven petitions. Six blocks were involved: Puketotara, Kapowai, and Opua (in the Bay of Islands); Waimamaku No 2 (a Crown purchase in Hokianga); and Tangonge and Motuopao Island (in Muriwhenua). Houston was tasked with ascertaining whether these were surplus lands; how they had been acquired by the Crown; and which parts, if any, might realistically be returned to Māori. Long a Mangonui local-body politician before becoming a Liberal Party member of the House, and a former chair (from 1891 to 1906) of the Native Affairs Committee, he was no stranger to Māori grievances about surplus lands, among other matters.[1575]

A public notice to announce the commission is revealing of the Government's mindset leading into the inquiry. It stated that petitioners were not contesting the Crown's legal right to surplus lands but merely asked for any remaining surplus to be returned. As Stirling and Towers noted, the shift in focus was interpreted – incorrectly – as 'tacit acceptance by Maori to the government's right to the lands'. Any decision made by the commission in favour of Māori therefore would be 'due to the benevolence of the government',[1576] or as Seddon had put it, an 'act of grace'.[1577] That Houston was instructed to consider not only the claims to surplus lands but also the circumstances of Māori inhabiting them likewise speaks to the prevailing attitude of Parliament.

Nonetheless, the Houston commission represented a milestone: the first opportunity in more than a generation for Māori claims regarding surplus lands to be heard – which they were at Russell, on 17 May 1907. It is worth noting that the evidence of all the petitions was presented in a single packed day, which suggests an inquiry of limited remit and resources.

Hone Rameka was spokesperson for the Puketotara block. Like the petitioners for the other blocks, he outlined its history to Houston. He described the initial transaction with Kemp (see section 6.7.2.4), the ensuing boundary dispute, the following Native Land Court hearings, and then the additional boundary problems, this time with Shepherd's claim. He advised that, although it was deemed to be

1574. Waldegrave to Edger, 30 January 1905 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 918).
1575. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 914.
1576. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 918.
1577. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 914.

Crown land, the Te Mata block had been continuously occupied by Māori until they had been finally forced off when the Government had subdivided it.[1578]

Kereama Hori and Henare Keepa presented the evidence about the Kapowai block and its ongoing occupation by Māori. Kereama Hori explained that the land had never been sold, and that the Crown's claim to it only became evident on the death of his father. Keepa, too, believed the land, with its wāhi tapu and cultivations, still belonged to Māori, stating that the hapū did not 'understand how the land was taken.'[1579] He estimated the area to be 3,000 acres, although there had been no survey, and while there had been transactions with his tūpuna prior to 1840, Māori could identify these, such as that with Cook for the land named Pahiko, and that with Greenway for Ōhua. He further enumerated Stephenson's 800 acres, and the sales of Opa to the Crown and Taikapukapu to Cook.[1580]

Riri Maihi Kawiti, Horotene Kawiti, and Te Atimana Wharerau submitted evidence regarding the Opua block. According to Riri Maihi Kawiti, the land had been occupied by Māori until some 30 years before, when the Government had taken possession of it for the construction of a railway extension, wharf, and township. Kawiti identified sites of customary use in the block and named people associated with them: Tuakainga, a seasonal fishing kāinga, occupied by Wiki te Ohu and Toheriri; Maraeaute, a papakāinga; Waipuna, near Ōpua wharf, by the railway; and Ongarumai, a papakāinga, also near the railway line.[1581] He explained how the land from Ōpua to Te Haumi had never been alienated by their tūpuna, and that the boundary of the original transaction with the CMS (disputed and then redefined by his grandfather, Te Ruki Kawiti) stood; therefore, Māori had retained possession of the land outside the CMS grant.[1582]

Horotene Kawiti agreed that the land had always been theirs, though he understood the CMS rather than the Crown had taken it, and the boundary line he quoted was marginally different. He mentioned that Maihi Parāone Kawiti, in the late 1870s, had asked the Native Minister, John Sheehan, to return the land, but this request had fallen on deaf ears. He wanted to know how the Crown came to own the land when it was never gifted to the CMS to begin with.[1583] Te Atimana Wharerau, too, described his knowledge of the boundaries of the land over which his forebear, Maihi Parāone Kawiti, had protested. He asked whether the Crown had told Māori lies to get the land, or had confiscated it.[1584]

Irrespective of minor inconsistencies, all the witnesses gave clear evidence to Houston that their tūpuna had never willingly parted with the whenua. This was at complete odds with the very scope of the commission, set up, as it was, to

1578. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 919–920.
1579. 'North of Auckland Surplus Lands, Minutes of evidence', 1907, AJHR, 1907, C-18, p 4.
1580. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 920.
1581. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 921; closing submissions for Wai 354, Wai 1514, Wai 1535, and Wai 1664 (#3.3.399), p 172.
1582. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 921.
1583. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 921–922.
1584. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 922.

investigate which of the surplus lands might be returned to them benevolently. Indeed, Houston's decision echoed Seddon's words:

1. That in some of the lands mentioned . . . there are portions of 'surplus lands' undisposed of by the Crown;
2. That there are landless Natives residing in the locality of such 'surplus lands';
3. That, without prejudice to the Crown's legal right to such 'surplus lands', it would be an act of grace on the part of the Crown to confer portions of such lands on—
   a. The landless Natives; or
   b. On those who but for the alleged sales would have been the owners, according to Maori custom, of such lands; or
   c. On both.[1585]

Houston's use of the term 'alleged sales' is noteworthy, and paradoxical. As Stirling and Towers remarked, 'for any surplus to exist such transactions would have to be valid, not merely alleged'.[1586] Houston's slimline commission had delivered what his party leader, Seddon, had wanted: a decision that did not undermine the Crown's claim to legal ownership of the surplus land but nonetheless addressed Māori grievances by recommending that some of it be returned as an 'act of grace'. Houston suggested that legislation be introduced to implement his decision to return lands to the landless and to customary owners, with the Chief Judge of the Native Land Court acting as the final adjudicator – but no legislation was introduced, nor any land returned. In the end, the commissioner singled out just one tract of land from the other claims, in the Tangonge block in Muriwhenua, because it had been given back to Māori by the settler concerned.[1587]

Why the Government did not follow through with Houston's recommendations is not readily apparent. The intransigence of officials, who were indifferent to Māori land issues generally, may have contributed. Problems in awarding grants to landless Māori in the South Island had perhaps coloured Crown thinking. Or maybe the Stout-Ngata commission that followed soon after, and was charged with identifying Māori lands that could be opened for sale and lease, was a distraction. In any event, the idea of setting aside parts of surplus lands for Te Raki Māori in Northland as an act of benevolence missed the main point of grievance and the strong desire of hapū to have the lands lost by reason of the old land claims process returned to them. The issue of unsold and surplus lands remained alive for Te Raki Māori, who continued to agitate for their claims to be addressed by an inquiry.

Their next opportunity was at the Native Land Claims Commission in 1920. Appointed on 8 June of that year to inquire into 11 matters arising from petitions and claims received by the Government, including the question of surplus lands, it was headed by Native Land Court Chief Judge Robert Noble Jones, assisted by the

1585. 'Report of R. M. Houston, North Auckland Surplus Lands', 1907, AJHR, 1907, C-18, p 1.
1586. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 923.
1587. 'Report of R. M. Houston, North Auckland Surplus Lands', 1907, AJHR, 1907, C-18, p 1.

former Surveyor-General John Strauchon and the Ngāti Maniapoto leader John Ormsby. This was the first occasion, since 1840, when a Māori was given any sort of power of determination on this issue. Two of the petitions under consideration, relating to the Kapowai and Puketotara blocks, were of relevance to our inquiry district.

The petition in respect of the Kapowai block had been presented by Kereama Hori and 20 others in 1917.[1588] The commission acknowledged the discord to be longstanding, dating from pre-treaty transactions which, according to the Crown, had resulted in the land becoming surplus, while Māori claimed it should never have been classified as such. Edward Bloomfield represented the claimants, first providing an account of its history. Situated on the south side of the Waikare Inlet in the Bay of Islands, the 2,075-acre area had been subject to the four historic land claims of Cook and Day, Greenway, Whytlaw, and Wood.[1589] In the case of all, early Māori interests relating to the claims were a matter of record, thanks to evidence heard at the first and second Land Claims Commissions.[1590] A few years on, the Native Land Court had awarded land from the block to Māori: Taikapukapu in 1866, Opa in 1867, Manukau in 1868, and Kohekohe in 1870.[1591] It was not until the 1890s that the Crown asserted its claim to the Kapowai surplus lands when it leased out an area from Whytlaw's claim, which it had exchanged for scrip, triggering protest from local Māori. After Wiremu Te Teeti and others had petitioned Parliament in 1894, an inquiry to address their claims was recommended but when one was finally appointed, it was the unsatisfactory Houston commission of 1907 which had provided no redress for the loss of Kapowai. All of this had led to the petition of 1917, under consideration by the 1920 commission. From this complexity, Bloomfield specified the Crown's dealings over the Whytlaw claim to be the root of the grievance, arguing that the Crown had not established its boundaries. Supporting evidence was given by Pou Werekake, Pene Rameka, and Wiremu Hori, a repeat of that given by Kereama Hori and Henare Keepa before the Houston commission in 1907.[1592]

Although the commission initially favoured the return of most of the land claimed by Māori, it was not to be. The commission reported that, in the three years between the petition being sent and the commission sitting, the Crown and Māori had reached a compromise. Under this deal, each would keep a part of the land – the Māori portion comprising 1,099 acres. It emerged that Māori also sought a 50-acre area known as Ohinereria within the Crown's portion, as this contained an old kāinga, and instead of an exchange, the commission recommended that it be returned as well, as an 'act of grace'. Section 81 of the Reserves and other Land Disposal and Public Bodies Empowering Act 1920 fulfilled the

1588. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 925.
1589. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 926. For details of these claims see Berghan, 'Northland Block Research Narratives' (doc A39(a)), pp 103–107, 138–142, 317–319, 338–340.
1590. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 926–933.
1591. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 933.
1592. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 934.

recommendations, designating 850 acres as Crown land, of which no more than 50 acres at Ohinereria would be considered Māori land.[1593]

The commission also considered a 1918 petition from Hone Peeti and others on behalf of Ngāi Te Whiu over the Puketotara block.[1594] This was part of a much larger transaction between Ngāi Tāwake and Kemp in 1835. The 4,644 acres at issue had been surveyed as the Te Mata block by its Māori owners in 1872 and represented approximately a quarter of the area covered by the Puketōtara old land claims (see section 6.7).[1595] As with Kapowai, the commission heard evidence about the history of the land and its treatment by the two Land Claims Commissions. The details were no different to those Hone Peeti had presented to Seddon in 1895, and then reprised by Hone Rameka at the Houston commission in 1907. The Puketotara (Te Mata) block had been excluded from Kemp's 1857 survey of his claim because of a deal struck with Ngāi Te Whiu, but Bell, basing his decisions solely on evidence brought before the original commission, had dismissed all objections, declaring that 'it would be taken possession of for the government; as it could not for a moment be allowed that a claimant should return to the natives any portion of the land originally sold.'[1596]

Bell, however, had taken no steps to formalise the status of the land by survey, and it had continued to be occupied by Ngāi Te Whiu. Some 60 years after the second Land Claims Commission, when Ngāi Te Whiu presented the same evidence to the 1920 Native Land Claims Commission, it was to quite different effect. The latter concluded that the Crown itself had some doubt about its claim to the land, whereas the claims of Māori had remained consistent.[1597] Despite questioning the Crown's title, and despite its positive reception of the Ngāi Te Whiu claim, the result was another compromise deal. Puketōtara would be divided using a road as a boundary – land to the west would return to Māori, while land to the east would remain with the Crown. As with Kapowai, the Reserves and other Land Disposal Act enacted the arrangement. Māori ownership of the land was settled by the Native Land Court, which awarded it to Ngāi Te Whiu in 1921, in the face of a claim by Ngāi Tāwake.[1598]

It is evident that the Native Land Claims Commission of 1920 saw a shift in the Crown's thinking about surplus lands. Seddon had insisted that the Crown was their rightful owner while proposing that some lands be returned by 'act of grace', and the Houston commission had endorsed this approach. But the 1920 commission questioned the Crown's legal ownership, and its recommendations acknowledged that Māori title to some of the surplus lands may not have been extinguished. All the same, the Crown retained substantial areas at Kapowai and

1593. 'Native Land Claims Commission', AJHR, 1921, G–5, pp 5–6; Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 935.

1594. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 925.

1595. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 936.

1596. Bell, memorandum, 26 March 1858, OLC 1/595 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 939).

1597. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 940.

1598. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 940–942.

Puketōtara. As Stirling and Towers argued, 'In this light, the compromise deals look more like the acts of grace proposed by Seddon and Houston, than the result of the Commission (let alone the Crown) accepting the validity of the Maori claims to their lands.'[1599]

The Royal Commision on Confiscated Lands (Sim commission) of 1927 was the next opportunity for Ngāpuhi and other northern Māori to have their claims heard. Primarily appointed to investigate grievances arising from confiscations that occurred during the New Zealand Wars, it was also mandated to inquire into a schedule of petitions, three relating to surplus lands, while a fourth concerned a pre-emption waiver claim from John Maxwell pertaining to the Okahukura block. The Supreme Court judge, Sir William Alexander Sim, was appointed to chair the inquiry, assisted by Legislative Councillor and former Bay of Islands member Vernon Reed, and the Ngāti Kahungunu leader William Turakiuta Cooper.[1600]

The commissioners were instructed to 'inquire into the claims and allegations made by the respective petitioners . . . so far as such claims and allegations are not covered by the preceding terms of this Commission and to make such recommendation thereon as appear to accord with the good conscience and equity in each case'.[1601] Petitions were considered from Patu Hohaia and others in respect of the Puketi block (part of Orsmond's OLC 809) in the Whangaroa Forest survey district;[1602] Hemi Riwhi and another unnamed petitioner in respect of the Wheronui block (part Crown purchase; part Kemp's OLC 599–602) in the Kāeo survey district;[1603] and Hone Hare and others of Ngāi Tūpoto in respect of the Motukaraka block in Hokianga.

A limited inquiry, the Sim commission produced predictable results. In the case of the Puketī petition, it considered only evidence from Bell's report and dismissed the claim; it declared Māori title to the Wheronui block as long gone; and as for Motukaraka, in the absence of better information, it adopted the report of the first Land Claims Commission. The thinking harked back to earlier investigations, where the claims to surplus lands by Te Raki and other Northland Māori were denied because of the Crown's fixed stance that Māori interests were extinguished by the original transactions.

6.8.2.3 *Disputed ownership at Kororipo*

In the early 1930s, Māori at Kerikeri began to express concern about Kororipo as a result of increasing commercial activity there. The pā site was part of a property originally awarded to the missionary James Kemp but had passed through several hands subsequently – Williams, Bull, and Riddell; and then the North Auckland Development Company (NADC), from whom it was purchased by Edward Little of

1599. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 942.
1600. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 943.
1601. 'Report of the Royal Commission to Inquire into Confiscation of Native Lands and Other Grievances Alleged by Natives', 1928, AJHR, 1928, G-7, pp 1–3.
1602. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 944–945.
1603. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 946–947.

Petition of Patu Hohaia and others, 14 July 1925

To the Honourable Speaker of the House of Parliament

Greetings to you all.

1. This is a Petition from us in regard to Puketi Block situated in . . . Whangaroa Forest District containing 1919 acres which was surveyed in 1857. This land belongs to the Maoris exclusively. We do not know how the Government acquired this land,

2. The timber has been sold to the Kauri Timber Company, Auckland.

Wherefore your Petitioners humbly pray that the Native Land Court be empowered to hold an enquiry whereby relief may be obtained for the injustice which has been inflicted upon us.[1]

1. Stirling and Towers document bank, 'Not with the Sword but with the Pen' (doc A9(a)), vol 5, p 2590a

Kingston Orchards Ltd.[1604] What had finally led local Māori to question the Crown about the title in 1932 was Little's installation of a tenant, Nordstrand, on the land in a new building under the auspices of the Unemployment Settlement Scheme.

In December 1932, in a letter written on his behalf by a Mr Clinton, Henare Kingi Te Rangaihi, the son and successor of the late Kingi Te Rangaihi of Ngāti Tautahi, alerted the Native Department of the situation. Clinton's words read: 'Kingi and his people are anxious to place the position of the Kororipo Pa before you and pray that you will take such steps as will have this historic property preserved for all time as a monument to its founder Hongi Hika whose principal stronghold it was.'[1605]

Henare Kingi understood where the boundaries of the 13-acre property lay from his father and had previously protested its inclusion in the sale of land by Riddell to the NADC, to no avail. The letter further noted that the 'Misses Kemp of Kerikeri', descendants of James Kemp, held letters 'which will no doubt prove the right and title of the Ngapuhi to this land'.[1606] While there was no desire that the land be put to 'tribal use', offense had been caused by the 'present mercenary fashion' in which it was being handled. Specific mention was made of the erection of the 'standard cottage'. The letter concluded: 'I feel sure I state the feelings of the Ngapuhi correctly in saying that they are much incensed and are most anxious to

1604. Bennion, 'Kororipo Pa' (doc E7), p 23.
1605. Bennion, 'Kororipo Pa' (doc E7), p 23.
1606. Bennion, 'Kororipo Pa' (doc E7), p 23.

have this desecration of their ancient places stopped and the property taken over and cared for by the Government.'[1607]

Charlotte Kemp, the granddaughter of Kemp and 'an old and respected resident of Kerikeri', had already taken her views about the new cottage ('a most exceptionally unsightly shack') to the top, writing a letter of complaint to the Governor-General after getting no action from several Government agencies.[1608]

In February 1933, Henare Kingi te Rangaihi presented the history of Kororipo pā as handed down to him by his father and kaumātua. The long life of Kingi Te Rangaihi – an estimated 98 years – had encompassed much knowledge, starting with memories of occupying the land as a boy. He had said that the pā and church site were excluded from the Kerikeri lands sold to the CMS and that along with other chiefs, he had arranged for the land 'to be set aside.'[1609] But when the NADC began planting trees on the site, his father had begun to 'suspect that something had happened to the land'. The NADC had also broken down the boundary fence he had erected.[1610]

W M Cooper, a Consolidation Officer from Whāngārei, was deputised by the Native Department to investigate. In February 1933, having seen the site and its building, now leased to Nordstrand, and having interviewed Miss Kemp, Mr Clinton, and Henare Kingi te Rangaihi, he reported on the various accounts of ownership of the land. While citing the pre-treaty purchase of land by the CMS, OLC 34, Cooper related that for Māori, Kororipo pā had been specifically excluded from sales 'owing to the fact that it was Hongi Hika's Pa and at the time subject to Tapu'. Miss Kemp's view, however, was that her grandfather had at some point held it, as why else would he have once negotiated with the Crown to exchange it for another parcel of land? That said, Miss Kemp had told him that 'the older Natives have always stated to her that the area in question was never sold'. Cooper also reported that both Miss Kemp and Mr Clinton, fearing defacement of the pā, advocated its preservation by purchasing the land from Little, its present owner. He was certain of its historical value, 'located as it is in close proximity to the old Kerikeri station, the present home of the Misses Kemp.'[1611]

Just as the accounts reported on by Cooper reflected some common ground between Māori and settler versions of the history of the land, so did a letter from Tamati Arena Nepia to the Native Minister in March 1933. The land had been 'handed down by our ancestors for a landing place when they sold Keri Keri to the Missionaries,' he wrote; and additionally: 'I am very clear about this land and so are the daughters of Hunia Keepa and so too some of the old settlers.'[1612] In reply, the Native Minister explained that the land was vested in Little, but that 'The

1607. Bennion, 'Kororipo Pa' (doc E7), p 23.
1608. Bennion, 'Kororipo Pa' (doc E7), p 22.
1609. Bennion, 'Kororipo Pa' (doc E7), p 23.
1610. Bennion, 'Kororipo Pa' (doc E7), pp 23–24.
1611. Bennion, 'Kororipo Pa' (doc E7), p 24.
1612. Bennion, 'Kororipo Pa' (doc E7), p 25.

matter has been referred to the Scenery Preservation Board to see if they can get it back again.'[1613]

It seems that Hone Rameka (Ngāti Rēhia) of Waimate had made a similar approach in April to the registrar, who likewise explained that the land was legally Little's and as such 'impossible for the Court to set it aside as a Reservation.'[1614] Eru Pou, on behalf of Rameka and others, responded, asking to have the Kororipo case presented at the Native Land Court, with a view to reserving the pā site 'for all Ngapuhi people.'[1615] The registrar conveyed this to Judge Acheson, who agreed that there was a grievance to address, yet nothing transpired, possibly because Little was overseas. An inter-departmental letter, in January 1935, noted Little as 'sympathetic towards the proposal, but is of opinion [*sic*] that the Pa has been too much knocked about by cattle to be of any value for reservation'. Department of Lands and Survey inspections supported the view. Reconstruction of the pā would be too expensive. The Scenery Preservation Board agreed and therefore, no further action was proposed.[1616]

A hearing to inquire into the title of Kororipo pā finally began in Kaikohe on 22 August 1935, having been adjourned there from Russell for the convenience of affected Māori. They believed that Kororipo continued to belong to them, but that understanding was now shaken, especially with the erection of the building. Witnesses recited the history and significance of the site, the 'biggest and most important Pa of the Ngapuhi tribe', according to Hone Rameka; the place from which Hongi Hika's war parties departed, and Hongi Hika and Waikato's departure point for England; a burial place that had 'never been sold to Europeans.'[1617] Rameka disputed Kemp's purchase of the land from Hongi Hika; it was not possible, as the great Ngāpuhi leader had died in 1828 – a notion to be perpetuated by Acheson – though it was Hare Hongi, Hongi Hika's son, who was the likely signatory at the 1838 transaction.[1618] Two other witnesses gave evidence attesting to the pā's significance, supporting that of Rameka.

Next T P Mahony was heard – a representative of either Little or the Crown; his precise status is unclear – who argued that as the pā was European-owned land, it was not a matter for the Court. Furthermore, a reservation had not been discussed when the land was purchased, nor issues of 'Tapu', and neither had Māori interrupted the survey.[1619]

Consolidation Officer Cooper, however, restated his findings of three years earlier, that 'Miss Kemp, grand-daughter of Rev Kemp, told me she understood this land had never been sold by Hongi.'[1620] Despite a prevailing settler narrative

1613. Bennion, 'Kororipo Pa' (doc E7), p 25.
1614. Bennion, 'Kororipo Pa' (doc E7), p 25; see also fn 145.
1615. Bennion, 'Kororipo Pa' (doc E7), p 25.
1616. Bennion, 'Kororipo Pa' (doc E7), p 26.
1617. *Kororipo Pa* (1935) 14 Bay of Islands MB 161 (cited in Bennion, 'Kororipo Pa' (doc E7), p 26).
1618. Bennion, 'Kororipo Pa' (doc E7), p 26.
1619. *Kororipo Pa* (1935) 14 Taitokerau MB 236 (Bennion, 'Kororipo Pa' (doc E7), pp 26–27; see also fn 155).
1620. *Kororipo Pa* (1935) 14 Taitokerau MB 236 (Bennion, 'Kororipo Pa' (doc E7), p 27).

where the land was properly purchased from the outset, prominent and respected Kerikeri residents lent credence to the view of Māori.

As for Judge Acheson, he found it 'amazing' that Māori 'ever allowed (if they did so in fact allow??) so historical a Pa to be sold or to remain unclaimed by them for so long'. Agreeing with Rameka's argument, he found that Hongi Hika could not have sold the site to Kemp and noted 'other peculiar circumstances' that also warranted a court inquiry. Of Little, the current owner of the land, he declared him a person who 'might respond to an appeal by the Natives'.[1621]

Accordingly, the registrar wrote a detailed memorandum to the Under-Secretary of the Native Department on 7 October 1935 laying out the evidence brought before the Kaikohe sitting, notably the importance of the site to Ngāpuhi; their continued use of the pā 'at various times' until its occupation by Little; the continuing assertion of Ngāpuhi leaders that the pā had never been sold; and the discrepancy between Hongi Hika's death and the date of the deed. When the claim had come before the Land Claims Commission, the registrar noted, 'There was no mention of any Reservation for the Kororipo Pa.' The memorandum continued: 'They also want to know how it was that OLC 273F became merged in OLC 34 and so practically submerged and merged the identity of the 13 acres [in fact six acres] reserved for the Pa. They want the matter investigated.'[1622]

He related Judge Acheson's suggestion to deal with the issue in the next parliamentary session by inserting a clause in the Native Purposes Bill 'authorising the Native Land Court to hold an Inquiry and to require the production of old records for inspection by the Court'. He concluded: 'The Court stresses the fact that the loss of this particular Pa has been a matter of much concern to the Ngapuhi for many years past, and that if anything is to be done on behalf of the Natives it should be done this year before Mr Little effects costly improvements.'[1623]

On 26 November 1935, Little, on behalf of Kingston Orchards Ltd, wrote an amenable letter to Judge Acheson outlining a nine-point proposal regarding the future of Kororipo '[in] order to show our willingness to meet Maori opinion and to promote good feeling between ourselves and the Maori community'. While the land would remain in its present ownership, the company would set aside the site of the pā and its approaches 'as a memorial'. In return, Māori would find the funds to reconstruct its palisades and whare and to plant the site, and so create a 'place of scenic beauty' under the aegis of a representative committee. Compensation for Nordstrand would be the Government's responsibility. The deal was conditional: 'The arrangement shall continue so long as the Maori community is sufficiently interested to find funds necessary for the upkeep of the area. When this ceases the

1621. *Kororipo Pa* (1935) 14 Taitokerau MB 237 (Bennion, 'Kororipo Pa' (doc E7), p 27).

1622. BAAI 1030/102a 9/2/30fpl (National Archives Auckland) (cited in Bennion, 'Kororipo Pa' (doc E7), pp 27–28).

1623. BAAI 1030/102a 9/2/30fpl (National Archives Auckland) (cited in Bennion, 'Kororipo Pa' (doc E7), p 28).

Company will resume its own direction of the area and whatever of the Pah may remain.'[1624]

After dialogue with the Native Department, Judge Acheson was entrusted to put the proposal to Māori. In June 1936, at a sitting of the Māori Land Court in Kaikohe, the offer was heard. Hone Rameka responded with a restatement of the reasons the site was so significant and he again challenged the 1838 sale. With regard to Little's offer, he said it had been received favourably; that Māori would indeed undertake to clear and rebuild the pā.[1625] In a memo to his registrar, Acheson confirmed approval of the draft as 'a suitable basis for negotiations for a friendly solution of the problem', but he considered a site inspection with Little necessary to work through some details. Little was then in China.[1626]

Though progress was made with the removal of the lessee Nordstrand from the land, it was stymied by the absence of Little, who remained abroad till at least March 1937,[1627] only to return briefly and then depart again by the following month. By June, it seemed his son would act in his stead.[1628]

It was not till early 1938 that the reservation of Kororipo was brought before the Native Land Court. By then, the idea of developing 'a replica of Hongi Hika's famous pa' had become associated with the upcoming centenary of the treaty; it was suggested as a contribution Ngāpuhi could make to the celebrations,[1629] along with building a waka. On 31 January, Hemi Whautere informed the Court that after consideration by 'a large and representative gathering', Little's plan had been accepted. Member of Parliament Tau Henare was then nominated as the Māori representative on the 'Pa Committee'.[1630]

Judge Acheson provided the Native Department with a copy of the draft clause on 24 August for its incorporation into the Native Purposes Bill, describing it 'as a means of putting the arrangements for the Pa upon a footing worthy of its importance to the Maori people and to New Zealand'. He explained that there had been no objections to the proposal from the Europeans, who asked for no compensation, and that the process of obtaining formal consents for the land and its access was underway. He was keen to see work commence on clearing gorse and preparing the earthworks and palisades, given the imminent centenary.[1631] Acheson noted that he would also send the clause to Tau Henare: 'It is on the lines already

1624. BAAI 1030/102a 9/2/30fpl (National Archives Auckland) (cited in Bennion, 'Kororipo Pa' (doc E7), p 28).

1625. Bennion, 'Kororipo Pa' (doc E7), p 29.

1626. 6 July 1936 BAAI 1030/102a 9/2/30fpl (National Archives Auckland) (cited in Bennion, 'Kororipo Pa' (doc E7), p 29).

1627. Bennion, 'Kororipo Pa' (doc E7), p 30; see also fn 174.

1628. Bennion, 'Kororipo Pa' (doc E7), p 30.

1629. 21 January 1938, BAAI 1030/102a 9/2/30fpl (National Archives Auckland) (cited in Bennion, 'Kororipo Pa' (doc E7), p 30).

1630. *Kororipo Pa* (1935) 16 Taitokerau MB 241–242 (cited in Bennion, 'Kororipo Pa' (doc E7), p 30).

1631. BAAI 1030/102a 9/2/30fpl (National Archives Auckland) (cited in Bennion, 'Kororipo Pa' (doc E7), p 31).

agreed to by him and by the assembled leaders of Ngapuhi.'[1632] Reflecting Little's proposal, the draft legislative clause additionally contained administrative details about the operation of a 'Koropiro Pa Fund' through the Tokerau District Maori Land Board and identified that for access to the site, some land would need to be given up by neighbouring property owners.

On 24 August 1938, Judge Acheson sent the clause to Wellington, as well as a request for funding to clear up the site, only to learn from the Native Minister that Parliament was tied up with other business. It was not until 21 May 1939 that the departmental Under-Secretary responded to the letter with the news that the draft clause had been received too late to be included in the Native Purposes Act 1938 but would be heard in the next parliamentary session; and that, regrettably, the relief fund could offer no financial aid for the pā.[1633]

In spite of this pessimistic timetable, headway was clearly made, and the draft clause was enacted. On 6 December 1939, a Native Land Court hearing in Rāwene made an order pursuant to section 8 of the Native Purposes Act 1939 to declare that the six acres of Kororipo be reserved as a place of historical interest and that the land be vested for an estate in fee-simple in the Kororipo Pa Board.[1634] On 22 January the following year, Acheson informed the Kerikeri Settlers Association of the Court's proceedings, including details of marking off the access road and the election of the three-person Pa Board, namely the judge himself, Minister of Parliament Paraire Paikea, and Mrs Little.[1635] The same day, he alerted the Native Department of developments, noting that the Pa Board 'will also seek always the co-operation and advice of Mr Hone Heke Rankin and the chiefs of Ngapuhi.'[1636]

All good intentions for the redevelopment and maintenance of Kororipo pā under the management of a representative board were thwarted, however. The first two annual reports (for the years ending 31 March 1940 and 1941) recorded no progress in clearing the gorse, the necessary first step. Māori lacked the funds to do so, while Acheson's plan to get unemployment assistance was met unsympathetically by the Native Minister, who served the judge a lesson in how accountability around 'free Government moneys' worked in the department: 'There is little use clearing gorse if it is to be left to grow again.'[1637] The relationship between Acheson and the Native Department became increasingly acrimonious and personal, with the former claiming that 'the Native Dept throttled the whole project out of hostility to myself as the medium through whom the Ngapuhis and Mrs Little saw fit to move.'[1638]

The situation stagnated until early 1947, when a call was made for the land to be returned to its Pākehā donors. Representatives of all interested parties met to

1632. Bennion, 'Kororipo Pa' (doc E7), p 31.
1633. Bennion, 'Kororipo Pa' (doc E7), p 33.
1634. Bennion, 'Kororipo Pa' (doc E7), p 33; Native Purposes Act 1939, s 8.
1635. Bennion, 'Kororipo Pa' (doc E7), p 33.
1636. BAAI 1030/102a 9/2/30fpl (National Archives Auckland) (cited in Bennion, 'Kororipo Pa' (doc E7), p 33).
1637. Bennion, 'Kororipo Pa' (doc E7), p 34.
1638. Bennion, 'Kororipo Pa' (doc E7), p 34.

consult on 13 May. Among the minutes were recorded remarks of some condescension from Judge Pritchard, Acheson's successor, about the pā: 'Judge pointed out pros & cons, the difficulties – never c[oul]d be used as Maori village – Hongi left many more famous places, This was not scene of triumph etc.'[1639]

The stalemate dragged on, with lack of Māori financial capacity at its heart, until a proposal was made in 1948 to vest the property in the council as a domain board. Kingston Orchards finally agreed to this course in September 1952, but the plan was never executed. In 1965, Edward Little's daughter sold the land to the Veale family who began developing it, resulting in protest and the formation of a local society which went on to purchase the site, assisted slightly by the Government. The reserved land finally was transferred to the Crown and to the administration by the Bay of Islands Maritime and Historic Park in 1970.[1640] Issues relating to the subsequent management of the pā and calls led by Ngāti Rēhia[1641] for its return will be discussed further in our part 2 report in relation to wāhi tapu and the Department of Conservation.

6.8.2.4 *The 1946 Royal Commission into Surplus Lands (Myers commission)*

With neither the Houston commission of 1907 nor the Sim commission of 1927 yielding outcomes wanted by Te Raki Māori, they continued to agitate for another inquiry into their claims to the surplus lands. On 6 February 1940 at Waitangi, at the celebration to mark the centenary of the treaty, Āpirana Ngata addressed the gathering about the longstanding sense of 'unremedied grievance' around the issue. Representing the Prime Minister, Michael Savage, at the event, acting Prime Minister Peter Fraser promised a full inquiry.[1642]

Māori would have to wait until the post-war years before this promise was kept. To use its full title, the 'Royal Commission to inquire into and report on claims preferred by members of the Maori race touching certain lands known as surplus lands of the Crown' was appointed in October 1946, but it was commonly known as the Myers commission, after its chairman, Sir Michael Myers, a retired chief justice. An acclaimed career lawyer with a wealth of experience, he could be perceived as impatient and arrogant. Early in his career, his great mentor was his law partner, Francis Bell, son of the influential second land claims commissioner.[1643] Also appointed was Albert Moeller Samuel of Auckland, a retired ex-member of Parliament; and Hanara Tangiawha Reedy, a Ruatoria farmer and Ngāti Porou leader.[1644]

The terms of reference acknowledged the history of Māori grievances regarding surplus lands:

1639. Bennion, 'Kororipo Pa' (doc E7), p 36.
1640. Bennion, 'Kororipo Pa' (doc E7), p 40.
1641. See Nora Rameka (doc R17 (b)), pp 4, 10–11, 17–20, 41–42, 44.
1642. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 955.
1643. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 963.
1644. Michael Nepia, 'Muriwhenua Surplus Lands; Commissions of Inquiry in the Twentieth Century', 1992 (doc E39), p 38; Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 963–964.

> And whereas in and by petitions to Parliament and otherwise members of the Maori race have from time to time claimed and contended that the surplus lands should have reverted to the members of that race who would but for the purchases, gifts, conveyances, or other agreements aforesaid have been the owners thereof according to their customs and usages or to their successors by Native title.[1645]

Though 'the Government has not admitted such claims and contentions as aforesaid', it wanted Māori to be afforded 'an opportunity of pleading and proving the justice and merit of their claims and contentions to the end that if those claims and contentions are well founded in equity and good conscience the General Assembly may be enabled to consider what relief (if any) should be accorded or granted to them.'[1646]

The commissioners were instructed to:

- inquire (both 'in a general way' and with respect to specific claims) into how lands came to be claimed by the Crown as surplus;
- report on whether, as a matter of 'equity and good conscience', the lands should have remained in or been returned to Māori ownership;
- make recommendations for compensation 'in money or money's worth' to the descendants of the original owners of any lands that should have remained in Māori ownership; and
- inquire into any other claims or allegations made in the various petitions placed before it (as listed in a schedule to the terms of reference) and recommend 'what relief (if any)' should be awarded to the petitioners.[1647]

As Stirling and Towers noted, for the bulk of surplus lands, the return of the land itself, even if still in Crown ownership, was 'apparently . . . ruled out from the beginning'.[1648] For the specific petitions, however, 'relief' would appear to include the possibility that land would be returned.[1649]

What transpired was a general inquiry into the question of surplus lands rather than an investigation into the petitions regarding specific hapū and whānau lands that Māori argued had never been sold. Once again, the core grievance of Te Raki Māori was sidelined.[1650] Of the six petitions, three were relevant to this inquiry district, listed as numbers 4, 5, and 6 in the schedule:

- petition 143 of 1925, of Riri N Kawiti and others, concerning the Opua block;
- petition 24 of 1938, of Kipa Roera, concerning the Manawaora block; and
- petition 97 of 1938, of George Marriner and others, concerning the Tapuae and Motukaraka blocks.[1651]

1645. 'Royal Commission to Inquire into and Report on Claims Preferred by Members of the Maori Race Touching Certain Lands Known as Surplus Lands of the Crown', 1948, AJHR, 1948, G-8, p 3.
1646. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 3.
1647. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, pp 3–4.
1648. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 964.
1649. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 4.
1650. See Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 982.
1651. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 5.

Other key roles in the commission were filled by R J Blane, the commission's secretary, and Crown counsel Vincent Meredith, who had also represented the Crown before the Sim commission.[1652] Most Māori were represented by a Crown-appointed lawyer, Hugh Cooney of Tauranga, with C A Herman appearing for some claimants, and Louis Parore, a celebrated Ngāpuhi and Te Roroa land rights campaigner, for others. Some of the Māori petitioners objected when Cooney was appointed, saying they had not been properly consulted, but his appointment nonetheless stood.[1653] While Cooney's capabilities as a lawyer were undeniable and he had experience representing Māori before other inquiries, he lacked knowledge of the people, lands, and history of the district. The complexities around surplus lands required a huge amount of research into numerous iwi and hapū, and several hundred old land claims. Compared with Meredith, who had assistance from the Department of Lands and Survey and the Native Department, Cooney was under-resourced and had to rely largely on his rival counsel to provide him with the required historical evidence.[1654]

The first hearing of the Myers commission convened on 21 November 1946 in Auckland. Present were the commissioners and the two counsel only. It was a preliminary meeting to discuss procedure and operational questions. Immediately apparent was the vast scale of the workload ahead. Familiar with surplus lands matters, Meredith identified two aspects to the inquiry: the 'historical side' and the petitions. A decision was therefore reached to split the commission's business along these lines. Of the former, Meredith advised: 'there is not only the question of surplus land, but there is a question of rights in equity and good conscience, so the historical side has to be properly placed before the Commission because that will have a considerable effect, possibly, on that question.'[1655]

Having considered the wider question of whether Māori had any rights whatsoever to surplus lands, the commission would then investigate the individual or tribal claims of the petitioners. Meredith further recommended setting a time limit on the addition of fresh petitions to the schedule and dismissed the need for oral evidence: 'Well, as far as the Crown is concerned, all the evidence could only be documentary, and I cannot see that there can be any oral evidence.'[1656] Both recommendations would disadvantage Māori.

Myers agreed with Meredith but saw the presence of Māori, if not their right to speak, as important: 'we must be careful to see that the natives, or any Natives who

1652. Meredith introduced himself variously as 'counsel to assist the commission' and 'counsel for the Crown, assisting the commission', but it is clear from the minutes that he was the Crown's representative, and that is how he is described in the commission's report: Nepia, 'Muriwhenua Surplus Lands' (doc E39), pp 40–41, fn 122; Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 966; 'Report of the Surplus Lands Commission', AJHR, 1948, G-8, p 13.

1653. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 966–967; 'Report of the Surplus Lands Commission', AJHR, 1948, G-8, p 13. According to Nepia, the Northern Maori member Tapihana Paikea had promised to consult while in the north, but this was pre-empted when someone from Ngāpuhi, acting unilaterally, wired the Government accepting Cooney's appointment.

1654. Nepia, 'Muriwhenua Surplus Lands' (doc E39), p 42.

1655. Record of proceedings, p 2 (cited in Nepia, 'Muriwhenua Surplus Lands' (doc E39), p 44).

1656. Record of proceedings, p 4 (cited in Nepia, 'Muriwhenua Surplus Lands' (doc E39), p 44).

wish to be present, have the opportunity of being present and hearing what goes on, because it must be made plain to them they are receiving justice.'[1657]

He also had doubts about the viability of dividing the commission into two parts. Were they indeed to conclude from the submissions put before the historical hearing that there were no rights 'in equity and good conscience', would the second part of the inquiry be necessary? Commissioner Samuel championed the right of the Māori petitioners: 'I think the matter is so important that every Native who is interested at all should have the right of being heard.' Because of difficulties in transporting the mass of documents involved elsewhere, Auckland had already been settled on as the location for the historical part of the inquiry, but Samuel strongly advocated that the commission hold hearings in Northland as well, otherwise 'at a later stage, some natives may say that they did not have the opportunity of putting their side of the question before the Commission, because the Commission sat in Auckland and they lived in Hokianga or somewhere else.'[1658] No decision was reached about locations at this meeting. The two-part format was agreed to and a three-month adjournment to allow for the collection of evidence.[1659]

This preliminary hearing revealed some fundamental issues. Cooney's inexperience with surplus lands meant he was unable to put forward any of his own proposals as to how matters should proceed. Asked by Myers how much time the historical aspect of the case would take, he frankly replied, 'I cannot talk to you, Sir, confidently about this matter at the present time. I am insufficiently instructed really to give a considered opinion to the Commission, even on that phase of it.'[1660]

Myers' query as to whether findings from the historical aspect of the case might invalidate the next stage highlights the gulf between what the Crown and the petitioners wanted, as exemplified by the two-part structure. As Stirling and Towers pointed out, the general inquiry into surplus lands claims would necessarily rely on 'general principles associated with the investigation of pre-Treaty dealings and the creation of surplus land (not to mention FitzRoy's promise to return the same to Māori)'.[1661] The Māori petitioners, however, believed the land was not surplus – it had never been surplus because it had never been sold, and it had therefore been wrongly claimed by the Crown. The commission failed to note the distinction.

During the interval between hearings one and two, Blane received additional requests for claims to be heard, some in the form of petitions. He also fielded queries about the commission's itinerary and timetable. Hepeta Renata twice explained that the Māori claimants needed these details. Other questions from Renata about the commission's approach to the historical claims again illustrated the divide between Māori and Crown officials as to the basis of the inquiry. While

1657. Record of proceedings, p 5 (cited in Nepia, 'Muriwhenua Surplus Lands' (doc E39), p 45).
1658. Record of proceedings, pp 5–6 (cited in Nepia, 'Muriwhenua Surplus Lands (doc E39), p 45).
1659. Nepia, 'Muriwhenua Surplus Land' (doc E39), p 46.
1660. Record of proceedings, p 8 (cited in Nepia, 'Muriwhenua Surplus Lands (doc E39), p 46).
1661. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 968.

it would be touted as definitive, 'the fullest inquiry', in Myers' words,[1662] it presupposed the validity of the old land claims.[1663]

The commission held its second hearing in Auckland from 25 to 28 February 1947. Meredith and McCarthy appeared for the Crown; Cooney and Herman for the petitioners, assisted by Parore, who at the start of proceedings asked that the meeting be adjourned to Kaikohe, 'the centre of the North'.[1664] He explained that most of the 100 or so Māori present had travelled especially, but elders could not, and that relocating the hearing was 'the wish not only of the people here but also the wish of the thousands of Maori people living in the North':

> the people would like to hear the history of it from the Crown because they have the records and we do not have access to all the records. But the address from the counsel, also the address from your counsel, they would like that delivered at Kaikohe. That would help us a great deal in helping the Commission to solve this very knotty problem.[1665]

After some discussion around the impracticality of the move, especially with the last-minute timing of the application, the commission decided to carry on as planned but then to hold another hearing later in Kaikohe where the historical matters covered in Auckland would be presented as an address. That settled, the general submissions were heard, and counsel presented their respective positions as to whether Māori had a right 'in equity and good conscience' in surplus lands. The answer to that, in the commission's view, depended on who owned the land taken by the Crown. As Myers expressed it, 'if the property that was taken was the property of the purchaser and not the property of the Maori, the Maori could not have any legal or equitable right. If, on the other hand, the property was the property of the Maoris then they [had] a moral right.'[1666]

On behalf of the Crown, Meredith provided a detailed historical survey of the surplus lands issue, from which he drew key arguments. Essentially, the theme of his opening submissions was that Māori had been dealt with fairly. As they had received payments for the pre-treaty transactions, the old land claims were valid and absolute; Māori title was extinguished. The findings of the two Land Claims Commissions had clarified that Māori had no further claim to the 'demesne lands of the Crown'.[1667] If Māori could have no equity, then the taking of surplus land was a matter between purchaser and Crown in transactions where the entire area was validated, not just a portion. As such, the surplus lands were a 'creation' or

1662. Record of proceedings, pp 5–6 (cited in Nepia, 'Muriwhenua Surplus Lands (doc E39), p 45).
1663. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 269.
1664. Nepia, 'Muriwhenua Surplus Lands' (doc E39), p 47.
1665. Report of proceedings, p 10 (cited in Nepia, 'Muriwhenua Surplus Lands (doc E39), pp 47–48).
1666. Report of Proceeding of Surplus Lands Commission (Stirling and Towers, document bank (doc A9(a)), vol 5, p 430).
1667. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 3.

'accident' of law.[1668] This, in essence, had been the Crown's position since 1840. Reflecting British racial ideology that persisted well into the twentieth century, Meredith also referred to pre-treaty Māori as living in a state of anarchy, with a rapidly declining population; he claimed that Māori neither occupied nor used vast tracts of land, which in any case had no value; and he said they had sought the protection of the British King, and that the civilising force of the Crown was a godsend.[1669]

When it came to the value of the lands concerned, the question as to whether fair consideration had been paid was not one Meredith wished the commission to address. Myers agreed that 'it would be impossible at this stage to say what was a fair consideration for this land prior to 1840 or even shortly afterwards.'[1670] Meredith further stated that 'schedule "B" of the ordinance of 1841', the sliding scale used to work out the equities between old land claimants who had made their 'purchases' in different time periods, had no relation to the price paid to Māori and its fairness.[1671] Schedule B would figure significantly in Cooney's submissions on behalf of Māori. But he was handicapped from the outset by his acceptance that the surplus lands were unquestionably the legal property of the Crown, having failed to challenge Myers' view that if anyone had rights to the surplus lands, it was the settler who had originally purchased them. The infallibility and rectitude of the original commissions was also assumed, especially Bell's work, meaning that no proper investigation into their operation or deficiencies was thinkable. Cooney's reliance on evidence from land claim files assembled by the Government for Meredith likewise weakened his position.[1672]

He based his case on the Land Claims Ordinance 1841 and what 'fell' from it, focusing on schedule B and the situation of Māori at the time.[1673] In his reply to Meredith's submissions, Cooney argued that, although the Crown undoubtedly owned the lands in question, the process by which the lands had been obtained in the first instance was unfair and inequitable, and thus did not meet the benchmark of 'equity and good conscience'. If the schedule represented a 'yardstick' that set a fair price for the pre-treaty transactions, then any land not so granted by reason of the schedule had been purchased unfairly. If, however, the schedule was not that yardstick, then the work of the first commission was contrary to the Crown's treaty obligation to protect Māori interests, as there had been no enquiry into the adequacy of the consideration and no other measure of the equity of a transaction. Nonetheless, schedule B was the only measure to hand that could be applied ret-

1668. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 971–972; Nepia, 'Muriwhenua Surplus Land' (doc E39), p 75.

1669. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 973–974.

1670. Report of Proceedings of Surplus Land Commission (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 973).

1671. Michael Nepia, Muriwhenua Surplus Lands: Commissions of Inquiry in the Twentieth Century', 1992 (Wai 45, doc G1), p 76.

1672. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 975–976.

1673. Report of Proceeding of Surplus Lands Commission (Stirling and Towers, document bank (doc A9(a)) vol 5, p 430.

rospectively to pre-treaty purchases and on that basis, all surplus lands created by reason of the schedule should as a matter of equity and good conscience have been returned to Māori.[1674]

Though espousing views of early contact between Māori and the British that were (in the words of Stirling and Towers) 'scarcely more enlightened' than Meredith's and as much a product of the times,[1675] Cooney raised significant points: 'Whatever factors and motives induced the British to take steps to establish British sovereignty in New Zealand, the protection of the rights and property of the Maoris and to secure to them the enjoyment of peace and good order was a dominant consideration'.[1676] He argued that the Crown had failed in its responsibilities enshrined in the treaty. Once it had assumed sovereignty, it was obliged to protect the rights of Māori to their land and therefore should have compensated them for unfair pre-1840 transactions.[1677]

The submissions from both sides completed, the second hearing of the Myers commission drew to a close. A starting date was slated for the third hearing, 10 June 1947, at Kaikohe. More time was needed for research, so it was adjourned, finally taking place from 10 to 22 October. The venue was the Kaikohe Magistrate's Court, supplemented by a marquee and amplifiers in the grounds, so that those who could not fit inside could follow proceedings. Myers affirmed that the adjournment north was to allow parties whose interests were involved to appear. But, as had been the case with using Auckland as a location for hearings, some Te Raki Māori were experiencing problems with Kaikohe. They wrote saying that they wanted the commission to adjourn the hearings of the petitions to localities appropriate to the affected lands, to Mangonui, Russell (in the case of Ōpua and Manawaora), and Kaitaia:

> We who are staying here are not people of this district, therefore we are experiencing many inconveniences.
>
> The people and tribes concerned in these matters are not here.[1678]

Though Cooney presented the letter – 'it is my duty to bring it before the Commission' – he subverted its purpose, invoking Myers' previously stated position that Kaikohe would be the only venue used in Northland. Myers was however ready to look at the request if it would do justice to the cases. Cooney advised him otherwise but acknowledged, 'I will probably render myself a little unpopular with some of the petitioners.' He personally believed that 'At this stage viva voce evidence in regard to the petitions 100 years after the original transactions is practically impossible.'[1679] Meredith had previously expressed the same view. Whereas previous inquiries, like the Houston commission, had sat in various localities and

1674. Cooney's reasoning is explained in Nepia, 'Muriwhenua Surplus Lands' (doc E39), p 71.
1675. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 975.
1676. Nepia, 'Muriwhenua Surplus Lands' (doc E39), p 72.
1677. Nepia, 'Muriwhenua Surplus Lands' (doc E39), pp 73–74.
1678. Nepia, 'Muriwhenua Surplus Lands (doc E39), pp 50–51.
1679. Nepia, 'Muriwhenua Surplus Lands (doc E39), p 51.

heard traditional oral evidence, the Myers commission denied Māori this opportunity. Its decisions would be based on submissions of counsel and the vast documentary record. In Stirling and Towers' view, Cooney had 'undermined his clients by denying there was any purpose to meeting his clients' instructions.'[1680] As a result, the commission heard no evidence of tikanga and its continuing operation.

The business of the third hearing began. As had been decided, the lawyers first presented précis of the submissions from the second hearing. Consideration of the various petitions followed, and though some reference was made to specific blocks, the focus was again on surplus lands in general. Both sides relied largely on Crown-supplied research and evidence prepared by officers of the Lands and Survey Department that was, according to Stirling and Towers, 'voluminous in nature but narrow in range.'[1681] Indeed, so voluminous was the material that not all could be covered at the Kaikohe hearing, and additional time was required for counsel to prepare their closing submissions; they were ready some seven months later.

The fourth hearing of the Myers commission was held in Auckland from 11 to 14 May 1948. There is no record of the presence of any Māori. Meredith presented his evidence first, involving a convenient interpretation of schedule B. Although he had already advised the commissioners at the second hearing that the 'yardstick' used by the two Land Claims Commissions had no relation to the price paid at the initial purchase, Meredith now found merit in its use in his own evidential schedules. For each transaction, he presented a calculation that compared the area of land that could have been awarded, based on schedule B, with the actual amount of surveyed land that was eventually granted. By this calculation, he sought to demonstrate that Māori had indeed been treated fairly and had no equitable claim to the surplus lands; in fact, he argued that Northland Māori were up on the deal to the tune of 50,344 acres. His argument relied on the 'in globo' approach, also his recommendation at the second hearing, by which all surplus lands should be dealt with together – and therefore all claimants as one group.[1682]

Cooney rebutted Meredith's arguments, pointing out the failure of logic before presenting his own closing submissions. He said that, with a few exceptions, Māori had occupied and owned the land secured by the Government as surplus after the Bell commission. He further argued that its commissioners had not considered the adequacy of consideration to Māori. Of the first Land Claims Commission, he highlighted the lack of counsel to represent Māori in a situation requiring knowledge of the law. The protection promised by the treaty had not come to pass, nor Hobson's declaration of an inquiry into pre-1840 claims; and then the Bell commission had failed Māori again, Cooney concluded.[1683] Cooney said:

> there was no enquiry from the point of view of the Maori . . .

1680. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 980.
1681. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 981.
1682. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 983–984.
1683. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 985.

> I say that the Maori was led to believe that some enquiry would be instituted and having been promised that, his representatives signed the Treaty of Waitangi and the Act and the Ordinance seemed to be a fulfilment of it. In actuality there was no enquiry from the point of view of the Maori and the enquiry was from the point of view of the white and that is why we are before this Commission. . . . And what did the average Maori with the mat around his shoulder, attending that Commission, what did he know about [the] pre-emptive right of the Crown, or what did he know about the Crown's right of demesne?'[1684]

The hearings completed, the three commissioners began five months of painstaking deliberations, involving hundreds of claims. A précis of every file was considered, with additional reference to the fuller record when needed, the total volume of work being 'in the estimation of the Chairman . . . the equivalent of the hearing and determination of over three hundred actions in the Supreme Court.'[1685] On 18 October 1948, their report was ready. It comprised three parts. A joint report recapped the work undertaken by the commission and gave its decisions in respect of the claims made in the petitions and the 'general controversy whether the Maoris have a claim in equity and good conscience.'[1686] Though in agreement that compensation should be paid, the commissioners were unable to reach consensus about its calculation; as a consequence, parts two and three consisted of a majority report from Reedy and Samuel and a minority report by Myers.

As an introduction to their findings regarding each petition, the commissioners advised:

> We shall directly explain these petitions more particularly (though it will not be necessary to do so at very great length), but they may all really be disposed of in a few words. Not one of them raises the question of surplus lands as such, nor do the petitioners base their claims on considerations of equity and good conscience to 'surplus land.' What they do is to claim on other and altogether different grounds.[1687]

In our view, it is a moot point why the petitions ever came under the consideration of the Myers commission. As already noted, the terms of reference for the commission stated that by means of petition, 'members of the Maori race have from time to time claimed and contended that the surplus lands should have reverted to the members of that race.'[1688] None of the three Te Raki petitions met the criteria. None asked for the return of 'surplus' lands; this was an irrelevance when Māori claimed that the land was never sold or alienated in the first place.

1684. Cooney, 21 October 1947, 'Proceedings of Surplus Lands Commission' (Stirling and Towers, supporting papers to 'Not with the Sword but with the Pen' (doc A9(a)), vol 5, p 421.
1685. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 12.
1686. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 17.
1687. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 13.
1688. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 3.

Of the petition of Riri Maihi Kawiti and others concerning the Opua block, the report explained: 'This petition claimed that the land had been wrongly taken by the Government, and had never been sold by the elders or any member of the tribe to whom the land belonged.' The claim was a reiteration of the petition brought before Houston by Hoterene Kawiti, Riri Maihi Kawiti, and Te Atimana Wharerau – itself a restatement of the same claim that had been made repeatedly since the 1880s: the land had never been sold to the CMS. The commissioners concluded that the petition had nothing to do with the Crown's claim to surplus lands and, as a result, '[it] may be disposed of shortly.'[1689]

The petition regarding the Manawaora block, by Kipa Roera on behalf of his wife, likewise described a long-held grievance that had been repeatedly expressed. It asked for an inquiry to investigate a claim for compensation for 600 acres taken by the Government 'without a legal title to the land from the Native owners whatsoever'. It advised that Manu, the chief who had made the original agreement with Clendon in 1832, had done so without the required consent of the people, and the Native Land Court had ruled as much.[1690] As with the Ōpua petition, the commissioners rejected the Manawaora claim – this time in just three summary sentences. In short, 'This is also a straight-out case of surplus lands, and the petition can be considered on no other basis.'[1691]

The petition filed by George Marriner and others concerning the Motukaraka and Tapuae blocks in northern Hokianga fared the same way. The petitioners argued that the land in question had never been alienated. Again, it was a long-standing claim aired previously, notably in a petition from Hone Hare and others before the Sim commission. Myers, Reedy, and Samuel saw no need to interrogate the matter further, repeating verbatim the decision that had been reached in 1927, which itself had adopted the report of the first Land Claims Commission – and so were fallacies dating back to McDonnell's initial transaction in 1831 perpetuated. The commissioners advised, however, that the same decision would have been reached 'from a consideration of the question of surplus lands on the principles we have applied in dealing with the whole topic. From no point of view can it be said that there is any surplus in this case to which the Maoris have a claim in equity and good conscience.'[1692]

As to the matter of surplus lands in general, the commissioners made special mention of 'one specific point'. They agreed with the request from Māori that any wāhi tapu in areas still in Crown possession be preserved and they noted that there was already 'ample statutory power' in the Native Land Act to do so 'administratively as a matter of course'.[1693] According to Michael Nepia, who researched the Myers and other commissions for the Muriwhenua inquiry, the Māori petitioners

1689. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 15.
1690. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 988–989.
1691. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 15.
1692. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 16.
1693. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, pp 16–17.

had sought protection of wāhi tapu as a 'fall back' position should the commission reject their claim to rights over all surplus lands.[1694]

On that more general question of Māori rights to surplus lands, the commissioners found that a claim existed in some cases but not others:

> We are agreed that in the case of many transactions there was an area of surplus land to which the Maori vendors would have had no right in equity and good conscience but that in a number of other transactions where there was an area of surplus land they would have had a claim in equity and good conscience to the whole or part of such area.[1695]

This distinction between cases where Māori had a claim to the surplus and cases where they did not was predicated on the accuracy of the original estimated acreage in relation to the consideration that was paid, and on whether the final survey exceeded that initial estimation.

The commissioners were unanimous that Māori had rights to 87,582 acres of 'surplus' land. This was far less than the 205,000 acres that Bell had calculated as surplus once he had made grants to settlers. It was also significantly less than the 104,000 that Meredith had acknowledged as surplus.[1696] The commissioners gave conflicting explanations as to how this acreage had been arrived at. On the one hand, Myers explained it was the difference between the area stated in the original sale deed and the area ultimately surveyed.[1697] Elsewhere in his report, he said the commission arrived at their figure by considering each block case by case, discounting any area that Bell considered 'waste' land (that is, land already purchased by the Crown) that was available for settlement; and by taking into account other local circumstances which Myers regarded as too complicated to explain. He viewed this as the 'true surplus' – the area that Māori had a claim to in equity and good conscience in accordance with English law.[1698] Reedy and Samuel appear to have adopted the latter explanation, saying in their report that the figure had been arrived at by starting with Bell's estimate, discounting any areas of Crown purchase, and further discounting 'other areas [to] which in the opinion of the Commission the Maoris did not have a claim'.[1699] The commission therefore significantly discounted the area for which compensation might be awarded. Having

1694. Nepia, 'Muriwhenua Surplus Lands' (doc E39), p 68.
1695. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 18.
1696. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 32.
1697. 'Report of the Surplus Lands Commission', 1958, AJHR, 1948, G-8, pp 64–65. Myers explained his view of the issue with the following example: A deed entitled a settler to 1,000 acres, and he was allowed 800 acres by the yardstick applied by the first Land Commission and the claim was later surveyed at 5,000. Bell then might make additions to the 800 acres in accordance with the provisions of the Land Claims Settlement Act, 1856. If that brought the 800 acres to 1,200, a new grant would be issued for 1,200 acres. Thus there would be left 3,800 acres of 'surplus land'. The question would then be 'as to which party – the purchaser or the Maori vendor – had the right in equity and good conscience to such 3,800 acres'.
1698. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, pp 53–54, 72.
1699. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, pp 32–33.

reached this point, they were unable to agree on the basis for awarding compensation or the amount to be awarded; accordingly, they issued separate reports on this matter.

Myers' thinking, as detailed in his minority report, was coloured by a number of beliefs. He doubted that FitzRoy had ever promised to return the surplus, and was of the view that it was contrary to Crown policy in any case and could have no bearing on the issue at hand.[1700] Key to his approach was the assumption that Māori title had been extinguished by the original transactions, and that those transactions and matters such as price had been thoroughly investigated by the first Land Claims Commission. In his view, Bell's sole duty had been to judge the case between purchaser and Crown, and not the equity of the initial transaction. Myers was also of the view that Māori had accepted Bell's findings. Furthermore, in his view, guarantees under article 2 of the treaty applied only to lands in the actual possession of Māori. The Government had been 'actuated by the purest motives' in its dealings with them. All in all, the Crown's claim to the surplus was unimpeachable. It was both legal and made in good conscience.[1701]

This left very limited grounds on which to recognise a Māori claim. The principle that Myers thought 'would seem to accord with good sense and reason, which would have done justice to both the original purchaser and the Maori vendor, and which therefore may be applied to-day as between the Maori and the Crown', was based on the difference between the estimated area covered by a deed and the actual amount that was demonstrated on survey.[1702] If – as often was the case – the survey encompassed a larger area than was originally estimated, did it rightfully belong to the purchaser (and thus the Crown) or to Māori? Myers argued that two different approaches could be taken. The first was that Māori could have no legal right since the commission had found that they had sold all the land within the boundaries stated in the deed; but Myers' preferred reasoning was that the purchaser's payment was based on the estimated acreage, in which case it could not be in accordance with equity and good conscience for the extra land to go to the Crown.[1703]

In their separate report, Reedy and Samuel argued that Māori were entitled to the surplus because of the promises made implicitly at the Waitangi negotiations and explicitly by Governor FitzRoy.[1704] Yet, in essence, they saw the promises as applying only to the 'true surplus'; that is, lands wrongly or unfairly taken according to English ideas of equity. Their reasoning was ambiguous, but nonetheless it seems to have led them to a point where they agreed with Myers over the area to which Māori had claims (the lands created by schedule B) while disagreeing about the basis for compensation.

1700. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, pp 60–61.
1701. See 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 40. For detailed analysis of the Commission's reasoning see Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1004–1021.
1702. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 64.
1703. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, pp 64–65.
1704. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, pp 34–35.

6.8.2.5 *Divergent recommendations for compensation*

While the commission had been unable to reach consensus about what sum of compensation to recommend, it appears to have at least briefly considered the return of undisposed surplus lands to the descendants of the original customary owners, although its terms of reference with regard to the general question of surplus spoke only of monetary compensation (as distinct from the lands subject to specific petition, where 'relief' could be recommended).[1705]

The framework in which the commission operated was one of English law and assumptions derived from it: that sovereignty had been ceded when the treaty was signed; that radical title resided in the Crown; and that Māori – although ignorant of such precepts – had been brought to a more civilised state within a superior and benevolent legal and social order. Māori oral evidence had been ruled out, and no consideration was given to the tikanga and customary law that underpinned Māori grievances. As a result, the commission rejected the grounds of wrongful taking alleged within the petitions, concluding that the

> real and only valid ground upon which relief could be claimed [was] that there was an area of surplus land involved in the case of each petition, and that in each case the real and only question [was] whether the original Maori vendors of the land had a claim in equity and good conscience to the surplus.[1706]

A return of such land to the descendants was deemed 'quite impracticable' however, because there was none sufficient, it being scattered and unsuitable 'for profitable or successful occupation by Maoris'.[1707] Myers considered the needs of Māori to be greater in Northland but much of the surplus lands remaining in Crown hands was located in the vicinity of Auckland.[1708] Samuel and Reedy said in their report that they would have recommended a return of all 87,582 acres of surplus but had found no lands that were suitable.[1709]

It was also deemed impossible to allocate monetary compensation to specific hapū or whānau. The commission therefore advised that compensation should be 'dealt with *in globo* for the benefit of the Maoris or of Maori institutions in the district or districts in which the surplus lands [were] located' (italics in original). To do otherwise and 'individualize the parties or persons to whom the compensation should be paid' they considered 'impracticable' because of the century that had lapsed since the early transactions, changed circumstances, and 'intermarriage that [has] taken place between members of the various tribes and hapus and

1705. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, pp 4, 13.
1706. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 16.
1707. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 17.
1708. Myers made this comment in assessing the allocation of compensation to Maori Land Boards. See 'Report of the Surplus Lands Commission', AJHR, 1948, G-8, p 78; Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1027.
1709. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 32.

families'. Cooney had agreed with this and with the commission's decision that the petitioners could not succeed on the specific grounds they had alleged.[1710]

In Myers' minority view, he recommended that compensation be calculated based on the value of surplus lands at the time of their initial purchase, using prices paid in pre-treaty and pre-emption waiver transactions. In Nepia's view, this was 'what a cynic might call a "minimalist" approach'.[1711] Nor did Myers suggest any interest payment should be applied or any adjustment made to late-1940s valuations. Having calculated that Māori had a claim in equity and good conscience to a much-reduced area of the surplus lands only – 45,747 acres (including pre-emption waivers) in our inquiry district; 87,582 acres nationwide (71,155 acres from pre-treaty transactions and 16,427 from pre-emption waivers)[1712] – his calculation for compensation payable was £9,476 6s 9d, increased to a 'complete and final settlement' of £15,000 'by way of solatium' (a payment given as solace or consolation for injured feelings). Payment should go to a Maori Land Board for disbursement in the districts with surplus lands. There was no explanation given as to how Myers had calculated the solatium.[1713]

Myers advised:

> I have endeavoured in this memorandum to dispel the confusion that has given rise to erroneous and exaggerated notions of the Maori grievances, and to explain what I regard as the real equities and broad justice of the case; and on the whole case as I see it I consider that a payment of £15,000 would give the fullest measure of justice to the Maori claims.[1714]

Underlying the Chairman's thinking about compensation – as about surplus lands in general – were familiar problematic assumptions: that it was largely waste land; that big tracts of land had 'reverted' to Māori ownership, creating a 'profit' for them; that pre-treaty transactions were for a fair price and constituted 'sales' of the land; and, most particularly, that the matter of adequacy of consideration had been settled before the issuance of grants.[1715]

Commissioners Reedy and Samuel concluded likewise that a claim existed on equitable grounds, but had formed their opinion on different grounds, citing FitzRoy's promise of 1843, and summarised, 'In our opinion, their right and title to this heritage is unquestionable.' As to the compensation payment, they argued that 'the length of time during which the Maoris have been deprived of their land and the increase in value during that period' should be acknowledged. Finally – and crucially, judging by their use of italics – their calculations were guided by the

1710. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 15.
1711. Nepia, 'Muriwhenua Surplus Lands' (doc E39), p 100.
1712. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 36. The figures for regions do not provide a breakdown between old land claims and pre-emption waivers; see also Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 999–1000.
1713. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1027, 1030–1031.
1714. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 78.
1715. Nepia, 'Muriwhenua Surplus Lands' (doc E39), pp 100–101.

Memorandum by Samuel and Reedy, Report of the Surplus Lands Commission, 1948

'If words mean anything, then promises to return the surplus lands were made to the Maoris by many persons in "high places", amongst whom were Governor Hobson, James Busby, Henry Williams, and Governor FitzRoy.

'Without a doubt these promises were made in all sincerity and it could not have been contemplated by those responsible for making them that they could have any other meaning.

'No other construction could be put upon their utterances by the simple and trusting people of those times.

'That the Natives regarded the word of the representatives of the "Great White Queen" and the missionaries as tapu or sacrosanct will not be doubted by anyone having the slightest knowledge of Maori character or custom.

'The Maoris have been waiting for more than a century for the redemption of these pledges.

'In our opinion, their right and title to this heritage is unquestionable.

'We feel sure that the people of New Zealand would not hesitate in agreeing that as a matter of good conscience the surplus lands should have been returned to the Maoris according to promises.'[1]

1. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, pp 34–35.

value put upon these lands in Lord Stanley's despatch of 21 August 1843 and the Land Claims Settlement Act 1856, whereby scrip or cash could be issued to settlers a rate of £1 per acre:

> *By this action the Government placed a value upon surplus lands, and if it was equitable to compensate the European at this rate, would it not be equally fair to adopt a similar system now? In our opinion, it would be unfair not to do so.* [Emphasis in original.][1716]

Reedy and Samuel then recommended compensation of 14 shillings per acre, amounting to a full and final settlement of £61,307 for all the surplus lands. Their calculation was based on the same national figure of 87,582 acres of surplus lands as in Myers' report. They further recommended that the compensation be payable over 10 instalments and administered by a trust board, with special attention paid

1716. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 35; for discussion of Stanley's despatch, see p 31.

to housing to mitigate urban drift.[1717] As Stirling and Towers noted, it is not clear how they arrived at their 14 shillings-per-acre recommendation, having previously determined that Māori deserved £1 per acre, the same rate settler scrip claimants had received.[1718]

The Government decided to implement the larger payment, as recommended by Reedy and Samuel. Section 28 of the Maori Purposes Act 1953 authorised payment of the compensation moneys to the Māori Trustee, who would distribute the £61,307 amongst relevant Māori trust boards. The lion's share, £47,150 4s, plus a further £4,735 10s in respect of the surplus in Aotea (Great Barrier Island) would go to Northland by way of a new regional body, also authorised by the Act, the Taitokerau Trust Board, intended to administer compensation moneys on behalf of Ngāti Whātua, Ngāpuhi, Te Rarawa, Ngāti Kahu, and Te Aupōuri, with Cabinet to decide most of the particulars around the appointment of its members and its administration.[1719]

Preliminary meetings were held with iwi representatives to discuss the makeup of the board. After feedback from kaumātua, the initial plan of a five-member structure – one member per iwi – was rejected in favour of dividing the Taitotokerau Trust Board district into seven tribal districts, considered more appropriate because of the distribution of the surplus lands.[1720] The division occurred 'along very broad lines' and reflected local body administrative districts rather than customary rohe or takiwā.[1721] The board held its first meeting on 30 November 1955, some seven years after the commission's report was tabled.

Continuing and widespread dissatisfaction with the settlement for the surplus lands was evident. A pan-iwi compensatory payment made to a regional trust board was not what Te Raki Māori had ever wanted, though very much a product of the Myers commission. As Stirling and Towers observed, 'the entire [Myers] commission had operated along non-tribal lines, with the separate and very specific claims of individual hapu being set aside in favour of a general claim to surplus lands on behalf of Maori in general'.[1722]

Indeed, by 1962, three of the five tribal groups identified in the Act as beneficiaries (Ngāti Whātua, Ngāti Kahu, and Te Aupōuri) had sought separation from the Taitokerau Trust Board. Ngāti Taimanawaiti did not have representation and therefore did not participate even indirectly in the compensation made for surplus lands, including that for Aotea.[1723]

1717. 'Report of the Surplus Lands Commission', 1948, AJHR, 1948, G-8, p 36.
1718. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1001.
1719. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1032–1034.
1720. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), pp 1035–1036.
1721. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1042.
1722. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1045.
1723. Closing submissions for Wai 2063 (#3.3.255), p 17.

6.8.3 Conclusions and treaty findings: the Crown response to Māori protest and petition

The Bell commission had given certainty to settler grants and enabled the Crown to define its scrip lands. Bell had discounted earlier promises to Māori regarding the return of surplus lands; instead, his recommendations enabled the Crown to take extensive areas for itself. But, contrary to Bell's confidence that Māori had accepted his repeated explanations as to the 'law' – that their transactions and the boundaries stated in the deeds had been ratified by the first Land Claims Commission and could not be revisited; and that any surplus lands belonged to the Crown and any requests for reserves entailing the 'return' of a portion of these areas were at the discretion of the Governor – Ngāpuhi had continued to protest the loss of a number of blocks for many years following. Those protests took the form of direct discussions with leading politicians of the day, attempts to gain recognition of title through the Native Land Court, petitions to Parliament, and (after many years of delay) evidence before a series of commissions of inquiry. These efforts had limited effect.

In particular, the contention of Te Raki Māori that their lands – at Ōpua, Puketōtara, Kapowai, Motukaraka, and elsewhere – had never been sold was never properly investigated and dealt with. Instead, successive administrations and inquiries focused on issues of landlessness and on the question of whether Māori had any rights to surplus lands. Their core grievance was discounted on the assumption that the question of sale had been properly investigated and decided by the first Land Claims Commission. Such redress as was made available fell well short of what Māori wished, and was eventually contemplated by the Crown largely in order to solve what it came to see as the increasing problem of landlessness. In the case of Kapowai and Puketōtara, a substantial proportion of the land was still retained by the Crown; elsewhere, redress was in the form of monetary compensation only. Such redress was made as an 'act of grace' rather than as an act of justice; its receipt was seen as contingent upon good conduct and acceptance of the law, disregarding the loss of hapū rangatiratanga that was at the heart of their complaint. We note also a degree of obstruction on the part of Government officials when faced with requests for information about old land claims, likely because they might lead to further queries and a 'feeling of insecurity' among the current Pākehā owners.

The Myers commission, presented as a definitive inquiry into the protracted surplus lands issue, for all its apparent exhaustiveness, dipped no more deeply into the source of Māori grievances than did earlier twentieth-century commissions, and it discounted the importance of Māori oral evidence, instead relying on official sources and the documents generated by the earlier flawed investigations undertaken by the first and second Land Claims Commissions. Again, the transactions questioned by Māori were presumed to have been valid sales since they had been ratified as such, and legal title to the surplus lands was presumed to have been vested in the Crown since this was the law. The commissioners were undoubtedly conscientious, but their considerations were limited by the framing of the inquiry and the assumptions they brought to it. Nonetheless, members

Reedy and Samuel acknowledged the weight of outstanding Māori grievances in general 'in equity and good conscience'.

The remedy proposed by the commission for Te Raki and other Northern Māori was flawed. The compensation was inadequate, its means of distribution via the Crown-established Taitokerau Trust Board unsatisfactory. As historian Professor Alan Ward has remarked with reference to the Myers commission and the Crown's actions – or omissions – in the years after the signing of te Tiriti: 'The most serious underpayment to Maori in districts such as the Far North was the failure to provide the settlements and the services that Maori expected to follow swiftly from the transactions and to involve them in real partnership in development, which is obviously what they wanted.'[1724] We agree with this assessment.

Accordingly, we find that the Crown's responses to decades of Māori petition and protest over the question of old land claims and surplus lands was entirely inadequate; that, through the various inquiries that took place between 1907 and 1947, the Crown failed to properly inquire into the essence of Māori grievances; that the Myers commission's formula for calculating compensation was flawed and based on an unreasonable discounting of the area of surplus lands and the nature of Māori interests in those lands; and that, through these failings:

- the Crown breached te mātāpono o te tino rangatiratanga, and te mātāpono o te whakatika/the principle of redress.

6.9 Kōrero Whakatepe/Conclusions and Findings

How the Crown dealt with settler claims to land ownership arising out of their transactions with Māori prior to 1840 is an important take for the claimants of our inquiry district, as evidenced by the long struggle to achieve recognition of their grievances. Numerous claims alleging breaches of the treaty in this context and with reference to many blocks of land that were subject to old land claims were filed before us. Our view is that these claims are well founded. When the Crown began its investigation into the old land claims, it imposed an alien legal system upon Te Raki Māori that supplanted the customary law that had been in operation when those land arrangements had been made, transforming them into permanent and exclusive sales. Legislation was passed that favoured settler interests, and processes were introduced that were defective and that completely disempowered Te Raki Māori. The Crown then took surplus lands contrary to promises that it would be 'returned' to Māori. Māori capacity to engage with the opportunities presented by colonisation was severely impeded by the loss of land and resources that resulted, and the Crown's efforts at redress have fallen well short of what the treaty requires.

6.9.1 The nature of pre-treaty transactions

Whether Māori envisaged a permanent and exclusive alienation of land and resources when entering into deeds with settlers before 1840 was a key point of

1724. Ward, *National Overview* vol 1, p 48.

disagreement between Crown and claimants. The claimants argued that underlying customary principles of tuku whenua still operated in all cases despite some modification of practice. In their view, transactions are more properly described as social arrangements rather than as commercial in nature. The Crown suggested that Māori had gained an appreciation of sale by 1840; that there were clear instances when a sale was intended; and that whether any particular transaction had been customary and intended only to convey a right of occupation, rather than a more permanent alienation, has to be established case by case. Further, the Crown questioned whether the claimants had established that tuku was traditionally practised at all.

It is indisputable that Māori law was the only cognisable law in New Zealand when these engagements were made. We do not accept the Crown's implication that evidence is lacking that tuku whenua was practised under customary law. Such a conclusion disregards the oral testimony of the claimants and the overwhelming weight of scholarship and treaty jurisprudence; nor did the Crown present any evidence to the contrary. The more persuasive argument is that these early land arrangements took place on what scholars have termed the 'middle ground', in which people from different cultures adjusted their behaviour and expectations so as to engage with each other and obtain what they wanted. For settlers, this was women, land, resources, and protection; for Māori, goods, money, literacy, and knowledge of new technologies; and for both sides, the opportunity for further trade. There was academic support for this proposition in our inquiry, and it is undeniable that adaptation was occurring. Māori adapted by signing deeds, accepting money, and in many cases, allowing landholdings to transfer from one European to another, often without apparent opposition. Some of the transactions for very small areas at Kororāreka appeared to be commercial in character, although, even there, Māori often knew the 'purchaser' and did not intend to sever all connection with the land. Settlers adapted too, and in very significant ways. They married into their host communities and had little or no choice but to make additional payments when demanded, accept Māori repossession of land that they had failed to occupy, and most importantly, acquiesced in continuing Māori occupation and use of lands they believed they had purchased.

Although both sides adapted, Māori and settlers continued to view these arrangements through their own cultural lens: as Dr Phillipson explained, Māori saw them as conditional, personal, and limited grants of a right to use hapū lands, in return for the benefits associated with settler presence; settlers saw them as purchases that granted them exclusive rights. Crucially, throughout the pre-treaty period and for many years beyond, Māori were able to enforce their view; it was not until after te Tiriti (indeed, not until the late 1850s, in Phillipson's view) that the middle ground gave way, and the settler view prevailed.

The Crown, in its submissions, discounted the significance of ongoing Māori occupation, arguing that it occurred only by permission of the European owner. We do not see that position as tenable. In our view, when settlers asserted that Māori remained in occupation only because they allowed it, this was a sort of fiction: it enabled settlers to occupy the land, use it, and to trade with Māori while

sustaining the self-deception that they had purchased the land outright. The reality was that settlers were permitted to occupy properties on the sufferance of Māori, conditional on the acceptance of the authority of the rangatira and the community he or she represented, not the other way around. The ground remained firmly Māori.

We have accepted that the missionary drafters of land deeds attempted to convey the concept of permanent alienation but we cannot accept that they succeeded. Where the deeds were translated, the author intended one thing based on their worldview, but Māori can only have understood the document through theirs. Also, many deeds were still in English and in most cases, we do not know what was said between the parties. Where we do know what was discussed, as in the instance of the missionaries and settlers who were being married into hapū, the clear evidence is that Māori were assured that they and their children would remain on the land.[1725]

The Crown has failed to demonstrate that the fundamental principles and value system underpinning Māori law had changed to any great degree at the time of actual engagement with Pākehā over land. This was so despite the use of deeds, money, and other innovations in protocols such as the substitution of one European for another, which was increasingly (but not invariably) tolerated for the long-term benefit of settlement and trade.

The Crown submitted that we could not make general findings about the nature of pre-treaty land arrangements but rather should consider them case by case. We do not regard this as a reasonable request either of us or of the claimants. Due in no small part to the very limited and pro forma nature of the Crown's old land claims inquiries, it is no longer possible to discern the exact details of the relationship that was established between Māori and settlers for each of the many hundreds of claims for which grants were awarded. Nor is it necessary to do so. As we have set out, the operative law was customary law when these arrangements were made. None of the expert witnesses in this inquiry saw the transactions as sales, and nor (despite some hesitation in the Hauraki inquiry) has the Tribunal elsewhere. Māori who entered pre-treaty land arrangements were not consenting to sales but were making allocations of land to settlers as part of a broader and mutually beneficial relationship. Yet Crown policies proceeded on the basis that the transactions were sales, in the knowledge that there was no such thing in custom and that there remained outstanding issues about what Māori had intended when entering into these arrangements.

Given that under tikanga, as understood and enforced by Māori, the pre-1840 transactions were not absolute alienations but rather customary arrangements, conditional, ongoing, and with an unextinguished underlying Māori title, it is our view that:

- the Crown's grant of absolute freehold title and its own subsequent taking of the surplus was effectively a raupatu of both thousands of acres of land and authority over it, in breach of the te mātāpono o te tino rangatiratanga, te

1725. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 392.

mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect, and te mātāpono o te matapopore moroki/the principle of active protection.

Prior to the Crown's assertion of its sovereignty, Māori law and custom had been accorded considerable 'recognition and respect'. That was evident in the observations of several British residents and visitors and in their testimony before the 1838 House of Lords select committee – but this was largely overridden as the imperial project of bringing order to land ownership in New Zealand on British terms got under way. At this point, respect for tikanga was largely written out of the script, and Māori were never able to recover from the position in which they were placed before the early land commissions, which were conducted on the basis of settler understandings and favouring their interests.

6.9.2 The New Zealand Land Claims Ordinance 1841

The legislation establishing procedures and rules by which pre-treaty land arrangements were investigated was seriously flawed and in breach of the treaty and its principles. The Land Claims Ordinance 1841 under which the first Land Claims Commission operated was based on Australian precedents and concerned the purchase of lands by settlers from each other, under a law system common to, and accepted by, both parties – rather than indigenous Australians, who were not seen as having any land rights and with whom no treaty had been recognised. It was utterly inappropriate to New Zealand circumstances and to establishing whether valid transactions had been undertaken with Māori, who were governed by their own laws and who had been given to understand, at the time of entering negotiations for te Tiriti, that their tino rangatiratanga would be respected, the land arrangements they had made with Pākehā investigated, and any lands unfairly acquired returned to them.

The ordinance spoke of inquiry into the 'mode' and 'circumstances' of the case in question and of commissioners being guided by 'real justice and good conscience' rather than legal 'solemnities', but it failed to direct the commissioners to consider land arrangements in light of the customs and standards of Māori society. Although Governor Gipps later issued instructions to this effect, the context was quite specific: if the settler could not produce a deed, the commissioners could accept verbal assurances from Māori that they had consented to the transaction according to their own custom; there was no requirement to consider to what exactly they had assented. It is apparent, too, that the requirement to be guided by real justice derived from and reflected the Australian situation and the frequently unsatisfactory nature of the documentation that could be produced by settlers there, not the equity of the arrangements entered into with Māori. Legislators failed to acknowledge and incorporate customary law into the ordinance in a meaningful way.

Nor did the ordinance require the commissioners to consider the adequacy of the price; again, the legislation (and the scale it established of acreages to be awarded for money spent at various dates) was intended to protect the interests of the Crown and ensure equity between competing Pākehā claimants rather

than between the Pākehā 'purchaser' and Māori 'vendor'. Although the ordinance required that claims had to be conducted on 'equitable terms', and later instructions directed that compensation could be paid if the consideration was insufficient, no guidance was given as to what this meant. Inquiry into the fairness of price was attempted only early on for Busby's claims. In general, Crown officials resisted the notion that as Māori acquired a greater knowledge of the monetary value Europeans placed upon the land, they could repudiate their bargains for insufficient price.

If, as the Crown has argued, at least some of these transactions were straightforward sales, the obligation to ensure that Māori were fairly paid was all the greater. For Māori however, the ongoing benefit was the important consideration, and it was dependent in large part on adequate land being reserved into the future. But there was no requirement stated in the ordinance for the commission to consider whether Māori 'vendors' had sufficient other land, or for reserves to be set aside for their future welfare.

We find, therefore, that the Land Claims Ordinance 1841 was:

- inconsistent with the guarantees in article 2 of te Tiriti in breach of te mātāpono o te tino rangatiratanga and te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect.

6.9.3 Conduct of Godfrey and Richmond's inquiry under the Land Claims Ordinance 1841

The deficiencies in the legislation were reflected in the commission's composition, its procedures, its failure to ascertain how these land arrangements and deeds had been understood at the time, and its failure to adequately protect sites of occupation.

The first Land Claims Commission assumed that the arrangements it was investigating were sales and failed to consider Māori usages, even though that information was available to the Crown and its officials. While we accept that clause 3 of the 1841 ordinance provided for claims by virtue of different sorts of conveyances, the ordinance as a whole and the instructions to Godfrey and Richmond made clear that they were investigating conveyances under English law. The notices issued, forms used, and questions asked during hearings all assumed that the transactions under consideration were sales. Even though officials were aware that under their own usages, Māori could not alienate land permanently, there was no attempt to uncover the true nature of these arrangements. Nor were the commissioners, though conscientious, at all equipped to undertake such an inquiry. They had no legal expertise, they had only recently arrived in New Zealand, and they had no cultural knowledge.

That Māori giving evidence before the commission generally were recorded as acknowledging their 'sale' cannot be read as simple proof that this was their intention. The evidence was recorded in English, so we cannot know the Māori terms used. We do know that in many cases the rangatira had long-established relationships with the settler claimants, whom they wished to support; indeed, in a significant number of cases they had married them into the community. Such acceptance

reflected their desire to honour and affirm the original transaction as they saw it, and to ensure that 'their' Pākehā remained in the district and would continue to meet their responsibilities to the community. They did not regard their own interests in the land as having been extinguished. Māori could acknowledge that an arrangement existed with the settler yet continue to occupy the lands supposedly sold. How then to interpret those occasions when sales were specifically denied? Do they suggest, as the Crown argued, understanding and acceptance of the settler view on all other occasions? In our opinion, the evidence does not support that conclusion. Rather, testimony before the commission denying a sale reflected specific dissatisfaction with the price paid or the extent of the land claimed, and again was not directed to the question of whether their earlier agreements were tuku whenua or sales.

Even leaving aside the failure to investigate this crucial issue, the commission's inquiry was inadequate. There were frequent instances of the commission recommending awards even though it knew that not all customary owners had been included, that Māori were still cultivating and living upon portions of the land, and that boundaries had not been fully agreed upon and defined. At best, disputed areas were excised from the recommended award, and generally reserves were recorded in the award only if they were specifically mentioned in the deed. Where Māori continued to occupy these sites but admitted a transaction, or where agreements were oral, the commission awarded the land to settlers as if an absolute and unconditional alienation had taken place without any reserves being set aside; nor were trusts and joint-use arrangements given legal recognition.

These defects and uncertainties were acknowledged by the commissioners themselves. Their solutions were to make a general recommendation that all kāinga, cultivations, and wāhi tapu be reserved and to fashion awards that left room for future recognition of remaining unextinguished rights. The officials followed through on neither strategy. FitzRoy's 'perfectible' expanded grants entrenched purchases that were not yet complete, which encouraged grantees to buy up wāhi tapu and reserves and undermined the Crown's capacity to recognise any unextinguished rights out of the lands in excess of what went to the claimant (which ended up in the pocket of the Crown instead). No general reservation was made of occupied sites, and these, too, were lost to Māori and also went to settlers or the Government.

The presence of Protectors clearly did not solve these problems. We have not formed the view that the Protectors – and the missionary interpreters – were deliberately defrauding or deceiving Māori, although there was a clear conflict when their own family-aligned interests were involved or when interpreters were working for both claimants and the commission. But the crux of the problem was that they brought their own cultural assumptions to their duties of protection and ignored the mutual understanding they knew to have existed when settlers and Māori entered into land deeds. Justice for Māori came second to securing titles for settlers and the progress of the colony. In any case, the presence of a handful of missionaries could not compensate for the total absence of any Māori input into

the decisions about what Māori had actually intended and how this might be carried into future arrangements.

We find that the Crown was:

- in breach of te mātāpono o te matapopore moroki/the principle of active protection and te mātāpono o mana taurite/the principle of equity.

Māori of our inquiry district were prejudicially affected by the lack of adequate inquiry and by a skewed validation process. Had the Crown ensured that the process it instituted was consistent with the treaty and respected tribal rangatiratanga and laws, outcomes would have been more equitable, and Māori rights in these lands would not have been extinguished in such a sweeping manner and replaced by awards of exclusive and absolute title to Pākehā. There had not been a sufficient meeting of minds regarding the meaning of the arrangements made within the supposed middle ground to permit this. As a result, many thousands of acres of land were ratified as 'sold' and lost to Māori (by Crown grant, scrip exchange, or appropriation of the surplus) within the Te Raki region.

6.9.4 The actions and omissions of Governors

The damage to rangatiratanga already caused by the commissioners' practice of validating transactions they knew to be incomplete was exacerbated by FitzRoy's decision to increase awards and issue unsurveyed grants, a policy he instituted even though he knew that Māori had not intended permanent alienations when they had entered into land deeds with settlers; this he justified on the grounds that settlers would be able to 'perfect' their titles once Māori came to realise the superiority of English laws and practices – or they had died out. Further, he introduced the policy against the clear advice of the land commissioners that it would undermine their intention to cater for unextinguished Māori interests out of the area excluded from the more restricted awards they had recommended. The procedure followed by FitzRoy to increase awards beyond what the first Land Claims Commission had recommended was at first endorsed and then overturned by the courts. Most recently, it has been condemned in the 2017 Supreme Court *Wakatu* decision as 'expansive' and beyond the 'scope' of the Governor's 'power to make grants under the prerogative.'[1726]

The policy also increased the vulnerability of the few reserves that had been awarded since it was open to settlers to perfect their title 'by degrees'. It was clear that the Crown would not intervene to protect remaining Māori interests, and that settlers could remove any such impediments to the full enjoyment of their freehold title. FitzRoy ignored the Crown's 1839 instructions concerning the importance of reserving areas of occupation, and the warnings of Godfrey and Richmond that Māori had not alienated their kāinga, wāhi tapu, and other valued sites, and would be dispossessed by degrees unless the Crown acted to protect them.

Grey was critical of his predecessor's policy, repeatedly advising the Colonial Office of Commissioner Godfrey's denunciation of it. He recognised that Māori did not accept that they had lost all rights in the lands they had allocated to settlers

1726. *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17 at [11].

and, in his opinion, had intended only to convey a 'life interest'. Acknowledging the existence of unextinguished Māori interests in lands judged to have been validly sold, he condemned FitzRoy's premature issue of grants as an act of injustice to them and predicted the outbreak of conflict once Māori realised they had been displaced. In particular, he condemned the transfer of any urupā into European hands as 'repugnant' to Crown policy.[1727] Grey informed Earl Grey that he considered it 'a duty upon behalf of the Crown' towards Māori 'to do its utmost to support their rights' in the matter.[1728]

Yet his governorship resulted in few fundamental changes. The protectorate was abolished, but for all its shortcomings, nothing replaced it; and Grey's Quieting Titles Ordinance achieved little. Largely focused on the difficulties being experienced by settlers, not Māori, it was intended to affirm 'the validity of the Crown grants which had been issued to Europeans' while 'inflict[ing] the least possible amount of injustice on the natives'.[1729] This was an imbalance that did not bode well for Māori. While they could challenge the commission's decisions and FitzRoy's subsequent extension of grants, they would have to do so through the Supreme Court. As Grey admitted, this would not be easy, and it never happened. Māori gained no additional protection for lands that they continued to occupy. Nor did Grey have any intention of preserving Māori custom in this matter; they had to understand that 'land once sold "was gone forever"'.[1730]

Accordingly, we find that the Crown, through Governor FitzRoy's actions in expanding grants beyond the commissioners' initial recommendations, issuing grants where the commissioners had recommended none, and issuing unsurveyed grants:

- breached te mātāpono o te tino rangatiratanga and te mātāpono o mana taurite me te mātāpono o te matapopore moroki/the principles of equity and of active protection.

The Crown Titles Quieting Ordinance 1849 aimed to remove uncertainty about settlers' title in Crown-granted lands but provided inadequate protections for enduring Māori customary interests and was:

- in breach of te mātāpono o mana taurite me te mātāpono o te matapopore moroki/the principles of equity and of active protection.

The failure to ensure occupied sites and wāhi tapu were reserved in grants to settlers was:

- in breach of te mātāpono o te matapopore moroki/the principle of active protection.

Especially prejudiced by the Crown's failings were hapū who held rights in lands granted to missionaries (Kemp, Williams, Shepherd, Baker, and others)

1727. George Grey, file note, 15 November 1848 (Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 166).

1728. Grey to Grey, 17 October 1848 (Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 196).

1729. Grey to Grey, 3 October 1849, BPP, vol 6 [1280], p 67.

1730. Burrows Journal, 28 November 1845 (cited in Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 612).

or established settlers (such as Mair, Powditch, and Clendon), whom FitzRoy deemed especially 'deserving' on criteria that were far from consistent or clear. In most instances, Māori were still occupying portions of those lands, accessing their resources, taking mahinga kai, cultivating, and erecting whare, unaware yet that their rights no longer existed under the new laws.

6.9.5 Pre-emption waivers; policy and practice

The good intentions of FitzRoy in waiving pre-emption in favour of individuals (as discussed in chapter 4) were undermined by serious flaws in the design and application of policy.

The regulations introduced under FitzRoy's proclamations, though deficient in several respects, reflected the Governor's awareness and acceptance of the obligation to protect Māori even though the Crown's pre-emptive right was waived in favour of individual settlers. However, the protections proved inadequate – evaded by purchasers or abandoned as settler interests increasingly came to dominate in Crown policy. Notably, several waiver certificates might be issued for what was essentially a single purchase, enabling evasion of the restriction to a few hundred acres described in FitzRoy's notice of 6 December 1844. Purchases exceeding that limit were later approved by both FitzRoy and Grey. Protection of pā and other sites in Māori occupation, guarantees that waivers would not be issued for lands that Māori required for their 'present use', and promises of tenths contained in FitzRoy's proclamations were abandoned or compromised by subsequent legislation passed to confirm settler title. The prohibition on the issue of waiver certificates for purchases already negotiated was also regularly ignored by officials, meaning that Māori did not receive the intended benefit of increased prices through competition.

The Governors and the Secretaries of State for War and the Colonies acknowledged the danger posed to Māori by the waiving of pre-emption, and both recognised the Crown's responsibility to ensure that they were not harmed by excessive and inappropriate land purchase. Earl Grey had issued clear instructions regarding the settlement of pre-emption waiver purchases that Māori vendors must be 'according to native laws and customs, the real and sole owners of the land'.[1731] But this was not established by the validation procedures that were introduced. For all Governor Grey's rhetoric about the failure of the pre-emption waiver proclamations – and of FitzRoy and the protectorate, in general – to safeguard Māori interests, again, nothing effective was done to remedy the injustice he had repeatedly identified. By his own admission, the measures he introduced were concerned with the interests of the settlers, not Māori

His 1846 ordinance undermined the tenths provisions – a crucial ptotective element in the waivier scheme – and the investigations under his three options perpetuated failures to identify all rightful owners properly (see section 6.5), establish that a fair price was paid, and ensure that Māori retained their valued sites and sufficient lands for their use. In general, the issue of a waiver certificate in the first

1731. Stirling and Towers, 'Not With the Sword but With the Pen' (doc A9), pp 556–557.

place was taken as proof that a transaction had been valid. Although settler claims were often disallowed, this was for failure to submit the necessary documentation or to comply with survey requirements, not because rightful owners had been omitted or those involved retained insufficient lands. As a result, the Crown was able to take those disallowed claims for its own as surplus. While clause 10 of the 1846 ordinance acknowledged that the Crown's title to that land was 'burdened' by 'the rights which may hereafter be substantiated thereto by any person of the Native race', the onus was on Māori to establish whether any customary rights remained; in the meantime, often the Crown had on-sold tracts or issued mining rights to settlers.

We find therefore that:

- the administration of the waiver policy was flawed from the outset, and Crown scrutiny of transactions was deficient to the point of negligence with the result that settlers were able to evade the intended protections in breach of te mātāpono o te matapopore moroki/the principle of active protection.
- Governor Grey's Land Claims Ordinance 1846 and options of August 1847 for the settlement of waiver claims favoured settler and Crown interests over those of Māori in breach of te mātāpono o mana taurite/the principle of equity and te mātāpono o te matapopore moroki/the principle of active protection.

6.9.6 The Land Claims Settlement Act 1856 and Extension Act 1858

The Land Claims Settlement Act 1856 and Extension Act 1858 entrenched the injustice that Governor Grey had acknowledged but failed to redress. This legislation also embedded and further deepened the inequitable treatment of Pākehā and Māori. The Land Claims Settlement Act 1856 was intended to facilitate the final settlement of old land claims that had not been already surveyed and confirmed by a valid Crown grant. This would give certainty of title to claimant settlers and clarify what land the Crown claimed as 'surplus' following the reassertion of its claim to this land, despite earlier promises to Ngāpuhi and other Māori that the land would 'return' to them. The Act would also provide Māori with greater certainty and, potentially, protection of what land was reserved. However, this was not a priority, and redressing the inequitable outcomes of the first Land Claims Commission and FitzRoy's intervention was not a consideration at all.

Section 15(2) of the Act specifically prohibited the commission from reopening investigations into claims that had resulted in a Crown grant being made or the payment of scrip. Earlier awards could be adjusted but not overturned. The commission could not reopen claims that had lapsed or been disallowed, except in pre-emption waiver cases. In the view of the 1856 select committee appointed to consider the nature and best means of disposing of outstanding land claims, Grey's 1846 ordinance to deal with waiver purchases had been unfair to settler claimants and the regulations too strictly applied. Special provisions were passed to deal with those cases (sections 29 to 31 of the Act); notably, however, restrictions were placed on the acreage that could be granted, resulting in a sizeable 'surplus' for the

Crown which, as noted earlier, had already disposed of much of this land before the Act was passed.

In addition, the Act was designed to encourage settler claimants to survey the fullest extent of boundaries as described in the original deeds, even when they had been awarded a much lesser area, and the boundaries had never been examined by the first Land Claims Commission. The clear intention was to maximise the 'surplus' lands going to the Crown, and this outcome was further strengthened by the Land Claims Settlement Extension Act 1858, which increased the already generous incentives being offered to settlers. Other assistance was offered. Under section 8, claimants could buy back from the Crown land that had been reserved to Māori in the original transaction if Māori were willing to surrender it to the Governor, further undermining protections. Section 15 also permitted claimants in 'exceptional cases' to reopen cases to which the provisions of the 1856 legislation could not 'in justice be strictly applied', or had been disallowed by the first commission for want of evidence that they could now supply, or if they had been in actual possession of the land for many years.

On the other hand, despite the many defects of the first commission's findings that had been identified by this time, neither Act required a review of these or of cases where scrip had been awarded without prior investigation. The provision of reserves was not required and remained utterly inadequate. Conditions, notably joint-use arrangements on which transactions had been predicated, were ignored. Māori were not heard on what was required for grants to be tika, what they had consented to, or the area of surplus that the Crown intended to take.

We thus find the Land Claims Settlement Act 1856 and Extension Act 1858 to be:

- in breach of te mātāpono o te tino rangatiratanga, in breach of te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect as well as te mātāpono o te mana taurite me te mātāpono o te matapopore moroki/the principles of equity and of active protection.

6.9.7 Conduct of the Bell commission

Although inhibited by the defects in legislation identified earlier, Commissioner Bell cannot be seen as an impartial and blameless arbiter. There is no doubt that Bell himself assumed that legitimate sales had taken place and was personally eager to maximise the land held by Europeans and the Crown irrespective of existing use by Māori or their likely future needs. He quickly acted to thwart any effort by Māori to revisit the findings of the first commission and devised rules and amendments to the original legislation that favoured the interests of settlers and Government over those of Māori. We note, in particular, Bell's dismissal of the claims of a new generation of hapū leadership to whom the task of defending land rights fell, since the long delay in the Crown establishing exactly what land it deemed 'surplus' also meant that the original Māori participants were often no longer alive to testify to their understandings of the matter.

The result was that shared occupancy arrangements were brought to an end in spite of the objections of Māori, while the reserves that were recognised by Bell were minimal and made without regard to comparable equities.

We find that Māori hapū were prejudiced by these actions and omissions of the Crown which deprived them of lands in which they had legitimate rights. This was:

- in breach of te mātāpono o te tino rangatiratanga, te mātāpono o te mana taurite/the principle of equity; te mātāpono o te matapopore moroki/the principle of active protection; and te mātāpono o te whakatika/the principle of redress.

6.9.8 Scrip lands

The Crown has acknowledged that its taking of Te Raki land that had been exchanged for scrip without any investigation of the validity of the claims concerned was in breach of the treaty. This occurred in a significant number of instances, more especially after the passage of the Land Claims Settlement Extension Act 1858. Anxious to obtain the maximum amount of land for the Government in return for its early expenditure, Commissioner Bell and his delegate, John White, pressured Māori owners into accepting their boundaries for the scrip lands, notably by threatening to prevent access to timber resources in order to force them into acquiescence.

Scrip surveys followed the pattern set by Bell generally, with officials taking deliberate and, on occasion, questionable steps to gain as much land for the Crown as possible. Often it was found that the full acreage exchanged for scrip could not be realised because claims had been much exaggerated and from the Māori perspective, seemingly abandoned, but in a number of instances, such as Rāwene and Papakawau, White was able to secure land well in excess of the original award. In the case of Motukaraka and Waitapu, the Crown claimed land (by falsification of boundaries) to which it clearly was not entitled. In line with the effort to maximise the Crown's return, reserves were only reluctantly recommended even when wāhi tapu and cultivations were involved, and the provision for Māori was derisory. Although Māori were promised reserves, in most cases the Crown ultimately either made smaller awards than recommended or did not award them at all.

We consider the Crown, by these actions, to be:

- in breach of article 2 guarantees of tino rangatiratanga over lands and resources, and in breach of te mātāpono o te tino rangatiratanga.
- in breach of te mātāpono o te matapopore moroki me te mātāpono o te mana taurite/the principles of active protection and equity, resulting in prejudice to Māori throughout the inquiry region but, in particular, to hapū based in Hokianga, who lost 14,029 acres by this means.

6.9.9 Surplus lands policy and practice

The Crown has conceded that its 'policy of taking surplus land from pre-Treaty purchases breached the Treaty of Waitangi and its principles' when it 'failed to require proper surveys and to require an assessment of the adequacy of lands that Māori held'; and that this was compounded by flaws in the way the policy was implemented, including by 'failing to investigate transactions for which "scrip"

was given, and in some cases taking decades to settle title or assert its own claim to these lands'. This resulted in 'some hapū losing vital kainga and cultivation areas.'[1732]

This is an important general concession but in our view, it does not go far enough. First, the Crown does not acknowledge that the doctrine of radical title on which its claim to the surplus was based was itself in breach of the treaty, whereas from our standpoint and for the reasons set out in chapter 4, this was the root problem. The Crown was asserting a power by reason of its claim to sovereignty, which it did not in fact possess, and a legal principle with which Māori were unfamiliar and which they had not had the opportunity to understand or consent to, despite its enormous ramifications for their rights over their lands and resources.

Additionally, the policy was applied contrary to what we think Māori could have inferred from their discussions with Governor Hobson prior to the signing of te Tiriti; certainly, the Crown's intention to take such lands should have been clearly explained to them, and it was not. If there was any doubt as to what the Crown gave Māori to understand, this was removed by Hobson's successor. FitzRoy clearly signalled to his colonial masters, early on, that he intended that the surplus lands would revert to Māori both as an act of justice and as a practical necessity for maintaining the peace of the colony. He made a commitment to that effect on his arrival in New Zealand and at his subsequent discussions at Waimate in 1844. We question whether the Colonial Office was ignorant of those commitments, as the Crown has argued, but in any event, in our view Māori were entitled to rely on the assurances of Crown representatives who spoke on behalf of the monarch of the day. We consider the reneging on that pledge to be a failure of the Crown's duty to act in good faith and a serious aggravation of the treaty breach that had been already committed.

The Crown appropriated 'surplus lands' in numerous blocks (as discussed at section 6.7) amounting to some 72,857 acres (including pre-emption waivers) to the prejudice of Māori in our inquiry region, and most particularly in the Bay of Islands and Whangaroa, where the Crown acquired 35,541 acres and 11,696 acres respectively by this means. In the Mahurangi and gulf islands, the Crown obtained 20,877 acres as 'surplus' from pre-emption waivers, many of which had been approved although in excess of the limited areas FitzRoy had intended. We consider the Crown's surplus lands policy and practice, which resulted in the effective confiscation of extensive lands without the consent of Māori at the time of transactions or when they were ratified by Crown-created processes, to be in breach of the treaty, giving rise to sustained protest.

In sum, the Crown was:

- in breach of te mātāpono o te tino rangatiratanga, as well as te mātāpono o te houruatanga me te mātāpono o whakaaronui tētahi ki tētahi/the principles of partnership, mutual recognition and respect; and te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development;

1732. Crown closing submissions (#3.3.412), p 3.

- in breach of te mātāpono o te matapopore moroki/the principle of active protection; and
- in breach of te mātāpono o te houruatanga/the principle of partnership by failing to honour promises that such land would return to Māori, and it acted poorly, disregarding its duty to act in the utmost good faith.

6.9.10 Government efforts to redress its injustice to Te Raki Māori

The Crown failed over many years to fully put right its past wrongs. The second Land Claims Commission was not concerned with the injustices resulting from the first commission. Subsequent inquiries, instituted after decades of protest and petition – the Houston commission 1907, Native Land Claims Commission 1920, and Sim commission 1927 – were limited, cursory, and narrowly focused. Māori were denied proper redress because of the Crown's fixed stance as to the nature of the original transactions and the integrity of its earlier validation process: Māori interests were simply considered extinguished. Redress was extremely limited and offered only as an 'act of grace', not as an acknowledgement of wrong inflicted. Even the more thorough Myers commission fell well short of meeting treaty standards. As its official title – the 'Royal Commission to Inquire into and Report on Claims Preferred by Members of the Maori Race Touching Certain Lands Known as Surplus Lands of the Crown' – indicates, it, too, was focused on the question of surplus rather than the underlying grievances of Māori relating to the true nature of their land arrangements with pre-1840 settlers, the appropriation of their lands, and the displacement of their laws. Although the commission acknowledged the outstanding Māori grievances 'in equity and good conscience', it still presumed that legal title to the surplus lands was vested in the Crown. The remedy was also flawed as the compensation was inadequate and its distribution via the Crown-established Taitokerau Trust Board inappropriate and unsatisfactory. What Māori in our inquiry district received as a result of the Myers commission failed to redress the imbalance, involve them in real partnership in development, and remove the grievance.

We find, therefore, that:

- the Crown breached te mātāpono o te tino rangatiratanga and te mātāpono o te whakatika/the principle of redress.

6.10 Ngā Whakahāweatanga/Prejudice

Māori tikanga respecting land arrangements was supplanted by British law before there was any question as to which applied in Te Raki. This was done without Māori consent and in contravention of the understanding reached at the time of the signing of te Tiriti that the question of authority would be negotiated where interests of Pākehā and Māori intersected. The transfer of authority exclusively into the hands of Crown officials that followed was not voluntary, and the refusal of the Crown to fully recognise and give effect to customary usages resulted in the undermining of tribal autonomy and law.

As a consequence of the Crown's flawed process for assessing pre-1840 land transactions, Māori in the district were deprived of 159,461 acres by the granting of permanent and exclusive titles to settler claimants. Added to this loss were the 23,338 acres the Crown acquired as a result of scrip exchange, and also its appropriation of 51,980 acres of 'surplus' land (contrary to Māori understandings and the promises made to them). In total, the land loss suffered by Māori in the pre-treaty period amounted to 234,779 acres.

The pre-emption waiver system briefly introduced in 1844 also had long-term consequences for hapū involved. The purchases ratified under that system resulted in the transfer of a further 14,400 acres of land (including geothermal and mineral resources) out of hapū hands into those of settlers, while the Crown acquired an additional 4,245 acres of scrip and took some 21,168 acres as 'surplus', almost all that loss occurring in the Mahurangi and gulf islands.

Many claimant groups made submissions on the issue of the Crown's validation of old land claims and pre-emption waiver purchases and its taking of 'surplus' lands. As indicated in the next table, claimants included the following:

- Ngāti Kawa, Ngāti Rāhiri, Ngāti Hine, Ngāi Tāwake, Patukeha, Ngāti Kuta, Ngāti Rēhia, Ngāti Manu, Te Kapotai, Ngāti Pare, Ngāti Hineira, Ngāti Torehina in the Bay of Islands;[1733]
- Ngāti Kawau, Ngāti Rua, Te Whānaupani, Ngāti Ruamahue, Te Tahawai, Kaitangata, Ngāi Te Whiu, Te Uri o Te Aho in Whangaroa;[1734]
- Ngāti Hau, Ngāti Korokoro, Te Māhurehure, Te Ihutai, Ngāti Tupango, Ngāti Pou, and Te Roroa in Hokianga;[1735]
- Te Parawhau, Te Uriroroi, Ngāti Kahu o Torongare, and Ngāti Hau in Whāngārei;[1736] and,
- Ngātiwai, Ngāti Taimanawaiti, Ngāti Tahuhu, Ngāti Rehua, Ngāti Manu in Mahurangi.[1737]

1733. Closing submissions for Wai 1477 (#3.3.338); closing submissions for Wai 2244 (#3.3.326); closing submissions for Wai 1716 and Wai 1522 (3.3.341(a)); closing submissions for Wai 2027 (#3.3.312); closing submissions for Wai 1314 (#3.3.396); closing submissions for Wai 1140 and Wai 1307 (#3.3.354); closing submissions for 1341 (#3.3.377); closing submissions for Wai 354, 1514, 1535 and 1664 (#3.3.399); closing submissions for Wai 120 (#3.3.320); closing submissions for Wai 1464 and 1546 (#3.3.395); closing submission Wai 2394 (#3.3.336); closing submissions for Wai 1140 and Wai 1307 (#3.3.354).

1734. Closing submissions Wai 1312 (#3.3.319); closing submissions for Wai 1661 (#3.3.369); closing submissions for Wai 1333 (#3.3.313); closing submissions for Wai 1613, 1838, 1846 and 2389 (#3.3.328); closing submissions for Wai 2382 (#3.3.339(a)); closing submissions for Wai 1968 (#3.3.337); closing submissions for Wai 421 and others; closing submissions for Wai 1259 (#3.3.378(a)).

1735. Closing submissions for Wai 1516 and Wai 1517 (#3.3.247); closing submissions for Wai 1857 (#3.3.291); closing submissions for Wai 549, 1526, 1728 and 1513 (#3.3.297(a)); closing submissions Wai 1538 (#3.3.303); closing submissions for Wai 2149 and 1666 (#3.3.323); closing submissions for Wai 1857 (#3.3.291); closing submissions for Wai 250 and Wai 2003 (#3.3.272).

1736. Closing submissions for Wai 1516 and 1517 (#3.3.247); closing submissions for Wai 619 (#3.3.295); closing submissions for Wai 2368 (#3.3.243); closing submissions for Wai 179, 1524, 1537, 1541, 1681, 620, 1673, 1917 and 1918. (#3.3.393); closing submissions for Wai 354 and Wai 1535 (#3.3.392).

1737. Closing submissions for Wai 2063 (#3.3.255); closing submissions for Wai 678 (#3.3.248(a)); closing submissions gor Wai 1514 (#3.3.357); closing submissions for Wai 678 (#3.3.248), pp 15–17.

The list is not comprehensive since some claimants relied on generic closing submissions; however, all hapū who can show that their lands were affected by the Crown's flawed validation of pre-treaty and waiver transactions are covered by our findings.

The Crown has conceded that its 'investigation of pre-Treaty transactions was flawed and caused particular prejudice to Māori'.[1738] It acknowledged that the 'decision to proceed with unsurveyed grants of land was wrong and caused prejudice to Maori'.[1739] The taking of surplus land from 'pre-Treaty purchases' and pre-emption waivers 'breached the Treaty of Waitangi and its principles when it failed to require proper surveys and to require an assessment of the adequacy of lands that Māori held'.[1740] Counsel for the Crown also made a general acknowledgement that certain groups – namely, those associated with the Mahurangi, Whāngārei, and Whangaroa taiwhenua – are now virtually landless, but did not specify the role that its validation process had played in that loss.

While welcome, these acknowledgments do not encompass the full breadth and depth of the prejudice that the Crown's validation process inflicted upon Māori in our inquiry district. The prejudice here was far greater than elsewhere in the colony. The national average of the land loss through this ratification process was an estimated five per cent reduction of the territory held by Māori; in the Bay of Islands the figure was near 30 per cent, much of it their best land. In other taiwhenua, the loss was less extensive but still significant. In Mahurangi and the gulf islands, 38,509 acres transferred out of hapū hands as a result of the validation process, with all but 80 acres granted to settlers; and as noted earlier, further extensive acreages were lost as a result of the ratification of pre-emption waiver purchases. In Whangaroa, almost 35,000 acres was removed from the Māori sphere of authority as a result of some 40 validated old land claims, 11,696 acres of which was taken by the Crown as 'surplus' and 5,272 acres by means scrip. In Hokianga, the figure was 24,378 acres, with the majority (13,829 acres) acquired by scrip. At Whāngārei and Mangakāhia, the total loss to hapū as a result of the validation of their early transactions was 14,631 acres. For Māori of the region, this was a poor reward for their early manaakitanga, their enthusiasm for missionaries and settlers, and their acceptance of the Crown's presence.

6.10.1 Displacement of tikanga

The most profound prejudicial effect of the Crown's validation process was the displacement of tikanga by an alien system of property law that struck at the very heart of Māori social organisation, as well as their hopes for the future when they had welcomed manuhiri (guests) onto the land and into their communities. Through its validation or ratification process, the Crown sought to convert what had been essentially social and personal arrangements – whereby land had been allocated to Pākehā in the expectation that both sides would benefit – into straightforward

1738. Crown statement of position and concessions (#1.3.2), p 52.
1739. Crown closing submissions (#3.3.412), p 54.
1740. Crown statement of position and concessions (#1.3.2), pp 2, 52, 55.

'sales' in which all Māori rights as 'vendors' were extinguished. Understandings as to ongoing Māori occupation of transacted lands were additionally undermined by later stages of the validation process: they were inadequately expressed in the awards first recommended, severely jeopardised by Governor FitzRoy's expansion of awards, and then finally quashed by the insistence of the second Land Claims Commission that the full boundaries of the original deeds be surveyed, which took in lands that Māori still considered themselves to 'own'.

As a result of the Crown's ratification process, 'large tracts of land passed from tenuous and uncertain Pakeha occupation, subject to tikanga Māori, into clear and absolute title according to British law'.[1741] Ngāti Manu claimants expressed the impact in this way: 'the Old Land Claims and Land Commissions processes were instrumental in the decimation and denial of authority with respect to their tribal territories that followed the welcoming' of Pākehā;[1742] Ngāti Pakihi said that '[t]heir Tino Rangatiratanga and their laws and customs with regard to their turangawaewae were undermined and displaced'.[1743]

We note one further prejudicial effect. From the very outset, the Crown failed to consider sharing authority with Māori in investigating the validity of pre-treaty land transactions. That would have to wait until the twentieth century, when at last a tentative step was taken in that direction and a Māori kaumātua (albeit not from Te Raki) was appointed to an official body of investigation into the validity of a pre-treaty land transaction. In our view, the prejudicial effects of that failure to give effect to te Tiriti guarantees of tino rangatiratanga encompassed loss of knowledge, loss of mana, and loss of mana wāhine.

6.10.2 Prejudicial conduct of the validation process

Māori of our inquiry district were prejudicially affected by the lack of adequate inquiry into pre-treaty land transactions, a skewed validation process, and the inequitable nature of the legislation authorising it. The inquiries of the Land Claims Commissions were limited and their processes full of inconsistencies and omissions. The commissions were thus ineffective in determining the real character of the transactions undertaken under tikanga at the time and allowed conditional occupation rights to be converted into absolute conveyances under British law. The legislation did not require any consideration of Māori customary law and impeded any inquiry that would ascertain what Māori intended when they entered these transactions or whether there had been any meeting of minds. Those shortcomings were exacerbated by the inquiry process itself and the instruction that only two Māori witnesses were required to demonstrate that a transaction was valid. Customary owners were not all identified (as later protests demonstrated) nor their consent to transactions and the fair and full extinguishment of all rights established.

1741. Closing submissions for Wai 1333 (#3.3.313), p 17.
1742. Annette Sykes, transcript 4.1.31, Otangaroa Marae, p 23.
1743. Closing submissions for Wai 2377 (#3.3.333), p 87.

Meanwhile, in 'innumerable instances', as the first commissioners and Governor Grey themselves acknowledged, pā, kāinga, cultivations, and wāhi tapu were left unprotected and transferred into settler or Crown hands. We make special note, here, of Kororipo pā. That Ngāpuhi disputed the pā's ownership was brought to the attention of the Crown by the protests led by Ngāti Rēhia from the 1930s when they became aware of its loss – an issue that remains yet to be resolved. At Waitangi, none of Busby's promises of reserves or wāhi tapu identified in the decade after the commission's initial findings were respected in the final awards. Neither Pouērua nor the kāinga at Ōwhareiti were set aside out of Williams' award at Pakaraka, while the wāhi tapu identified at Tomotomokia and Warehuinga were given no protection. These are but a few examples of an injury widely experienced, known to have been inflicted, and yet unrectified by the Crown.

Claimants told us that they were prejudiced by a 'sliding scale' of justice that advantaged Crown and settler interests over their own. We agree. Claimant Erimana Taniora (Ngātiuru and Te Whānaupani) provided an example of the unfair process relating to Upokorau, noting that the Land Claims Commission gave James Shepherd a grant to land over and above the maximum limit:

> The maximum total award for an individual was supposed to be 2,560 acres according to the Old Land Claims Commission Ordinance 1842. Shepherd should not have been entitled to any land in Whangaroa because he had claims in the Bay of Islands as well. The fact that the Commission awarded lands over and above the maximum awards has had a lasting detrimental impact on Ngātiuru.[1744]

The expansion of grants by FitzRoy and endorsement by the Bell commission caused particular prejudice to the many hapū who had entered into transactions with missionaries such as Kemp, King, Davis, and Shepherd for lands at Bay of Islands, Kerikeri, and Whangaroa; and Charles Baker at Waikare and Mangakāhia. These hapū had been encouraged to think they could remain on the land and that their children would share in the benefits of that arrangement. Also prejudicially affected were the customary owners of lands subject to transactions with settlers and entrepreneurs such as Busby (at Waitangi), Clendon (at Manawaora), Gilbert Mair (at Whāngārei), and Sparke (at Mahurangi) whom FitzRoy decided (on very doubtful grounds) to be 'really deserving', or who ultimately benefited (in the case of Busby) from an 'arbitration' process that completely excluded Māori.

6.10.3 Prejudice resulting from Crown's 'surplus' land and scrip policies

The Crown's retention of 'surplus' land has long been a source of grievance for Te Raki hapū and iwi – the result of a broken promise, one made by Governors and then overturned by a colonial Legislature. Crown counsel questioned whether such a promise had been made but acknowledged the distress that the policy had caused in the region and conceded that it had breached the treaty. Survey had not

1744. Erimana Taniora (doc G1), p 65.

been timely and there had been no assessment of whether hapū retained adequate lands.[1745]

Many hapū were adversely affected. For example, Ngāti Hine, Te Kapotai, Ngāti Manu, Ngāti Uru, Te Whānaupani, and Ngāi Te Whiu have long pursued redress for takings at Ōpua, Kapowai, and Puketōtara.

We heard compelling evidence from Stirling and Towers about the overall loss in respect of the original CMS claims. The missionary claims lay across a swathe of land from southern Whangaroa down to Kerikeri, Paihia, Taiāmai, and across to Waimate and Ōpua. These included a total of over 107,000 acres of surveyed land. This is more than half of the land surveyed for all old land claims across Te Raki, even though the CMS and the missionaries made just 70 of the more than 500 claims pursued in our inquiry district. The missionaries had initially claimed just over 69,000 acres (a figure reached by estimation) and were in fact awarded essentially exactly this area in addition to almost £2,000 in scrip. This left the Crown with more than 38,000 acres of 'surplus' land from the missionary and CMS claims – over half of all the 'surplus' land derived from old land claims. The missionaries and the Crown did very well out of the claims, but Māori certainly did not.[1746] Included in that transfer of authority over the land were many wāhi tapu, pā, and kāinga.

In the Bay of Islands, 28.8 per cent of the loss suffered was in this form (the Crown gained a total of 35,541 acres). We make note, too, of the prejudice suffered by the Whangaroa people as a result of the Crown's assertion of its right to the 'surplus': 36 per cent of the land that went from their hands as a result of the ratification of their early transactions, especially those undertaken with the missionaries, ended up in those of the Crown (that is, 11,696 acres).

Particularly affected by the Crown's scrip policy were Ngāti Hau and other hapū based in Hokianga, though there were also cases in Whangaroa, the Bay of Islands, Whāngārei, and Mangakāhia. The Crown has acknowledged that the scrip claims were not properly investigated at the time. Yet it succeeded in claiming those lands for itself – a total of 23,338 acres, of which 13,829 acres was from Hokianga hapū. As described in section 6.7, the Crown considered itself to be the loser in the system it had created, faced with Māori opposition unable to survey for itself the full extent of the land for which it had given generous scrip. However, Crown agents Bell and White – operating under the legislation that had been enacted by a colonial Parliament to settle claims for once and for all in its favour – in fact manipulated and bullied Māori into giving up their rights at Motukaraka, Rāwene, and elsewhere. The result was a serious loss of land and mana.

Claimants described it in this way in generic closing submissions: 'In a number of cases, there was not the acreage the Crown had relied on to issue scrip. Rather than simply take a loss, however, the Crown did what it always did – it leaned

1745. Crown closing submissions (#3.3.412), p 2.
1746. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 310.

on Māori, literally taking land not included in anybody's version of an Old Land Claim to make up the deficit.'[1747]

The economy of Hokianga languished because of the scrip policy and also as a result of the Northern War and the shift of Crown focus to Auckland. Claimant counsel noted that, in Hokianga, it was the areas designated as scrip land that were severely impacted:

> The actual implementation of the scrip exchanges left much to be desired. Settlers were given scrip for their land and moved off. This left land vacant, in Crown ownership. This land lay dormant for decades, producing no economic benefit to anyone. As a result, those areas with the greatest concentration of scrip lands endured suffering economies.[1748]

6.10.4 Te Raki hapū were prejudiced by delay

The Crown took upon itself the power to determine whether transactions were valid, but then delayed the validation process for years while waiting for Māori to accept that all their rights had been extinguished and embrace the putatively 'superior' English tenurial system and property laws. Indeed, the generation of Māori who had originally entered into these arrangements began to die, and the task of negotiating with the Crown about the tikanga of land transactions fell to a new generation. Officials dismissed their views as those of young men who had not been present at the time. Claimant counsel put it this way:

> The typical basis for time as prejudice involves death, loss of memory, loss of records, and other similar changes. These features operated against Māori when they objected to a transaction and were unable to produce people who originally participated in a transaction. The [settler] claimants and Crown raised lack of original participation as a shield to objections – even when the defense wasn't warranted.[1749]

Thus, Māori were further deprived of any chance of ensuring that their view of these transactions and the obligations they entailed was embedded in law.

We have already noted the impact on the Hokianga economy of the long delay in settling the scrip claims. More generally, the intentions of Te Raki rangatira and hapū in entering these transactions were also frustrated by the passing of time. Tikanga had been supplanted by English property law, but the long delay in defining what properties had been created impeded the ability of Māori to establish communities of Pākehā under their authority and protection in order to enhance the prosperity of both peoples.

1747. Generic claimant closing submission (#3.3.222), p 6.
1748. Generic claimant closing submission (#3.3.222), pp 31–32.
1749. Claimant closing submissions (#3.3.222), p 34.

6.10.5 Loss of land and resources

The impact on Te Raki Māori of such an extensive land loss as a result of Crown-imposed laws and processes, so early in the development of the colony, was profound and lasting. As claimant counsel described in generic submissions,

> Under the broad rubric of culture sits all that arises for the Māori relationship to land. What came from enjoyment of the bounty of resources, including everything relied on to sustain life and culture was transformed into loss and struggle for survival as a person, as a people, and as a culture – all due to the central feature land. The land loss that arose from the [Old] Land Claims process was to set Māori on a course they did not anticipate and have still not recovered from.[1750]

Claimants told us that land lost through the old land claims processes was some of the best land in the inquiry district. In the case of Ngāti Hine, for example, we were informed (and accept) that

> The Crown's Land Claims Commissions wrongfully granted Old Land Claims which had the effect of permanently alienating our land and the Crown itself wrongfully acquired land in our rohe when it took lands declared 'surplus' or 'scrip' for its own benefit . . . As a result thousands of acres of land in the Bay of Islands were alienated from hapu ownership. This has had a profound impact on Ngati Hine, on our traditional connections with our whenua, our tikanga, wairua, whakapapa and way of life in general. Much of the land that was taken through the old land claims process was prime land in terms of location and quality, located close to the rivers, sea and main anchorage points. It was also very culturally significant land in that it included pa, kainga, wahi tapu, tauranga waka, walking tracks, hunting grounds and more. Prior to 1840 through to today there is evidence of frustration, grievance and prejudice from these Old Land Claims.[1751]

Ngāti Rēhia claimants also commented that

> over a third of the land [subject to old land claims] went to the Crown. The land kept by the Crown was some of the most fertile and productive lands in the Ngāti Rēhia rohe. An obvious example is what is now the Kapiro Land Corp Farm which was originally part of the three large John King Old Land Claims. As Arena Munro has pointed out, this land was rich in resources as well as sites of significance for Ngāti Rēhia.[1752]

At Whāngārei, Te Parawhau and other local hapū were denied the ability to participate in the management and economic development of the town by a process

1750. Claimant closing submissions (#3.3.222), p 7.
1751. 'Te Wahanga Tuarua – Whenua: Ngati Hine evidence for Crown breaches of te Tiriti o Waitangi', 2014 (doc M25), p 11.
1752. Bryan Gilling, transcript 4.1.31, Otangaroa Marae, p 181.

of loss of key ancestral lands initiated by the Crown's endorsement of their pre-1840 arrangements as complete alienations, quickly followed by its own purchases. The same point – the transfer of valued lands into the hands of settlers and Crown – can also be made in the case of Paihia, Waimate, Kerikeri, Puketōtara, and elsewhere as detailed in this chapter.

We note the hurt that was caused. In many cases, hapū of the region were betrayed by those whom they trusted most: missionaries and settlers who had been allocated lands and offered high-ranking women and protection. And it was their claims that the Crown ultimately favoured at the expense of Māori. As Charles Bristow (Te Roroa) told us:

> What the investigation of these Old Land Claims show is that the Crown granted a substantial amount of our lands to Pakeha claimants and this meant that our hapu suffered land alienation very early on and have therefore been landless for a very long time. In the Old Land Claims . . . are examples of Pakeha claimants exchanging the lands they claimed, for lands elsewhere in the Country and the Crown gaining ownership of our land. In terms of these Old Land Claims, only the Crown and Pakeha benefited. We on the other hand, were left landless. What is saddening for us about how our lands were alienated through the Old Land Claims process, is that the very missionaries and settlers who Pumuka befriended in the early 1830s including Williams, later claimed, and were awarded, his lands. . . . We have no marae.[1753]

Whangaroa claimants expressed similar views. Missionaries such as James Shepherd had been able to exert a tremendous influence over their tūpuna, but the ratification process enabled the missionaries to forget their original undertakings. Isabella Kathleen Urlich of Ngāti Kawau described how

> Land was central in the relationship between Maori and missionaries. The relationship between Maori and missionary made occupation of land possible. . . . Occupation of land in 1819 was by permission of Maori only. Later, permission to occupy was by missionaries only. The initial understanding between Maori and missionary, that is, missionary occupation of land by permission of Maori only, was conveniently forgotten.[1754]

Instead of the economic benefits, protection, and return of lands 'unjustly acquired' that Te Raki Māori had been promised, hapū in areas of early contact – in particular, the Bay of Islands, Whangaroa Harbour, and Hokianga, where lands were subject to scrip – bore the brunt of new and alien legal processes. As a result, they suffered a loss of land and authority from which they never fully recovered. Popi Tahere (Ngā Uri o Te Aho) told us that 'The old land claims have been a terrible affliction and injury on our people.'[1755] Claimant counsel Annette

1753. Phillip Bristow (doc M16), pp 16–17, 29.
1754. Isabella Urlich (doc G8), p 22.
1755. Popi Tahere (doc N23), p 7.

Sykes, speaking for Ngāti Manu, described the loss of Pōmare's coastal lands as his hapū became 'virtually landless by 1864', noting that they 'effectively became irrelevant' as a result of the procedures followed.[1756] For Te Kapotai, Te Patukeha (Ngāi Tāwake), Ngāti Rāhiri, Ngāti Kawa, Ngāti Hine, Ngāti Rēhia, and other hapū whose rights were located in that wide swathe of territory already described (from southern Whangaroa down to Kerikeri, Paihia, Taiāmai, and across to Waimate and Ōpua), the impact came early and resulted in extensive loss of land and hapū autonomy, and an insufficient economic base for their future sustenance and development.

It is clear to us that the Crown sought to undermine and abandoned respect for Māori law and custom in favour of its agenda to 'rationalise' land ownership in New Zealand on British terms. At this point, tikanga was overridden, and many hapū of the inquiry district were never able to recover from the position in which they had been placed; they had welcomed the manuhiri and been deprived of land and authority in return. The prejudice has been ongoing. The legal framework for all future land dealings was set. The Crown had established its exclusive authority and processes in which Māori should have shared when coming to decisions concerning their own lands and the arrangements they had made with Pākehā.

To summarise, the prejudice Te Raki Māori suffered as a result of the Crown validating pre-treaty transactions as permanent alienations that conferred absolute and permanent title; issuing scrip; and taking surplus lands encompassed the following:

- the displacement of tino rangatiratanga and tikanga with regard to their lands and resources;
- the loss of some of their most valuable lands very soon after first contact, meaning hapū were left with insufficient land and resources for their present and future needs;
- the denial of their ability to care for, manage and control their lands and resources in accordance with their law, cultural preferences, and customs;
- economic and social deprivation; and
- a consequent diminution of mana.

We finish with the words of Ngāti Hine:

> [We] have been prevented from freely exercising our tino rangatiratanga, including possession, management and control of all of our lands in accordance with our tikanga and we have been prevented from enjoying proper economic utilisation and development of our land and resources.[1757]

1756. Annette Sykes, transcript 4.1.31, Otangaroa Marae, p 39.
1757. 'Te Wahanga Tuarua – Whenua' (doc M25), p 10.

CHAPTER 7

TINO RANGATIRATANGA ME TE KĀWANATANGA, 1846–65: TE TIKANGA O TE HEPETA O KUĪNI WIKITORIA / TINO RANGATIRATANGA AND KĀWANATANGA, 1846–65: THE MEANING OF THE QUEEN'S SCEPTRE

Na, e mea ana ahau kia tino rapua e matou, te tino tikanga o te hepeta o Kuini Wikitoria: ki te kahore e kitea o Niu Tirani taua hepeta, ka pena o matou whakaaro me te koura kua pau i te waikura.

Now I say let us fully enquire into the meaning of Queen Victoria's sceptre. If we of New Zealand do not understand that sceptre we shall be like unto gold eaten up of rust.

—Honatana (a rangatira from the Bay of Islands),
speaking at the Kohimarama Rūnanga on Friday, 27 July 1860[1]

7.1 Hei Tīmatanga Kōrero / Introduction

In the aftermath of the Northern War, the Crown and Te Raki Māori each maintained their distinct approach to the treaty relationship. The Crown held the view that the treaty had enabled it to proclaim sovereign authority, tempered only by an obligation to protect Māori in possession of their lands. It therefore acted on the basis that Te Raki Māori must at some point become subject to the colony's laws. Māori, on the other hand, saw the relationship in broader terms: as a power-sharing agreement that would protect their right to exercise tino rangatiratanga while also providing a basis for economic partnership.

Neither party wanted a renewal of hostilities, so neither forcefully asserted its authority. Indeed, the Crown largely neglected the north from the late 1840s through to the end of the 1850s. Although it stationed a small military force in the Bay of Islands and sent a few local officials to negotiate for Māori acceptance of the colony's laws, its presence had little direct impact on Māori communities. Te Raki Māori, for their part, made several attempts to restore the economic partnership and attract settlers back to the north. They showed little enthusiasm for

1. 'Proceedings of the Kohimarama Conference', 27 July 1860, *Te Karere Maori/Maori Messenger*, vol 7, no 15, pp 41–42; David Armstrong and Evald Subasic, 'Northern Land and Politics: 1860–1910' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2007) (doc A12), pp 178–179).

submitting to the Governor's authority over their day-to-day affairs, but they were willing to affirm their alliance with the Queen. To this end, they restored the flagstaff on Maiki Hill in 1858 as an expression of unity between Māori and Pākehā. The Governor, in turn, promised to establish a township at Kerikeri and encourage settlers to return to the north. In other regions, the Crown's determination to assert its authority and advance the interests of the growing settler population were leading it into conflict with Māori.

A key factor in the political developments during this period were the significant steps taken by the Crown to to establish settler institutions of self-government and a constitutional framework for the colony. In 1852, the British Parliament passed legislation establishing representative national and provincial assemblies in New Zealand, and settlers were given wide legislative powers over internal affairs, subject to certain reserve powers of the Queen. In 1855, the Colonial Office instructed the Governor to introduce 'responsible government' (whereby elected representatives, rather than Crown-appointed officials, would exercise executive power (see sidebar at section 7.2)). The first responsible ministry was formed in 1856. On the advice of Governor Thomas Gore Browne, control of Māori affairs was withheld from the settler Government. Subsequently however, the British government progressively granted settler politicians control of the Crown–Māori relationship – a process that was essentially complete by February 1865, though New Zealand did not become fully independent of Britain until much later. During the 1860s, the settler Government became less willing to recognise even limited Māori self-government and instead pursued an increasingly assimilationist course, which continued through to the end of the century and beyond. This policy direction involved, among other things, the establishment of the Native Land Court, which opened the way for large-scale alienation of Māori lands, and the determination that Māori must submit to the colony's laws.

In this chapter, we examine the significance of these major constitutional changes for Te Raki Māori and the extent to which they would be involved in the representative governing instutions that were being established. The New Zealand Constitution Act 1852 provided for limited Māori participation in the new national and provincial assemblies, as the franchise required that voters meet property tests that excluded many Māori. However, section 71 of the 1852 Act made specific provision for the establishment of native districts, where Māori hapū and iwi might continue to govern themselves under their own customs and laws. This important provision presented the Crown with an opportunity to recognise Māori tino rangatiratanga as it transferred governing authority to the growing settler population. However, section 71 was never used by the Crown, and no native districts were established during this period.

We ask why this was, and why Governors Gore Browne and Grey each sought different solutions to provide for Māori involvement in the governance of their communities. When war broke out in Taranaki in 1860, Gore Browne feared Māori resistance might spread. He sought to shore up support among Māori leaders by calling a national rūnanga at Kohimarama that same year, where he offered to provide for ongoing Māori input into the colony's laws and policies, and to recognise

Māori rights of self-government at a local level. Māori from our inquiry district regarded these promises as significant steps towards restoration of the treaty partnership. In 1861, Gore Browne's successor, Sir George Grey, returning for a second term as Governor, rejected the plan for regular national rūnanga as agreed at Kohimarama, but did provide legal recognition for local and district rūnanga with some powers of self-government. Te Raki Māori engaged with and worked through these institutions until the colonial Government withdrew its support from them.

In the second part of this chapter, we consider the importance of these short-lived initiatives of the two Governors to Te Raki Māori in the context of the Crown's transfer of governing authority and responsibility to the settler population. We discuss whether they provided Te Raki Māori with meaningful involvement in the governance of their communities, and what the impact was of Crown withdrawal of its support for the continuation of the Kohimarama Rūnanga and of Grey's rūnanga system by 1865.

Claimants regarded the imperial government's transfer of authority to colonial institutions as a fundamental breach of the treaty partnership, exacerbated by the Crown's failure to provide for adequate Māori representation in the colonial legislature.[2] Claimants also told us that the Crown failed to keep its promises after the 1860 Kohimarama Rūnanga to establish an annual national conference of rangatira, and to ensure that Māori played a role in forming and administering the law in their districts 'consistent with tino rangatiratanga and a tikanga-based system of law'.[3] Having established district rūnanga in 1861 with the promise that these would be permanent institutions of local self-government, the Crown quickly broke that promise and disestablished them in 1865.[4]

7.1.1 Purpose of this chapter

Chapter 4 considered the treaty compliance of the Crown's exercise of its kāwanatanga from 1840 to 1845, and its impact on the ability of Te Raki Māori to exercise their tino rangatiratanga. This chapter continues the analysis of this dynamic into the post-Northern War period, from 1846 to 1865. In this chapter, we investigate claims that Crown actions, omissions, legislation, and policy undermined Māori autonomy and tino rangatiratanga from the middle of the nineteenth century, after the Northern War. We consider the steps the Crown took to establish institutions of settler self-government and grant the colony a system of responsible government (see sidebar at section 7.2).

These were major constitutional and political changes that had the potential to undermine the basis of the treaty agreement as Te Raki Māori understood it: the Governor's sphere of authority was to control British subjects, while they would

2. Claimant closing submissions: political engagement (#3.3.228), pp 9–10, 33, 269–270.
3. Claimant closing submissions (#3.3.228), pp 217–218, 275–276.
4. Claimant closing submissions (#3.3.228), p 17; Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage 1*, Wai 1200, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 1, p 242.

retain their tino rangatiratanga and independent authority.[5] The transfer of governing authority from the Governor to the settler population thus raises questions about the extent to which the Crown sought Māori input on the new constitution and institutions of government, and how Te Raki Māori rights and interests would be protected as settlers increasingly controlled the colonial Government's policies.

In this chapter, we consider a number of the options that were available to the Crown to provide recognition for Te Raki Māori tino rangatiratanga alongside or within the colonial Government. In the first part of the chapter, we look at section 71 of the Constitution Act which provided for the creation of self-governing native districts, yet was never used; and at the restrictive franchise (sections 7 and 42) which excluded nearly all Māori men because they could not meet a property qualification couched in terms in English law. In the second part, we examine the significance for Te Raki leaders of other steps the Crown took to afford hapū and iwi some role in the governance of colonial New Zealand and in their own districts, notably the 1860 Kohimarama Rūnanga (also known as Kohimarama Conference) and the establishment of district and local rūnanga in Te Raki. Our overarching aim in exploring these issues is to assess whether the Crown adequately recognised, respected, and gave effect to the tino rangatiratanga of Te Raki Māori during the colony's transition to responsible government.

7.1.2 How this chapter is structured

We begin this chapter by considering claimant and Crown submissions, and previous Tribunal guidance on relevant matters, in order to identify the issues for determination (section 7.2).

On each issue, we first set out the key arguments advanced by the parties (sections 7.3–7.5). We analyse those arguments in light of the evidence to reach a series of conclusions and findings on the treaty compliance of the Crown's actions in respect of the issues before us. All our findings are brought together in section 7.6, followed by our overall assessment of the prejudice Te Raki Māori sustained through the Crown's attempts to assert sovereignty in the inquiry district.

7.2 Ngā Kaupapa / Issues

7.2.1 What previous Tribunal reports have said

The issues in this chapter concern the political relationship between Te Raki Māori and the Crown, including their relative authority and spheres of influence. As we noted in chapter 4, the Tribunal has consistently found that the treaty guaranteed Māori rights to autonomy and self-government over the full range of their affairs, and through institutions of their choosing; that these rights constrained or fettered the Crown's power of kāwanatanga; and that the relationship between Crown and

5. Waitangi Tribunal, *He Whakaputanga me te Tiriti / The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry*, Wai 1040 (Wellington: Legislation Direct, 2014), pp 519–520.

Māori spheres of influence was subject to ongoing negotiation and adjustment in which neither side could impose its will.[6]

7.2.1.1 *The Crown's decision to transfer responsibility for the Crown–Māori relationship to the colonial Government*

In the *Report of the Waitangi Tribunal on the Orakei Claim* (1987), the transition to responsible government was considered in some depth. The Tribunal found that during the 1840s and 1850s the imperial government generally attempted to honour its understanding of the treaty, and in particular to stand between Māori and settlers by protecting Māori land and resource rights. But that changed as settlers acquired more influence over Māori affairs.[7]

The Tribunal considered that the Constitution Act enshrined '[t]he broad principle . . . that the Maori people might retain their own lands in accordance with their own customs', and might furthermore maintain 'their own customs to govern their dealings with each other'. Section 71 'provided for native laws to govern native people and native districts in which [Māori] laws would be supreme' – a principle that was important for Māori, as evidenced by New Zealand's history which is 'marked by continuing Maori attempts to assert tribal law and autonomy, both before and after the Constitution Act 1852'.[8]

The Tribunal stated that there was 'good reason to believe native laws would have adapted and developed had tribal autonomy and native districts been allowed' under section 71 – but they were not. Instead, the colonial Government asserted its authority over Māori affairs, and '[t]he colonists were wedded to a view of one law for all, which was of course to be their law'. From 1854, the colonial Government 'was to move very strongly to assert British law over Maori people, Maori lands and Maori society and there was never any support in the General Assembly for applying section 71'. Section 73 of the Constitution Act 'acknowledged the communal nature of native land ownership' and affirmed the Crown's right of pre-emption, but 'colonists were equally anxious to overturn this provision'. The Native Territorial Rights Bill 1859 was passed by the General Assembly to abolish the Crown's right of pre-emption. However, the Bill was disallowed by the imperial government, which considered it an infringement of the treaty. Nonetheless, the Tribunal found:

> The right of the tribes to retain their lands in accordance with their own customs, and not to be exposed to settler pressure to sell them was soon abrogated in domestic laws. The election of the first House of Representatives in 1855 was rapidly followed by overt War (1860 – 1867), the relinquishment of Imperial control of Native Affairs (1861), the confiscation of Maori lands (1863), and the individualisation of remaining

6. Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims – Pre-publication Version*, Wai 898 (Wellington: Legislation Direct, 2018), pts 1–2, pp 150–151; Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1), pp 166, 173–174.

7. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, Wai 9, 2nd ed (Wellington: Brooker and Friend Ltd, 1987), pp 35–38.

8. Waitangi Tribunal, *The Orakei Report*, Wai 9, 2nd ed, pp 36–37.

> Maori titles (1865). The general view of the Colonial Office, that laws should not contravene the Treaty of Waitangi, suffered a sudden decline.[9]

For Māori, the treaty, which 'should have been the fundamental law and was a constitution in itself, was effectively overturned by a settler population no longer a minority'. Māori were initially powerless to influence the new colonial Parliament:

> The settlers then had not sought the 1852 constitution in order to advance their responsibilities to the Maori and nor did they welcome it for the opportunity to provide for Maori laws and districts. They had sought instead, and had soon gained, self Government freed of Imperial controls.[10]

In the *Orakei* report, the Tribunal noted a tension between the principle that 'tribes or tribal individuals should retain sufficient lands for their needs' and settler impatience for land.[11] A fundamental question during this period was whether the Crown took 'sufficient steps' to protect Māori against excessive alienations and to ensure that they retained enough land.[12] This is a question we will be asking in our inquiry district, not just regarding land but also whether Māori rights of self-government were protected as responsibility for Māori affairs was transferred to the settler Government.

In the *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (1988), the Tribunal noted that Māori in that district retained independent control of their affairs until the 1860s. From that point, growth in the settler population, Britain's transfer of political authority to settlers, and the Crown's declaration of war against Māori in some districts combined to undermine Māori autonomy. Racial attitudes hardened, and laws were enacted to break the Māori control of land and resources and undermine Māori competitiveness in trade.[13]

In *The Taranaki Report: Kaupapa Tuatahi* (1996), the Tribunal found that Governor Grey's arrival in New Zealand in 1846 had already heralded a significant shift in the Crown's policy towards Māori. Grey abolished the Protectorate of Aborigines, made the same officials responsible for land purchasing and Māori affairs, and embarked on an ambitious land purchasing programme aimed at meeting the needs of a growing population of British settlers. Matters then 'worsened when representative institutions were introduced in New Zealand from 1853 without effective provision for Maori representation'. From that point, 'Maori custom, law, and institutions were judged by those who did not know them; and the judgments were wrong'. Under settler influence the Crown negated Māori rights to make their own decisions about land, causing war in Taranaki and elsewhere. It was then a revolution in land tenure that destroyed the capacity of Māori to

9. Waitangi Tribunal, *The Orakei Report*, Wai 9, 2nd ed, pp 37–38.
10. Waitangi Tribunal, *The Orakei Report*, Wai 9, 2nd ed, p 38.
11. Waitangi Tribunal, *The Orakei Report*, Wai 9, 2nd ed, p 38.
12. Waitangi Tribunal, *The Orakei Report*, Wai 9, 2nd ed, p 38.
13. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, Wai 22 (Wellington: GP Publications, 1988), p xv.

manage their own properties. The colonial Government 'was unable to see that the essence of peace is not the aggregation of power but its appropriate distribution'.[14]

7.2.1.2 *Māori institutions of self-government*

Several Tribunal reports have considered Māori rights to self-government at national, tribal, and local levels. In particular, the Tribunal in *He Maunga Rongo: Report on Central North Island Claims* (2008) analysed in detail the options available to the colonial Government throughout the nineteenth century. The Tūranga and Te Rohe Pōtae inquiries also considered these matters closely.

In broad terms, in *He Maunga Rongo* the Tribunal found that the treaty guaranteed Māori 'their autonomy and the right of self-government by representative institutions responsible to their communities'.[15] The Tribunal adopted the conclusions of the *Taranaki* report, that the guarantee of autonomy under article 2 offered Māori the right to 'constitutional status as first peoples', and the right to 'manage their own policy resources and affairs, within minimum parameters necessary for the proper operation of the state'.[16] The Tribunal also found that the Crown could not establish institutions of government with authority over Māori unless it had first secured Māori consent. As the Tribunal explained, this was because the right of tino rangatiratanga acted as an ongoing constraint on the Crown's right to govern.[17]

In addition, the *He Maunga Rongo* report identified a futher dimension of the treaty guarantee of self-government, arising from article 3, and the promise that as British citizens Māori would receive equal treatment to Europeans.[18] The Tribunal noted that by the mid-nineteenth century, 'British subjects in the colonies were entitled to a minimum of local self-government through municipal and other bodies, and to representative institutions at a national level'.[19] During this period, Central North Island Māori sought self-government on the same basis as settlers, 'that is, they sought fully responsible self-government'.[20] The Tribunal concluded that denying the Queen's Māori subjects self-government through representative institutions 'was in clear violation of the constitutional norms and standards of nineteenth-century New Zealand'.[21] Furthermore, this was what was required under article 3, 'either by full and fair incorporation in the franchise and

14. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi*, Wai 143 (Wellington: Legislation Direct, 1996), pp 42, 308–309; see also Waitangi Tribunal, *The Ngai Tahu Report 1991*, Wai 27, 3 vols (Wellington: GP Publications, 1991), vol 2, pp 250–251, 270–272; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, Wai 785, 3 vols (Wellington: Legislation Direct, 2008)), vol 1, pp 308–309, 374.

15. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, p 207.

16. Waitangi Tribunal, *The Taranaki Report*, Wai 143, p 20; Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, pp 172, 403.

17. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, pp 191, 207; see also Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pts 1, 11, pp 178–179.

18. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, p 176.

19. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, p 176.

20. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, p 177.

21. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, p 177.

representative institutions of the colony, or by their own institutions, or some mix of the two acceptable both to the Crown and Māori'.[22]

The Tribunal recognised that the Crown's obligation to provide Māori with legal powers of self-governement should also be judged by what was reasonable in the circumstances of the nineteenth century.[23] In *He Maunga Rongo*, and its Tūranga, Te Rohe Pōtae, and other inquiries, the Tribunal considered the Crown's decision not to use section 71 of the Constitution Act to establish self-governing Māori districts. In *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims* (2004), it found that, so long as Māori retained autonomy within their territories, the provision could have been used, and it 'would have provided for Maori autonomy within a constitutional and Treaty framework', delivering the tino rangatiratanga guaranteed by the treaty.[24] Section 71 gave the Crown 'a unique opportunity to protect Turanga Maori within its own kawanatanga framework', but, in breach of the treaty, it 'chose, instead, to wait until it could assert its own authority and so defeat Maori autonomy'.[25] In *He Maunga Rongo* and *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (2018), the Tribunal found that there was no legal or constitutional barrier to the Crown using section 71, nor any practical barrier until late in the century when Māori no longer exercised practical autonomy in their territories.[26]

In the *He Maunga Rongo* report, the Tribunal found that the Kohimarama Conference had been a significant step towards Māori self-government, and that the promised future conferences had potential to evolve into a Māori parliament, with consultative and legislative functions, in a manner that would have been consistent with the treaty.[27] However, the Tribunal concluded that when Governor Grey refused to hold future conferences, 'the most promising opportunity for a Māori parliament in the history of this country, endorsed by Maori and by the settler Parliament of the time, was deliberately rejected on very inadequate grounds' (we discuss this in section 7.4).[28] This 'was a critical missed opportunity for meaningful Maori participation and power in central government'.[29] In making these decisions, the Tribunal cited the settler Parliament's decision to provide funding for the planned annual conference as evidence that infrastructure and costs did not reasonably constrain what could have been afforded to Māori.[30] Furthermore, the Tribunal did not consider that the Crown was constrained by settler ideologies

22. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, p 177.
23. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, p 177.
24. Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, Wai 814, 2 vols (Wellington: Legislation Direct, 2004), vol 1, p 60.
25. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 1, p 62.
26. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, pp 227–228, 241, 337; Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pts 1, 11, pp 662–663, 687–689.
27. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, pp 228–229, 232.
28. The Tribunal found that Grey's reasons were racist and illogical (p 231): Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, pp 228–229, 385.
29. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, p 384.
30. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, pp 178, 232.

and politics from providing Māori self-government, noting that protective measures were a 'recurring possibility in Parliament in the nineteenth century'.[31]

In *Te Mana Whatu Ahuru*, the Tribunal found that Grey refused to reconvene the conferences because neither he nor his ministers wanted a national Māori authority that might rival the colonial Government.[32] Instead, Grey established district rūnanga that provided for some degree of local self-government, but then withdrew support after a few years. The Tribunal found that when Grey offered rūnanga to Te Rohe Pōtae Māori, they were required to disassociate themselves from the Kīngitanga. The 'New Institutions' were 'intended to control Māori in the Waikato and Te Rohe Pōtae'.[33] In *He Maunga Rongo*, the Tribunal found that the district rūnanga that Grey established in 1861 provided Māori with significant powers of self-government in conjunction with the Government and local officials. The policy was, in their view, 'a Treaty-compliant one that showed great promise'. But the Government abandoned the policy and dismantled the rūnanga in 1865 while also rejecting other options for Māori self-government. In the Tribunal's view, this was a serious breach of treaty principles.[34]

7.2.2 The claimants' submissions

Claimants said that, throughout the decades after the signing of te Tiriti, the Crown 'consistently and stridently' sought to impose its kāwanatanga over all Te Raki Māori people, lands, and resources, while Te Raki Māori 'strove to exercise their tino rangatiratanga and establish a relationship with the Crown based on their understanding of te Tiriti/the Treaty'.[35]

The claimants said that the Crown, having proclaimed sovereignty in 1840, then progressively attempted to assert power over Māori. The Constitution Act, in breach of te Tiriti, effectively severed the direct relationship between rangatira and the Queen, and instead handed law-making powers to a settler assembly from which Māori were effectively excluded. The colonial Parliament subsequently enacted legislation to bring Māori under the authority of the colony's system of law and government.[36]

On occasions, the Crown did make some provision for Māori to exercise some degree of self-government or influence on Crown decision-making, albeit under the control of the colonial state, but these provisions were either not used or quickly abandoned. Specifically:

- Section 71 of the New Zealand Constitution Act 1852 provided for the establishment of districts in which Māori 'laws, customs, and usages' could have continued in force. In generic closing submissions about tino rangatiratanga and Māori autonomy, claimants said that this 'would have provided for Te

31. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, p 180.
32. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pts 1, 11, pp 431–432;
33. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pts 1, 11, p 445.
34. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, p 242.
35. Claimant closing submissions (#3.3.228), p 10.
36. Claimant closing submissions (#3.3.228), pp 9, 33, 211; claimant closing submissions (#3.3.221), pp 89–91; closing submissions for Wai 2071 (#3.3.375), p 2.

Raki Māori to exercise tino rangatiratanga in their self-governing districts'.[37] In other submissions, claimants argued that section 71 was not sufficient to provide for the fullest exercise of tino rangatiratanga.[38] In any event, the provision was never used.[39]

- At the Kohimarama Conference in 1860, Governor Gore Browne 'assured Te Raki chiefs that in future they would take up a significant role in their own governance through annual conferences, Māori districts and establishing a means of ascertaining tribal boundaries and land titles'.[40] In the claimants' view, these roles would be 'consistent with tino rangatiratanga and a tikanga-based system of law'.[41] However, Gore Browne's successor, George Grey, abandoned the conferences, seeing them as a threat to the Queen's sovereignty, meaning no further discussion was held.[42]
- The Native Districts Regulation Act 1858 and the Native District Circuit Courts Act 1858 provided the statutory basis for a system of local government through district rūnanga. Māori were not consulted on this proposal, which was aimed at encouraging assimilation and was considerably more limited than section 71. Parliament initially refused to fund district rūnanga.[43] District rūnanga were established from 1862, providing a mechanism by which Māori could exercise some degree of self-government. Governor Grey promised that the rūnanga would be permanent.[44] The Crown quickly broke this promise: the rūnanga were starved of funds and then terminated 'because the Crown had made a political decision to disestablish any manifestation of Māori political autonomy'.[45]

Through its handling of these initiatives, claimants argued, the Crown failed to recognise Te Raki Māori autonomy or rights to a meaningful role in their own governance.[46] The colonial Government had acquired full responsibility for Māori affairs by 1865, and from that time, claimants said, 'the Crown turned away from policies promoting self-government' and instead began to pursue policies that were aimed at asserting the Crown's de facto authority while assimilating Māori into the colony's system of law and government.[47]

Claimants said that the Crown also asserted its authority through warfare (both the Northern War and campaigns elsewhere across the North Island); the promotion of settlement; and legislative initiatives that included successive Native

37. Claimant closing submissions (#3.3.228), pp 268–270.
38. Specific closing submissions for Wai 1477, Wai 1522, Wai 1531, Wai 1716, Wai 1957, Wai 1968, Wai 2061, Wai 2063, Wai 2377, Wai 2382, and Wai 2394 (#3.3.338(a), pp 3–4.
39. Claimant closing submissions (#3.3.228), pp 268–270.
40. Claimant closing submissions (#3.3.228), p 269.
41. Claimant closing submissions (#3.3.228), pp 217–218.
42. Claimant closing submissions (#3.3.228), p 271.
43. Claimant closing submissions (#3.3.228), pp 270–271.
44. Claimant closing submissions (#3.3.228), pp 275–276, 278; claimant closing submissions (#3.3.221), pp 106–107.
45. Claimant closing submissions (#3.3.228), p 17.
46. Claimant closing submissions (#3.3.228), pp 270–271.
47. Claimant closing submissions (#3.3.228), pp 9, 259, 278–279.

Lands Acts and the Native Rights Act 1865, which declared that every Māori was a natural-born British subject and provided that the colonial courts had jurisdiction over Māori.[48]

Claimants submitted that the Crown's 'imposition of . . . kāwanatanga' over Te Raki Māori and their taonga 'without their informed consent, cannot co-exist with their rightful exercise of tino rangatiratanga'.[49] They asserted that Te Raki Māori did not at any time willingly acquiesce in the gradual Crown encroachment on their exercise of tino rangatiratanga but rather continued, throughout this period and beyond, to assert their rights of autonomy and self-government.[50]

In closing submissions on tikanga, claimants said the doctrine of parliamentary supremacy or parliamentary sovereignty, brought into effect by the Constitution Act, had severed the constitutional relationship between Māori and the Queen, 'formalise[d] the subjugation of Tikanga Māori by stating that Parliament is the supreme law-making body over all of New Zealand', and provided a foundation for all other legislative regimes affecting Māori rights and interests.[51]

Claimants submitted that parliamentary supremacy is in breach of he Whakaputanga and the treaty, and 'denies Te Raki Māori their inherent right, under their Tino Rangatiratanga, to retain their own customary law and institutions and the right to determine their own decision makers and land entitlements'. Parliamentary supremacy 'does not allow for Tikanga Māori to operate in independence. It is a unitary model only and doesn't provide space for a Tiriti partner.'[52]

7.2.3 The Crown's submissions

Counsel submitted that, from the mid-1840s, the Crown 'sought to apply British law to Northland Māori in a gradual way and one that respected the role of rangatira'.[53] During the 1840s and 1850s, the Crown made few attempts to impose its authority on Te Raki Māori, and for the most part, Māori continued to govern themselves according to their own laws. During the 1860s, counsel submitted, the Crown provided mechanisms through which Northland Māori could exercise tino rangatiratanga in respect of their lands and taonga; in particular, through district rūnanga.[54] Furthermore, Crown counsel submitted that Māori were adequately represented in the colonial Parliament and the decision to abandon annual conferences was not prejudicial to Te Raki Māori.[55] In response to the claimants' submissions:

- Crown counsel did not specifically address the claim that the Crown had breached the treaty by handing law-making powers and responsibility for

48. Claimant closing submissions (#3.3.228), pp 9–10, 64–65, 180; Te Runanga A Iwi O Ngapuhi, amended statement of claim, October 1995 (Wai 549 ROI, claim 1.1.66(a), p 15.
49. Claimant closing submissions (#3.3.228), p 8.
50. Claimant closing submissions (#3.3.228), pp 10, 218.
51. Claimant closing submissions (#3.3.221), p 68.
52. Claimant closing submissions (#3.3.221), pp 68–69.
53. Crown closing submissions (#3.3.402), p 59.
54. Crown closing submissions (#3.3.402), pp 6–7, 59.
55. Crown closing submissions (#3.3.402), pp 91–92, 111.

the treaty relationship to a settler Parliament. Counsel acknowledged that the Crown had not established self-governing Māori districts as provided for under section 71 of the Constitution Act, but said the Crown was not obliged to under the treaty, and had caused no prejudice to Te Raki Māori by not doing so.[56]

- Crown counsel submitted that, during the Kohimarama Conference in 1860, Te Raki leaders acknowledged the Crown's sovereignty and expressed their desire to unite with Pākehā and live together under one law.[57] Counsel acknowledged that Governor Grey chose not to convene any further national conferences of rangatira, but submitted that this was not a breach of the treaty, as Grey provided other means by which Te Raki leaders could exercise their tino rangatiratanga.[58]
- Crown counsel submitted that the Crown had 'actively supported Northland Māori in self-government through the runanga scheme'. The powers exercised by rūnanga were broadly comparable to those of provincial government and allowed Te Raki Māori to make and enforce law – that is, a mix of tikanga and English law – at the local level. They held a wide civil and criminal jurisdiction. Counsel denied that the Crown had abolished rūnanga in 1865, arguing that they were affected by government-wide funding cuts but continued to operate beyond that date. However, counsel accepted that the legislation under which the rūnanga were established was repealed in 1891, which suggested 'that by at least 1891, and probably from about 1865, official runanga were no longer in operation'; but it was 'more than likely that unofficial runanga, councils and committees continued to operate at a tribal level'.[59]

7.2.4 Issues for determination

Arising from the findings of previous Tribunal reports, the key differences between the parties, and the evidence presented in our inquiry, the issues for determination in this chapter are as follows:

- Did the Crown make appropriate provision for the exercise of Te Raki Māori tino rangatiratanga as it took steps to establish institutions for settler self-government?
- What was the significance of the 1860 national rūnanga at Kohimarama for the exercise of tino rangatiratanga by Te Raki Māori?
- To what extent did Governor Grey's 'new institutions' adequately provide for the exercise of tino rangatiratanga by Te Raki Māori?

56. Crown closing submissions (#3.3.402), p 111.
57. Crown closing submissions (#3.3.402), pp 75–76.
58. Crown closing submissions (#3.3.402), pp 91–92.
59. Crown closing submissions (#3.3.402), pp 92, 111.

7.3 Did the Crown Make Appropriate Provision for the Exercise of Te Raki Māori Tino Rangatiratanga as it Took Steps to Establish Institutions for Settler Self-Government?

7.3.1 Introduction

Between 1852 and 1865, the Crown progressively transferred authority over New Zealand's internal affairs from the Governor to a colonial Parliament and executive, and to provincial governments. It did so in response to the agitation of New Zealand's growing settler population, who argued consistently for rights of self-government. These constitutional changes occurred at a national level, but during the nineteenth century and beyond have had profound effects on Māori in this district.

The Crown took the first steps towards granting the settlers self-government when the British Parliament passed the New Zealand Constitution Act 1846, providing for representative institutions. However, in 1848 the British Parliament suspended those parts of the Act that related to the provincial and general assemblies after strong criticism by Governor Grey and others, halting this process for five years.[60] The New Zealand Constitution Act 1852 established a colonial Parliament with two houses: an appointed Legislative Council and an elected House of Representatives. The 1852 Act also established six provinces, each with their own elected superintendent and elected provincial council.[61] It contained two major provisions that were significant for Te Raki Māori constitutional and political rights. First, it spelled out the entitlement to the franchise for provincial councils and the national Legislature (sections 7 and 42). The franchise was granted to men aged 21 and over, if they met a property test that, in practice, excluded almost all Māori.[62] Secondly, section 71 of the Act provided for the establishment of native districts in which Māori would continue to govern themselves according to their own laws until the colonial Government could establish authority over the whole country. Responsible government (under which the Government was responsible to the colonial Parliament) was not granted until 1855. The first responsible ministry was formed in 1856, and from then until 1865, responsibility for the Crown–Māori relationship was progressively transferred from the Governor to the colonial ministry.

By any measure, these were very significant constitutional developments. Claimants expressed four principal concerns. First, they said, the Crown

60. Raewyn Dalziel, 'The Politics of Settlement', in *The Oxford History of New Zealand*, ed Geoffrey W Rice, 2nd ed (Oxford: Oxford University Press, 1992), p 88; Philip Joseph, *Joseph on Constitutional and Administrative Law*, 5th ed (Wellington: Thomson Reuters New Zealand Ltd, 2021), pp 149–150. Following this, Grey enacted the Provincial Councils Ordinance 1848 which divided New Zealand into two provinces, New Ulster and New Munster, and provided for provincial legislatures to be composed of a mixture of officials and nominees. However, neither provincial government established regular operations as a means for settler self-government: Bruce Stirling, 'Eating Away at the Land, Eating Away at the People: Local Government, Rates and Maori in Northland' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2008) (doc A15), p 62.

61. New Zealand Constitution Act 1852, ss 2–3; Stirling, 'Eating Away at the Land' (doc A15), p 65.

62. Dalziel, 'The Politics of Settlement', p 93.

breached the treaty by establishing and delegating authority to its own institutions of government under the New Zealand Constitution Act 1852. Specifically, the Crown 'imposed their Kāwanatanga over Te Raki Māori' by establishing the three branches of government;[63] and denied tino rangatiratanga and subjugated Māori customary law by granting the colonial Parliament supreme law-making authority.[64]

Secondly, claimants said, the Crown severed the constitutional relationship between Te Raki Māori and the Queen by enacting the New Zealand Constitution Act 1852 and establishing settler self-government without Māori consent.[65] Thirdly, Māori were not adequately represented in the colony's Parliament.[66] Lastly, as the Crown never in fact established any native districts under section 71, it failed to protect the tino rangatiratanga of Māori communities.[67]

The Crown did not respond directly to claims about the delegation of sovereign power to colonial institutions of government. Crown counsel argued that the Crown was under no obligation to establish native districts,[68] and that it provided other means by which Māori could exercise their tino rangatiratanga.[69]

In this section, we consider the claims regarding these constitutional developments, with a particular focus on the following questions:

- What provision did the 1846 constitution make for the protection of Te Raki Māori rights and interests?
- What provisions did the New Zealand Constitution Act 1852 make for the protection of Te Raki Māori rights and interests?
- Why did responsibility for Māori affairs become such a fraught issue between the imperial and the colonial Governments, and how was it finally resolved?
- Why did the Government never use section 71 of the Constitution Act 1852
- Were Te Raki Māori appropriately represented in the colonial Legislature and Government between 1840 and 1865?

7.3.2 The Tribunal's analysis

7.3.2.1 *What provision did the 1846 constitution make for the protection of Te Raki Māori rights and interests?*

We begin with the British government's first attempt to provide self-government to New Zealand settlers in the 1846 constitution. Though it did not get off the ground, it would lead to a Constitution Act in 1852 which did come into operation, and which (like its predecessor) contained an important provision allowing

63. Claimant submissions in reply (#3.3.450), p 171.
64. Claimant closing submissions (#3.3.221), p 68.
65. Marama Waddell (doc AA30), p 7; claimant closing submissions (#3.3.221), p 68.
66. Claimant submissions in reply (#3.3.450), pp 175–176; claimant closing submissions (#3.3.221), p 68.
67. Claimant closing submissions (#3.3.228), pp 268–269.
68. Crown closing submissions (#3.3.402), pp 112–115.
69. Crown closing submissions (#3.3.402), pp 92–97.

New Zealand's Early Constitutional Arrangements

Between 1840 and 1865, the New Zealand colony was governed under a succession of constitutional arrangements. New Zealand was initially part of the colony of New South Wales, then became a Crown colony in its own right in 1841. In 1846, a constitution was granted providing for the establishment of representative institutions, which were not established, however. The British Parliament then passed a new Constitution Act in 1852, under which a national General Assembly and six provincial assemblies as well as provincial superintendents were elected. Finally, over the following years responsible government was granted by Britain, which changed the composition of the executive: the Governor must now take advice not from appointed officials but from ministers responsible to the elected House of Representatives. The first responsible ministry was formed in 1856.

Crown colony government

The Crown colony system of government involved the administration of a colony by the government of the United Kingdom through a Crown-appointed Governor.

Crown colony government was established in New Zealand on 21 May 1840 when New Zealand was annexed to the colony of New South Wales. During the following months, Captain William Hobson was Lieutenant-Governor of New Zealand (while Sir George Gipps remained Governor of New South Wales). In December 1840, New Zealand was constituted as a separate colony, and Hobson was appointed its Governor. The new colony was officially proclaimed in May 1841. The Governor was required to act in accordance with Royal Instructions. He received advice from two appointed councils: the Executive Council (responsible for policy and government) and the Legislative Council (responsible for legislation, known then as ordinances). The Executive Council initially consisted of three senior officials: the Colonial Secretary, the Treasurer, and the Attorney-General. These same three people were members of the Legislative Council, along with three Justices of the Peace.[1]

Ultimate decision-making power within the colony lay with the Governor, who could direct the councils as he wished.[2] The Governor chose all officials of the councils, with the exception of the Attorney-General, the first of whom was sent by the Colonial Office in 1842.[3]

Crown colony government was intended to be an initial, temporary arrangement for the governance of New Zealand until a representative assembly could be 'safely' established.[4]

1. Dalziel, 'The Politics of Settlement', p 88.
2. Dalziel, 'The Politics of Settlement', p 88.
3. Dalziel, 'The Politics of Settlement', p 88.
4. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, p 328.

The 1846 constitution

Very soon after the colony was founded, settlers began to apply pressure for their voices to be heard in the colony's system of government. Accordingly, in 1846, the Crown incorporated an element of representative democracy (in which the Legislature is elected) into New Zealand's constitutional arrangements.

The New Zealand Constitution Act 1846, passed by the British Parliament, provided for a three-tiered representative system for male settlers.[5] Government was based on elected local municipal corporations, which operated as part of a complex machinery of indirect election. The Act provided for two provincial governments for the provinces of New Ulster (north of a line drawn east from the mouth of the Patea River) and New Munster, each composed of a mix of officials and nominees. A national General Assembly would sit above the provincial bodies and would comprise the Governor and Legislative Council (both appointed by the Crown), and a House of Representatives (made up of and elected by members of the provincial Houses of Representatives).[6] The Governor retained final decision-making powers within the colony. Franchise would be granted to all male British subjects over the age of 21 who owned or occupied a dwelling and could read and write in English.

Within a year of the Act arriving in the colony however, those parts of it relating to the provincial and central assemblies were suspended for five years, following Governor Grey's vigorous protest at the plan for settler self-government in the northern province of New Ulster; he warned that it would provoke an uprising from Māori, who still greatly outnumbered settlers at the time. Earl Grey agreed that things were moving too fast, and in March 1848 the British Parliament passed a Suspending Act.[7]

The New Zealand Constitution Act 1852

The New Zealand Constitution Act 1852, which was also passed by the British Parliament, subsequently established a colonial Parliament as well as six provinces, each with its own elected superintendent and provincial council.[8] The Act gave the colony representative government but made no mention of the relationship of the Legislature to the Executive Council.[9]

5. New Zealand Constitution Act 1846, s 10 (UK); A H McLintock, *Crown Colony Government in New Zealand* (Wellington: R E Owen, 1958), pp 256–257.

6. Neill Atkinson, *Adventures in Democracy: A History of the Vote in New Zealand* (Dunedin: Otago University Press, 2003), p 18; Philip Joseph, *Constitutional and Administrative Law in New Zealand*, 4th ed (Wellington: Brookers Ltd, 2014), p 111.

7. Philip Joseph, *Joseph on Constitutional and Administrative Law* 5th ed, pp 149–150; James Rutherford, *Sir George Grey KCB, 1812–1888: A Study in Colonial Government* (London: Cassell, 1961), pp 142–143; William Lee Rees and Lily Rees, *The Life and Times of Sir George Grey, KCB*, 2 vols (Auckland: H Brett, 1892), vol 1, p 144.

8. Joseph, *Constitutional and Administrative Law in New Zealand*, p 112.

9. Joseph, *Joseph on Constitutional and Administrative Law*, 5th ed, p 153.

At a national level, the Act created a General Assembly comprising the Governor, a Crown-appointed Legislative Council, and an elected House of Representatives.[10]

Elections for the House of Representatives were to be held every five years. All males aged 21 years or older were eligible to vote in any district where they owned a freehold estate valued over £50, or possessed a leasehold estate of an annual value of £10 for at least three years within the limits of a town, or £5 outside a town.[11] The removal of the literacy requirement meant that a small number of Māori were now eligible to vote, and did so during the 1850s. However, the property test excluded most Māori.[12]

The General Assembly could enact laws required for the colony's 'peace, order, and good government', provided the law was not repugnant to the law of England.[13] This restriction did not however apply to Maori laws and customs which might be observed within particular districts set apart by the Queen, where they might govern themselves.[14] Provincial governments might also make laws, though they were prohibited from enacting laws about various specified matters including Māori lands under customary title.[15]

Responsible government

Under the New Zealand Constitution Act 1852, executive authority remained with the Governor. Within New Zealand, as in other British colonies in the mid-nineteenth century, settlers sought the right to become self-governing by securing a grant of 'responsible government' from the Crown.

'Responsible government' means that executive authority is exercised on the advice of Ministers who are chosen from the House of Representatives, and are therefore responsible to voters. Constitutional law expert Professor Philip Joseph has noted that responsible government implied three things: 'that members of the Executive Council be appointed from the House of Representatives, that the Governor accepts the advice of the Council, and that the members of the Council have the confidence of the House'.[16]

Under this system, the Governor retains final executive authority, but also in contrast to the central role played by Crown-appointed officials under Crown colony and representative governments, the responsible government's executive was selected from elected representatives, giving colonies and their enfranchised populations close to autonomous control over their governance. Under responsible

10. New Zealand Constitution Act 1852, s 33.
11. Atkinson, *Adventures in Democracy*, pp 23–24; Dalziel, 'The Politics of Settlement', p 93.
12. Atkinson, *Adventures in Democracy*, pp 23–24.
13. New Zealand Constitution Act 1852, s 53.
14. New Zealand Constitution Act 1852, s 71.
15. New Zealand Constitution Act 1852, ss 18–19.
16. Joseph, *Joseph on Constitutional and Administrative Law*, 5th ed, p 152.

government, some matters, including diplomatic relations and external defence, continued to be imperial responsibilities.

In 1848, Nova Scotia became the first responsible government outside of the United Kingdom. Twelve years later, all four Maritime provinces in Canada had the 'standard' responsible government structure: a Governor, an elected Legislative Assembly, an appointed Legislative Council, and an Executive that had been chosen by the Assembly.[17] Similarly, by 1867, five of the six colonies in Australia had achieved some form of responsible government.[18]

In New Zealand, when the House of Representatives first met in 1854, it passed a resolution requesting that the Crown grant it responsible government, and in December 1854 the Colonial Office sent a despatch giving government approval; it was received in New Zealand in March 1855.[19] The Acting Governor was advised that legislation was not required to make the change. 'Responsible government was a matter of convention and practice, not law'. When Parliament met in 1856, Henry Sewell was called upon to form the first responsible government composed of settler ministers. Provinical councils had already been constituted ahead of the General Assembly, and the first moves towards responsible government were made in Canterbury and Wellington provinces.[20]

Nationally, the Governor initially retained executive responsibility for Māori affairs, but the General Assembly had control of the budget and legislative agenda.[21] During the early 1860s, the imperial government progressively transferred responsibility for Māori affairs to the colonial Government, a process that was essentially completed by February 1865.[22]

17. David Hamer, *Can Responsible Government Survive in Australia?*, rev ed (Canberra: Department of the Senate, 2004), p 12.
18. Hamer, *Can Responsible Government Survive in Australia?*, p 14.
19. Joseph, *Constitutional and Administrative Law in New Zealand*, p 115; Earl Grey to Wynyard, 8 December 1854, BPP, vol 10, p 40.
20. Joseph, *Constitutional and Administrative Law in New Zealand*, p 115; W David McIntyre, ed, *The Journal of Henry Sewell 1853–7*, 2 vols (Christchurch: Whitcoulls, 1980), vol 1, p 69.
21. Joseph, *Constitutional and Administrative Law in New Zealand*, pp 114–116; Dalziel, 'The Politics of Settlement', pp 101–102.
22. Rutherford, *Sir George Grey* p 516.

for recognition of Māori law and customs in certain districts. We return to this provision later.

During the first years after the signing of te Tiriti, the Crown's power of kāwanatanga was vested in the Governor. Although the Governor could and did seek advice from appointed executive and legislative councils, final responsibility for governing the colony rested with him. Throughout those initial years of Crown colony government, many settler communities clamoured for the right to govern

themselves, and the Crown responded by making plans to delegate power to settler institutions. In February 1846, the directors of the New Zealand Company petitioned the British Parliament for representative institutions for settlers.[70] The imperial government responded in August 1846 when an Act was passed 'to make further provision for the Government of the New Zealand Islands'.[71]

The New Zealand Constitution Act 1846 (also referred to as the New Zealand Government Act 1846) provided for the establishment of municipal, provincial, and national legislative bodies.[72] The franchise was limited to adult males who owned or leased property of a certain value held under Crown grant and were literate in English – discriminatory tests that effectively excluded almost all Māori from the franchise.[73] According to the Crown's historian Dr Donald Loveridge, the Secretary of State for War and the Colonies, Earl Grey, was aware that of this, and he provided a mechanism by which particular districts might be created within the two provinces where Māori systems of law and government would remain in force 'for the present'. Provision might be made for the maintenance of Māori law and custom, so far as they were not 'repugnant' to English laws or to New Zealand laws.[74]

The Governor could appoint rangatira or others to govern the 'Aboriginal Districts', and Māori law would apply to Māori.[75] The Queen's Instructions specified however that non-Māori should respect and observe Māori laws and customs within these districts or be penalised for breaching them by 'any court or magistrate' within the relevant province.[76] This provision for Māori districts acknowledged the reality that settlers were vastly outnumbered at the time (100,000 to 13,000, according to the mid-century parliamentary historian Alexander McLintock).[77] We note that Earl Grey also foreshadowed the Crown's intention that such Māori districts would be a temporary measure.[78] As the settler popu-

70. Joseph, *Constitutional and Administrative Law in New Zealand*, p 111; Dalziel, 'The Politics of Settlement', p 91.

71. Government of New Zealand Act 1846; Joseph, *Constitutional and Administrative Law in New Zealand*, p 111.

72. Earl Grey transmitted the Act to Governor Grey in a despatch of 23 December 1846, enclosing a copy of the statute, as well as a Royal Charter based on the statute, also dated 28 December 1846, accompanied by the Queen's Instructions under the Royal Sign Manual, a document that detailed how the new system of government was to work: BPP, vol 5, pp 520–543.

73. New Zealand Government Act 1846, s 10; Donald Loveridge, 'The Development and Introduction of Institutions for the Governance of Maori, 1852–1865' (commissioned research report, Wellington: Crown Law Office, 2007) (doc E38), pp 10–12; Ian Wards, *The Shadow of the Land: A Study in British Policy and Racial Conflict in New Zealand 1832–1852* (Wellington: Government Printer, 1968), pp 287–288.

74. New Zealand Government Act 1846, s 10 (cited in Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 11–12).

75. New Zealand Government Act 1846, s 10 (cited in Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 11–12).

76. New Zealand Charter, enclosure in Grey to Grey, 23 December 1846, BPP, vol 5, p 543.

77. McLintock, *Crown Colony Government*, p 287.

78. Loveridge, 'Institutions for the Governance of Maori' (doc E38), p 12; Grey to Grey, 23 December 1846, BPP, vol 5, p 527.

lation and Crown resources grew, the Crown expected that the municipal districts would gradually expand and the colony's system of law and government would come to apply to Māori.[79]

The Act was sent to New Zealand with an accompanying Royal Charter and instructions to Governor Grey from then Secretary of State Earl Grey, which provided further detail on the new system of government. But the despatch and the Queen's Instructions had grave implications for Māori ownership of their lands. As we discuss further in chapter 8, Earl Grey's instructions also outlined the 'waste lands' principles that the Governor was to adopt, with a legal rationale for the Crown to claim of ownership over all Māori lands deemed uncultivated or unoccupied. This shift in the Crown's recognition of Māori land rights was presaged by an 1844 parliamentary select committee report that advocated Crown adoption of this policy. The arrival of the report in New Zealand in 1845 had provoked considerable suspicion among Māori, leading missionaries and government officials to give assurances that the treaty would be honoured, and Māori would retain their lands, whether 'occupied' or not; we discuss the select committee report further in chapter 8.

The Northern War had only ended in January 1846, a year prior to the arrival of Earl Grey's instructions, and war in the Wellington region had continued until August. Further conflict broke out in Whanganui in April 1847.[80] In this context, Governor Grey reasoned that both the land policy and the grant of self-government to a small minority of settlers would be highly inflammatory. He wrote to the Colonial Office accordingly, and warned that Māori vastly outnumbered settlers, were 'well armed, proud, and independent', 'much the more powerful' of the two populations, and highly unlikely to submit to rule by a settler minority.[81] Grey therefore sought and obtained a deferral of the 1846 Act for 'four or five years', by which time he hoped that the Māori 'fondness for war' would be in decline, their land disputes would be resolved, and they would have 'made great progress' in adopting British cultural values.[82] He suggested the adoption of a semi-representative system that allowed Māori men who possessed property in 'Government securities, in vessels, or in tenements' to vote.[83]

The imperial government consulted Grey and other New Zealand officials during the second half of 1846, but we have seen no evidence of any direct consultation

79. New Zealand Government Act 1846, s 10.

80. Wards, *The Shadow of the Land*, pp 387–388; McLintock, *Crown Colony Government*, pp 287–288; Steve Watters, 'War in Wellington: Last Battles', Ministry for Culture and Heritage, https://nzhistory.govt.nz/war/wellington-war/last-battles, last modified 19 October 2021; 'Steve Watters, 'War in Whanganui: The Siege of Whanganui', Ministry for Culture and Heritage, https://nzhistory.govt.nz/war/wanganui-war/siege-of-wanganui, last modified 20 October 2021.

81. Governor Grey to Earl Grey, 3 May 1847 (cited in H Hanson Turton, *An Epitome of Official Documents Relative to Native Affairs and Land Purchases in the North Island of New Zealand* (Wellington: George Didsbury, 1883), p 45); Stirling, 'Eating Away at the Land' (doc A15), pp 61–62.

82. Grey, memorandum, 29 November 1848 (cited in Loveridge, 'Institutions for the Governance of Maori' (doc E38), p 13).

83. Grey, memorandum, 29 November 1848 (cited in Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 12–13).

with Māori leaders, let alone any attempt to negotiate with them to determine how settler and Māori authority might interact.[84] Crown officials clearly understood that any move towards settler self-government would affect Māori rights and interests. Nevertheless, the constitution made only limited provision for Māori and treaty rights – through a highly restrictive franchise and a provision to Māori to occupy self-governing districts during a transitional period until the Crown's authority could be established. This plan, 'fashioned in ignorance of local conditions' according to one historian,[85] was abandoned partly due to its impracticality for such a small colony, but mainly because it was feared it might provoke a Māori uprising at a time when the Crown's authority in the colony remained far from secure.

In the following years, Grey proposed several options for a new constitution, including one in which settlers would be granted responsible government for Stewart Island, the South Island, and the main North Island townships, while the Crown would directly rule over Māori elsewhere.[86] He enacted the Provincial Councils Ordinance 1848, which confirmed the establishment of two provincial councils for New Ulster and New Munster to be composed of both officials and nominees, and proclaimed himself Governor of both provinces.[87] However, the New Munster Legislative Council was convened only once for a single session, and the New Ulster Legislative Council never met.[88] Over subsequent years, settler interests continued to lobby the Government in New Zealand and Britain for greater control over their lands and land revenue.[89] Missionaries and humanitarian associations also continued to advocate for treaty rights to be acknowledged and for Māori to be given a genuine share in the government of the colony.[90] The Aborigines' Protection Society[91] argued that Māori had been excluded from any share in state power under Grey's governorship, and the situation was only likely to worsen once settlers took control.[92] The Wesleyan Missionary Society argued that, if authority was to be handed to the colonial Government, it should also face legally enforceable treaty obligations – thus preventing any attempt to evade the

84. Stirling, 'Eating Away at the LandNorthland" (doc A15), pp 61–62; Alan Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand* (Auckland: Auckland University Press, 1995), pp 85–91.

85. Norman Foden, *The Constitutional Development of New Zealand in the First Decade: 1839–1849* (Wellington: L T Watkins, 1938), p 167; Stirling, 'Eating Away at the Land' (doc A15), p 61.

86. Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 14–15, 19.

87. Provincial Councils Ordinance 1848.

88. Dalziel, 'The Politics of Settlement', p 92; McLintock, *Crown Colony Government*, pp 244–245.

89. Dalziel, 'The Politics of Settlement', pp 91–92; Stirling, 'Eating Away at the Land', p 62.

90. Claudia Orange, *The Treaty of Waitangi* (Wellington: Allen and Unwin, 1987), pp 138–139.

91. Founded in England in 1837 in the aftermath of the abolition of slavery, the Aborigines' Protection Society was highly influential in shaping the policy of the British Empire with regard to indigenous people. Not only did it question the dependence on indigenous labour in the colonies, it encouraged settler populations to represent themselves and form elected assemblies: Jared McDonald, review of James Heartfield, *The Aborigines Protection Society: Humanitarian Imperialism in Australia, New Zealand, Fiji, Canada, South Africa, and the Congo, 1837–1909* (London: Hurst & Company, 2011) in *Settler Colonial Studies*, vol 3, no 2, 2013, p 248.

92. Orange, *The Treaty of Waitangi*, p 138.

'spirit and obvious meaning of the Treaty as understood by the natives at the time of its signing'.[93]

Neither of these societies had any influence on the ultimate decisions of the imperial government.[94] Nor did Hōne Heke, who wrote to the Queen in June 1849 explaining that his people had understood the treaty as providing for Crown protection of Māori from foreign interference and uncontrolled settlement; and that Māori, under the treaty, retained authority over their own lands and people.[95] As we will see, during the 1850s and 1860s the Crown proceeded to transfer its authority and treaty responsibilities to colonial institutions of government, providing very few safeguards for Māori rights and interests.

7.3.2.2 *What provisions did The New Zealand Constitution Act 1852 make for the protection of Te Raki Māori rights and interests?*

Ultimately, the Crown granted settlers representative government at both the provincial and national level. The New Zealand Constitution Act 1852 provided for the establishment of a bicameral national legislature comprising an elected lower house (the House of Representatives) and an appointed upper house (the Legislative Council),[96] as well as six provincial governments, each with its own elected assemblies and superintendents.[97] Similar to the 1846 Constitution, the franchise was granted to males aged 21 and over who owned freehold estate or leased or occupied property above certain financial thresholds. Because the tests applied to property held under Crown title, very few Māori men qualified. There was no provision for a special franchise for Māori – though the British government considered making one.[98]

The General Assembly (comprising the Governor and both Houses of Parliament) was empowered to make laws 'for the peace, order and good government of New Zealand', provided those laws did not conflict with English law.[99] The assembly also had extensive control over the colony's budget, though powers of executive government remained (for the time being) with the Governor and his appointed Executive Council, creating a system in which responsibilities were divided. The Governor also retained some powers over legislation, including the power to propose, assent to, reject, reserve, or amend legislation on the Crown's behalf. In carrying out his duties, the Governor was required to act in accordance

93. Wesleyan Missionary Committee, *Correspondence between the Wesleyan Missionary Committee and Sir James Pakington* (London: PP Thomas, 1852); (cited in Orange, *The Treaty of Waitangi*, p 138).
94. Orange, *The Treaty of Waitangi*, p 138.
95. Ralph Johnson, 'The Northern War 1844–1846' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2006) (doc A5), pp 402–403.
96. New Zealand Constitution Act 1852, s 32–33, 40–42.
97. New Zealand Constitution Act 1852, s 2–3. The provinces were Auckland, New Plymouth, Wellington, Nelson, Canterbury, and Otago.
98. New Zealand Constitution Act 1852, s 7; Loveridge, 'Institutions for the Governance of Maori' (doc E38), p 15.
99. New Zealand Constitution Act 1852, s 53.

with instructions from the imperial government, which retained final authority to assent to or disallow legislation even after the Governor had given his assent.[100]

Grey's hope was that Māori would rapidly assimilate into the colony's legal and governing framework; to that end, he had established the resident magistrate system, which we discuss later in the chapter.[101] Nonetheless, just in case Grey's assimilationist plans did not come to fruition, the Constitution Act 1852 retained (in section 71) the 1846 provision for native districts in which Māori for the time being could continue to exercise decision-making in accordance with their 'laws, customs, and usages', even if they were 'repugnant' to the law of England, 'or to any law, statute or usage in force in New Zealand, or in any part thereof.'[102] As Dr Loveridge argued (in evidence originally filed in the Whanganui Lands inquiry), the Crown had no real intention of using this provision except in that circumstance. Loveridge noted 'strong objections' in New Zealand at the outset to the idea of separate 'Aboriginal Districts'. In the words of one newspaper editor, they would prevent Māori from 'advanc[ing] in the scale of civilization', and would undermine British authority.[103]

The Act's provisions for settler self-government were vigorously debated in both houses of the British Parliament.[104] However, according to Dr Loveridge, there was 'very little comment on the few sections relating specifically to Māori, and virtually no discussion of the effects which the new arrangements might have on them'.[105] McLintock similarly had concluded that Māori interests 'did not appear even as a side issue'.[106] As he explained, a few members of the House of Commons sought assurances that Māori would be fairly treated under the new constitution, and were quickly placated after hearing Grey's assurance that Māori and settlers 'already formed one harmonious union'.[107]

Another mid-century historian, Professor BJ Dalton, whose study *War and Politics in New Zealand* remains an important one, regarded the constitution as 'surely the most liberal and elaborate ever devised for 26,000 colonists', indicating that Māori continued to far outnumber settlers at this time.[108] He also considered the constitution as making very limited provision for Māori, in his view chiefly because Grey had misled the imperial government.[109] It is notable that a

100. New Zealand Constitution Act 1852, ss 56–58.

101. Loveridge, 'Institutions for the Governance of Maori' (doc E38), p 13; Vincent O'Malley, 'Northland Crown Purchases – 1840–1865' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2006) (doc A6), pp 48–49.

102. Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 11–12, 16.

103. Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 16–17.

104. William Swainson, *New Zealand and Its Colonization* (London: Smith, Elder and Co, 1859), pp 287–288.

105. Loveridge, 'Institutions for the Governance of Maori' (doc E38), p 17.

106. McLintock, *Crown Colony Government in New Zealand*, p 335.

107. Sir John Pakington, 3 May 1852, GBPD, vol 121, col 137 (cited in McLintock, *Crown Colony Government*, p 336).

108. BJ Dalton, *War and Politics in New Zealand, 1855–1870* (Sydney: Sydney University Press, 1967), p 9.

109. Dalton, *War and Politics in New Zealand*, pp 12–13.

decade or so after the Act was passed, Britain's parliamentary Under-Secretary for the Colonies, Chichester Fortescue, commented in the House of Commons that it 'appeared to have been framed in forgetfulness of the existence of large native tribes within the dominions to which it was intended to apply'.[110]

Under the Act, provincial councils could not enact legislation that affected Māori customary lands or discriminated against Māori, but no such restriction was imposed on the General Assembly except in one respect. Section 73 of the Act restated the Crown's right of pre-emption: only Her Majesty might purchase or acquire land belonging to or occupied by them 'as Tribes or Communities'; otherwise, the General Assembly could legislate as it wished, subject to Crown assent, and its responsibility for approving the colony's budget meant, in effect, that it could exert significant influence over government policy towards Māori, and could also – if it wished – impose taxes on Māori who were not represented.[111] However, the General Assembly did not hold effective control over the Native Department and Māori affairs, as these were the domain of the Governor. We discuss the approach taken by Governors Grey and Gore Browne to Māori affairs in the next section.

The first general election was held over several months in 1853 to elect provincial superintendents and councils and the national House of Representatives.[112] The latter met for the first time in May 1854. The electoral districts covered all of New Zealand, including areas where Māori vastly outnumbered settlers. In the Bay of Islands electorate, broadly encompassing all territories north of a line between Whāngārei and the northern Kaipara Harbour, the journalist Hugh Francis Carleton (the son-in-law of Henry Williams) was elected unopposed. Two other members were elected to represent the 'Northern Division' electorate, which encompassed territories south of the Bay of Islands electorate as far as the Manukau Harbour.[113]

The General Assembly's first substantive act was to pass a resolution calling for responsible government, under which the government comprises Ministers appointed from and responsible to Parliament, and the Governor is bound to act on ministerial advice.[114] Grey had left New Zealand late in 1853, and Colonel Robert Wynyard served as the government administrator until Governor Gore Browne took over in 1855. Wynyard's response to the calls for responsible government was to appoint a 'mixed ministry' by adding three elected representatives

110. Chichester Fortescue, 11 April 1861, BPD, cols 481–488 (cited in Loveridge, 'Institutions for the Governance of Maori' (doc E38), p 17). According to Dr Merata Kawharu, these words were first used in a petition to the British government from Auckland settlers: Kawharu, 'Te Tiriti and its Northern Context' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2008) (doc A20), p 166.

111. Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 17–18; Stirling, 'Eating Away at the Land' (doc A15), p 64; see also enclosure 2, AJHR, 1860, E-6(b), pp 5–6.

112. McLintock, *Crown Colony Government*, p 373.

113. For election results, see 'House of Representatives', *Daily Southern Cross*, 26 August 1853, p 3; 'The Elections', *Daily Southern Cross*, 26 August 1853, p 3. For boundaries, see Alan McRobie, *Electoral Atlas of New Zealand* (Wellington: GP Books, 1989), pp 28–29.

114. Joseph, *Constitutional and Administrative Law in New Zealand*, p 115.

to the existing Crown-appointed Executive Council. However, this compromise proved unworkable, and the elected representatives resigned in August 1854.[115] In December 1854, the Colonial Office sent a despatch advising Wynyard that he might inaugurate responsible government forthwith. It added that there was no need for further reference to London before Wynyard effected the change and admitted responsible ministers.[116]

The introduction of representative institutions (that is, settler Legislatures), and particularly of responsible government, which from 1856 was exercised by members of a settler Executive Council appointed from the House of Representatives, had significant, lasting effects on Te Raki Māori, their exercise of autonomy, and their relationship with their treaty partner. Te Raki Māori had understood te Tiriti as establishing a personal relationship with the Queen – and her agent, the Governor – that was in the nature of a rangatira-to-rangatira alliance, under which they would receive the Queen's protection. As the Crown progressively transferred responsibility for 'Native affairs' to a Government responsible to a Legislature elected by settlers, it also in effect transferred responsibility for the treaty relationship. Because of the importance of this issue to claimants in this inquiry, we examine in some detail how this change came about, and the struggle for authority over Māori affairs between the colonial and imperial governments that preceded the final acceptance of authority by the colonial Government.

7.3.2.3 *Why did responsibility for Māori affairs become such a fraught issue between the imperial and the colonial Governments and how was it resolved?*

Gore Browne arrived in New Zealand in September 1855, and the following year marked a crucial turning point in New Zealand's governance. Gore Browne's commission as Governor provided that he was to act with the advice of the Executive Council, in accordance with his instructions. His instructions however gave him a 'general discretion' to act in opposition to the council's advice, though he had to report to London as quickly as possible his reasons for doing so.[117] In March 1856, Gore Browne reported to the Colonial Office his views on the administration of Māori affairs. His understanding was that,

> On matters affecting the Queen's prerogative and imperial interest generally, I should receive advice [from Ministers]; but when I differ from them in opinion, I should, if they desire it, submit their views for your consideration, but adhere to my own until your answer is received. Among imperial subjects, I include all dealings

115. Dalziel, 'The Politics of Settlement', p 94.
116. George Grey to Wynyard, 8 December 1854, BPP, vol 10, pp 125–126.
117. Alison Quentin-Baxter and Janet McLean, *This Realm of New Zealand: The Sovereign, The Governor-General, the Crown* (Auckland: Auckland University Press, 2017), pp 18–19.

> with the native tribes, more especially in the negotiation of the purchases of [Māori customary] land.[118]

Gore Browne envisaged the role of ministers in Māori land purchase as confined to setting the amount to be spent in any one year. He had two main reasons for retaining authority over Māori affairs. First, Māori affairs were viewed as closely tied to the defence of the colony, and how those defences were resourced and employed. In 1856, two regiments of British troops were stationed in New Zealand, and Gore Browne considered it his responsibility as Governor, and representative of the Crown, to manage their deployment. His fear was that the peace of the colony would be endangered if 'Native' affairs were in the hands of constantly changing ministries responsible to the colonists. For this reason, he also considered that the Chief Land Purchase Commissioner and his subordinates should take their orders only from himself.[119] Secondly, under English law, Māori were subjects of the Queen and had accepted her sovereignty, not that of settlers.[120] Therefore, as historian Dame Claudia Orange explained, Gore Browne believed the Crown had a 'duty . . . to stand between settlers and Maori'. In particular, he was aware that settlers wanted Māori land and would pressure their political leaders accordingly.[121] Gore Browne explained his intentions later in a note to then member of the House of Representatives Henry Sewell:

> as Govr I consider myself a Guardian & trustee for the Native Race & can never willingly delegate my power & responsibilities to a council the members of which are responsible to neither the Crown nor the Native Race, who are liable to constant change & always subject to pressure from their own constituents and the members of the Assembly.[122]

Colonial politicians accepted Gore Browne's position in April 1856, particularly because they recognised that the Governor's control was the price they had to pay for military defence. William Fox, second premier of New Zealand, later

118. Gore Browne to Grey, 12 March 1856 (cited in Quentin-Baxter and McLean, *This Realm of New Zealand*, p 19); see also F Whitaker, H Sewell, C W Richmond, and J Logan Campbell, memorandum, 22 August 1856, AJHR, 1858, E-5, pp 2–3 (Loveridge, 'Institutions for the Governance of Maori' (doc E38), p 18); Joseph, *Joseph on Constitutional and Administrative Law*, pp 154–161; see also enclosure 2, AJHR, 1860, E-6(b), p 6. Other issues affecting the prerogative and imperial matters were international trade and foreign affairs, and various Bills reserved for the Queen's assent (in accordance with the Governor's instructions).

119. Quentin-Baxter and McLean, *This Realm of New Zealand*, p 19; Dalton, *War and Politics in New Zealand*, p 30. It should be remembered that in this period there were no political parties as such; ministries were formed only indirectly on the basis of elections. Rather, they were the result of parliamentarians coming together behind a leader; their hold on office was unpredictable: Dalziel, 'The Politics of Settlement', p 98.

120. Orange, *The Treaty of Waitangi*, pp 139–140; enclosure 2, AJHR, 1860, E-6(b), p 6.

121. Orange, *The Treaty of Waitangi*, pp 139–140.

122. Gore Browne to Sewell, 13 June 1859 (cited in Janet McLean, 'Crown, Empire and Redressing the Historical Wrongs of Colonisation in New Zealand', *New Zealand Law Review*, no 2, 2015, p 200.

explained that there was 'a strong disinclination' among many members of the House to accept Gore Browne's position, but there was a great wish for responsible government in other matters, so a majority finally agreed.[123] But opposition soon surfaced as issues arose which tested their resolve – particularly funding for Māori purposes.[124] After some negotiation, Gore Browne and colonial Ministers agreed on a somewhat unwieldy compromise under which the Native Secretary would answer directly to the Governor, who would make all final decisions about Māori affairs, but the new Native Department would be part of the ordinary public service under the day-to-day oversight of a responsible Minister. In effect, the colonial Parliament would determine the budget for Māori affairs, and Ministers would have operational oversight, but the Governor would determine the policy and possess a power to prevent any action of which he did not approve.[125]

For its part, the Colonial Office viewed control of Māori affairs by the Governor as a 'temporary political expedient'.[126] Britain's permanent Under-Secretary for the Colonies, Herman Merivale, did not accept Gore Browne's argument that the Crown bore a special responsibility to protect Māori welfare, and did not 'think it possible with advantage to withhold native affairs from the cognizance of the responsible advisers, the matter being so closely connected with other points of domestic administration'. But the Colonial Office was also concerned that transferring control of Māori affairs to Ministers solely responsible to settler interests would risk conflict, and therefore greater expense (in the form of armed conflict) for the imperial government. Accordingly, in 1857, the imperial government supported Gore Browne's arrangements for control of Māori affairs 'without reservation', in Loveridge's words. But the Colonial Office's qualms about those arrangements were not conveyed to him, leaving the Governor, in Dalton's view, in a 'false' position 'by misrepresenting the real opinions of his superiors, and, by grounding the decision on factors of long term importance, it increased the difficulty of withdrawing from a position originally intended to be strictly temporary'.[127]

The complex division of responsibility between Governor and Ministers did not work well. Policy priorities differed, and lines of accountability were unclear. Settler politicians, for their part, also assumed that it was a temporary arrangement and regularly sought to assert their authority over Māori affairs. Gore Browne, on the other hand, remained sympathetic to some form of Māori self-government under Crown oversight. He complained that many settler parliamentarians (especially those from the South Island) knew little or nothing of Māori

123. Wiliam Fox, Minute, 8 October 1861, AJHR, 1862, E-2, p 9.

124. Dalton, *War and Politics in New Zealand*, pp 35–37.

125. Whitaker, Sewell, Richmond, and Campbell, 22 August 1856, AJHR, 1858, E-5, p 3; T Gore Browne, 28 August 1856, AJHR, 1858, E-5, p 4; see also Dalton, *War and Politics in New Zealand*, pp 31–32, 38–39; McLean, 'Crown, Empire and Redressing the Historical Wrongs', p 200; John E Martin, 'Refusal of Assent', Assent – A Hidden Element of Constitutional History in New Zealand', *Victoria University of Wellington Law Review*, vol 41, no 1 (2010), p 59.

126. Dalton, *War and Politics in New Zealand*, pp 40–41.

127. Dalton, *War and Politics in New Zealand*, p 45.

society, and that the colonial Parliament hampered his efforts to encourage Māori development by denying the necessary funding.[128]

In February 1858, Gore Browne visited the Bay of Islands where he met several leading rangatira, assuring them of the Queen's desire for their peace and prosperity, and emphasising his own role as the Queen's representative. Gore Browne made no mention of the colonial Parliament or of settlers' increasing responsibility for the government of the country.[129] Yet, within months, he had accepted that the system of 'double government' (in which authority over Māori affairs was split between the Governor and the settler Government) could work only if the colonial Parliament and Ministers had significant influence on Māori policy – since it was they who held the purse strings.[130]

In August, the first Native Minister – C W Richmond, a leading Taranaki settler – was appointed,[131] and the House of Representatives in the same month enacted a suite of legislation aimed at (in Dr Orange's words) 'deal[ing] comprehensively with the Maori situation'.[132] These Acts related to Māori lands, schooling, the regulation of local social and economic matters (including public health), and the administration of justice in Māori communities by courts (comprising itinerant resident magistrates assisted by assessors appointed from among local leaders); all were intended to hasten Māori acceptance of English culture and colonial law.[133] Notwithstanding the previous agreement about the administration of Māori affairs, Parliament sought to constrain the Governor by judicious insertion of the 'Governor in Council' phrase, which provided that in specified key matters he could act only on the advice of the Executive Council – that is, on ministerial advice.[134] Parliamentary historian John Martin has described the phrase as a 'legislative wedge levering the Governor out of responsibility for Maori affairs'.[135]

Gore Browne reluctantly assented to much of this legislation but stood his ground on the Native Territorial Rights Act 1858, which provided a process by which the 'Governor in Council' might issue certificates of title to Māori land,

128. Orange, *The Treaty of Waitangi*, p 140; Loveridge, 'Institutions for the Governance of Maori' (doc E38), p 18.

129. 'The Visit of His Excellency Governor Gore Browne to the Bay of Islands and the North', *Maori Messenger/Te Karere Maori*, 1 February 1858, p 4; O'Malley, 'Northland Crown Purchases' (doc A6), pp 121–122.

130. Orange, *The Treaty of Waitangi*, p 140; Manuka Henare, Hazel Petrie, and Adrienne Puckey, '"He Whenua Rangatira", Northern Tribal Landscape Overview', commissioned by Crown Forestry Rental Trust, 2009 (doc A37), p 481; Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 18, 111.

131. Loveridge, 'Institutions for the Governance of Maori' (doc E38), p 42. Richmond's full name was Charles William Richmond. During his lifetime he was known in public life as C W Richmond.

132. Orange, *The Treaty of Waitangi*, p 140.

133. The Acts were the Native Territorial Rights Act, Native Schools Act, Native Reserves Amendment Act, Native Districts Regulation Act and Native Circuit Courts Act; see Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 69–70; Martin, 'Refusal of Assent', p 59.

134. See, for instance, the Native Districts Regulation Act 1858, the Native Circuit Courts Act 1858, and the Native Territorial Rights Act 1858: Martin, 'Refusal of Assent', pp 59–60; Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 65, 70–71.

135. Martin, 'Refusal of Assent', p 59.

either to communities or individuals. There was also limited provision for the issue of Crown grants, which were circumscribed to 50,000 acres per year. If the Act had come into force, the provision would have allowed settlers to purchase some Māori land directly at the cost of a substantial fee per acre for land purchased or leased, under a waiver of the Crown's right of pre-emption. (Loveridge stated that there was strong support in the House for abolition of the Crown's right of pre-emption, but members also realised that there was little prospect that the Governor or his superiors would approve such a measure.)[136] Gore Browne regarded the Act as an attack on Māori land rights, and as undermining the Crown's honour and threatening the colony's peace. As he put it to the Colonial Office, the evident intent of his advisers to invalidate Māori rights to their unoccupied lands involved 'the rights of the natives secured to them by the Treaty of Waitangi, and the fulfillment of engagements made by successive Governors, and confirmed by successive Secretaries of State'. He reserved the Act for consideration by the imperial government, which refused assent.[137]

These experiences highlighted for Gore Browne the potential risks associated with full devolution of authority to a settler Government. In 1858, the Governor wrote a lengthy memorandum to the Colonial Office outlining his views. First, he noted that 'it was a hackneyed expression of the party who strenuously agitated for, and succeeded in obtaining parliamentary and responsible government . . . that government and taxation without representation are tyranny'. Gore Browne thus questioned what grounds settlers had to demand the right to govern Māori 'who are unrepresented in their councils'.[138] Secondly, Māori did not wish to be governed by the settler assembly; on the contrary, 'it is well known that the Maories refuse to acknowledge any [British] authority' other than the Queen and Governor. The imperial government could not be asked to bear the expense of maintaining armed forces in New Zealand for the purpose of coercing Māori and 'forcing on them a government which . . . they fear and distrust'.[139] Thirdly, settlers could not be trusted to protect Māori interests; rather, they would tend to govern in their own interests. Attempts by settler politicians to curtail Māori voting rights

136. Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 68–70.

137. Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 65, 70–71; Gore Browne to Bulwer Lytton, 14 October 1858, AJHR, 1860, E-1, p 1.

138. Gore Browne to Bulwer Lytton, 14 October 1858, AJHR, 1860, E-1, pp 1–2. In support of his views, Gore Browne said he had 38 letters from people in close contact with Māori, 36 of whom agreed that any transfer of responsibility would be imprudent and unjust. Gore Browne reinforced his points by enclosing a letter from the Archdeacon of Waitemata, George Kissling, who wrote on behalf of the Bishop of New Zealand urging that Māori would not understand that the Governor's powers were to be limited under the new legislation by his having to act 'with the consent of and by the advice of the Executive Council'. The Māori, he wrote, regarded the Queen as a mother, and the Governor as 'Her Representative and their friend', whereas they paid '[n]o special respect . . . to a changeable Ministry elected by the European population'. The Governor should not be left in a position where he had to decide between the opinion of an Executive Counil with little knowledge of Native Affairs, and that of the knowledgeable Native Secretary: Kissling to Gore Browne, 23 July 1858, AJHR, 1860, E-1, p 3.

139. Browne to Lytton, 14 October 1858, AJHR, 1860, E-1, pp 1–2.

were one example of this. It was for this reason that colonists had not been allowed to govern indigenous populations in other colonies such as India and Ceylon. Settlers in one province would never tolerate another province having power over them, '[y]et it will scarcely be alleged that the interests of the Maories and the Europeans are more identified than those of the English settlers in two different Provinces.'[140]

Lastly, any transfer of responsibility would sever the direct relationship between the Crown and Māori. Instead, control of that relationship would be handed to 'a constantly changing body of persons elected by the Colonists', whose policies might change from year to year. For these reasons, Gore Browne remained determined to exercise final control over Māori affairs, by retaining control over the Native Department and a power of veto over legislation. Any final transfer of authority would be 'neither prudent, [nor] just, nor expedient'.[141] There is no evidence of Gore Browne directly consulting Māori before forming his views, although he did seek advice from some 38 missionaries and others he regarded as familiar with Māori affairs; he reported that they were in broad agreement with his views.[142]

Although Gore Browne successfully maintained some degree of control over Māori affairs, the colonial ministry continued to press for increased influence, particularly over land policy. As the Tribunal found in its *Taranaki* report, the Governor bore primary responsibility for the outbreak of war in that region in March 1860 – chiefly because of his presumption that his authority must prevail over that of Māori, in a manner that was contrary to the treaty.[143] But, as the *Taranaki* report and several historians have pointed out, Gore Browne reached the point of taking military action only after facing significant pressure from settlers and colonial politicians – among them Donald McLean, his trusted advisor and Native Secretary – to complete the Waitara purchase by any means, including force if necessary. Ultimately, the Governor, colonial politicians, and settlers all bore some responsibility for the outbreak of war.[144]

The contest between imperial and colonial authorities for control of Māori affairs took a new turn in 1860 when the imperial Parliament attempted to enact legislation establishing a council to take control of Māori affairs on the Crown's behalf. Gore Browne had raised the idea with the Colonial Office in September 1859.[145] This was three months after war had begun in Taranaki, and two weeks into the 1860 national rūnanga at Kohimarama. According to the official minutes,

140. Browne to Lytton, 14 October 1858, AJHR, 1860, E-1, pp 1–2.
141. Browne to Lytton, 14 October 1858, AJHR, 1860, E-1, pp 1–2.
142. Browne to Lytton, 14 October 1858, AJHR, 1860, E-1, pp 1–2; Orange, *The Treaty of Waitangi*, pp 140–142.
143. Waitangi Tribunal, *The Taranaki Report*, Wai 143, pp 8–9.
144. Waitangi Tribunal, *The Taranaki Report*, Wai 143, pp 8–9; James Belich, *The New Zealand Wars, and the Victorian Interpretation of Racial Conflict* (Auckland: Auckland University Press, 1986), pp 77–78; Atholl Anderson, Judith Binney, and Aroha Harris, *Tangata Whenua: A History* (Wellington: Bridget Williams Books, 2015), pp 256–257; see also Dalton, *War and Politics in New Zealand*, chapter 4.4.
145. Gore Browne to Secretary of Newcastle, 20 September 1859, BPP, vol 11, pp 93–99.

Gore Browne did not discuss the Native Council idea with Māori leaders at Kohimarama, or mention the increasing determination of colonial politicians to take control of the Crown's relationship with Māori, presumably because at that point he remained determined to retain control of Māori affairs himself. On the contrary, everything about Kohimarama would have given rangatira the impression that Gore Browne and his Native Secretary McLean were the Crown's representatives in the treaty relationship. The Governor, in his speeches, emphasised that he was the Queen's representative, sent to protect Māori from harm.[146] Nor did Gore Browne mention the views of colonial politicians when he visited the north in February 1861 though he did offer the prospect of local self-government for Māori who remained loyal to the Crown.[147]

In response to Gore Browne's Native Council proposal, the imperial government introduced the New Zealand Bill 1860 to the House of Lords. It was titled 'An Act for the better Government of the Native Inhabitants of New Zealand, and for facilitating the Purchase of Native Lands', and provided for the establishment of a Native Council, appointed directly by the Queen (by letters patent) and presided over by the Governor. The council would be empowered, among other things, to establish native districts 'within which Native Law shall be maintained' under section 71 of the Constitution Act; to declare, with Māori consent, the laws that would apply in those districts; to investigate and determine title to Māori lands; and to make rules for the administration of Māori lands, including for their lease and sale.[148] The establishment of such a council, in Loveridge's view, 'would largely have decided the contest over control of Maori affairs in favour of the Governor, at the expense of the General Assembly'.[149]

The Bill was eventually passed in the House of Lords, but met with 'substantial opposition' there, largely on the grounds that it was proposed to impose a Council on the colony 'without the sanction of the constituted ministers of the colony or the Assembly', when control of a 'large portion of their domestic affairs' was at stake. Among documents produced in the Lords were two pamphlets by J E Fitzgerald, who declared,

> The policy of the Ministers and the Assembly is to save the native race, by amalgamating them with the Engish; by extending to them English laws and English civilization. The policy of the Bill is a policy of separating the races, of maintaining native customs, of sowing in the minds of the Maori a jealousy and mistrust of the Government of the settlers. The passing of this Bill will be the death warrant of the Maori race . . .[150]

146. See 'Minutes of the Proceedings of the Kohimarama Conference of Native Chiefs', AJHR, 1860, E-9, pp 4–5.

147. O'Malley, 'Northland Crown Purchases' (doc A6), pp 152–158.

148. New Zealand Bill 1860, AJHR, 1860, E-6(b), pp 3–5.

149. Loveridge, 'Institutions for the Governance of Maori' (doc E38), p 114.

150. 'Relating to the Conduct of Native Affairs in New Zealand, as affected by a Bill now before Parliament', 30 July 1860, pp 17–18 (cited in Loveridge, 'Institutions for the Governance of Maori' (doc E38), p 114.

The Bill was tabled in the House of Commons, but it seems was not debated there.

Meanwhile there was, in Loveridge's words, 'alarm' in New Zealand that such legislation should have appeared before the imperial Parliament. Many colonial politicians were enraged, partly by the content of the Bill but mainly by the fact that Britain was purporting to legislate on New Zealand affairs. There was much debate in the House of Lords over the propriety of enacting such a measure without the consent of the colonial Parliament, but the Bill nonetheless received its third reading. Facing greater opposition in the House of Commons, the imperial government withdrew the Bill.[151]

The General Assembly had just finished its own consideration of the colonial Government's policy towards Māori and it was appalled that the British government should make 'so important an alteration of the Constitution Act' without consultation. A joint committee of both the House and Legislative Council, set up to consider Parliament's response, recommended that if the imperial Bill was passed, the Governor be requested to defer bringing it into operation until the Colonial Office had seen the General Assembly's own legislation for establishing a Native Council. It also suggested that the British government be asked to pass an Act enabling the General Assembly to pass its own legislation relating to Māori customary lands. The Executive Government would then exercise its powers, subject to its hearing the advice of the Native Council on Māori lands and their partition and colonisation, as well as promoting the civilisation and welfare of Māori and preparing them for the exercise of political power. It is clear that achieving control of the titling, alienation, and administration of Māori lands was a key concern of the General Assembly. A new Native Council Bill was then drafted and passed through the assembly quickly. It provided that a council of between three and five members be established to advise and assist the Governor 'and his Responsible advisers' in the administration of Māori affairs; it was the 'duty' of the Government to consult it on all important questions relating to the management of Māori affairs.[152]

Gore Browne forwarded the Act to the Secretary of State for the Colonies, the Duke of Newcastle, and submitted it 'for Her Majesty's pleasure' in a despatch setting out his views on the disadvantages of the division of responsibility. He recognised that the General Assembly was responsible to settlers, whose interests diverged from those of Māori.[153] In his view, a possible result of any further transfer of responsibility could be a settler assembly claiming rights to the revenue deriving from Māori taxation and the profits arising from the purchase and on-sale of Māori lands, as well denying Māori the right to have Crown grants and to alienate their own land – all without Māori having any representation in the colony's Parliament. In that case, the question must be asked, 'what right the Assembly has to govern and tax a race it does not represent'? The Crown, furthermore, would

151. Dalton, *War and Politics in New Zealand*, pp 119–120.

152. Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 114–116; Native Council Act 1860.

153. Gore Browne to Duke of Newcastle, 26 November 1860, AJHR, 1861, E-3, p 6.

be called upon to bear the costs of the inevitable Māori uprising. By taking such a step, he warned, the Crown would be abdicating its responsibility to protect Māori:

> It may . . . be asked whether the Crown, having obtained the Sovereignty of the Islands on certain conditions by which it is virtually understood to act as guardian to the Maori race, can now disclaim these engagements because they are onerous, and transfer its power and its duty to others.[154]

Gore Browne was critical of the 1852 New Zealand Constitution Act, which had made insufficient provision for the Crown to 'act independently as guardian of the Maori race'.[155] It was evident, he added, that 'the existing relations between the Governor and his Responsible Adviser on the subject of Native affairs are not satisfactory'. In particular, it was unsatisfactory that while responsibility remained with the Governor, 'the power of the purse, which is all but absolute, has been altogether in the hands of ministers'.[156] He did not have access to enough funding, independent of the Assembly, to enable him to discharge his responsibility to Māori. But on the whole, he concluded, the Native Councils Act was the 'best compromise' that could be reached, and he recommended it receive the Royal Assent.[157] The Colonial Office neither accepted nor rejected the Act. Instead, the Secretary of State waved warning flags regarding the relationship between control of Native policy and the cost of military protection; and of the 'serious' objections so often raised to changing the relationship between the Governor and Māori. But it sent no decision to the Governor.[158]

In sum, then, after acquiring powers of responsible government in 1856, colonial politicians increasingly sought to assert their authority over Māori affairs in general, and government land purchasing in particular. Governor Gore Browne responded with numerous warnings about the potential for injustice and conflict if settlers acquired control of Māori affairs and the responsibility of the Governor to protect Māori interests were set aside. Both the Governor and the Colonial Office attempted to manage these risks, for example by rejecting legislation and proposing new forms of government for Māori. Ultimately, settler pressure for land, and the Crown's determination to assert its sovereignty by dismissing the right of rangatira to protect community lands from alienation, combined to lead to war in Taranaki. During the early 1860s, as we will see in the following sections, the colonial Government did acquire full responsibility for Māori affairs, but only after a struggle that at times became bitter.

In June 1861, George Grey was appointed Governor of New Zealand for a second term, replacing Gore Browne. Grey was sent with instructions to bring lasting

154. Gore Browne to Duke of Newcastle, 26 November 1860, AJHR, 1861, E-3, p 6.
155. Gore Browne to Duke of Newcastle, 26 November 1860, AJHR, 1861, E-3, p 6.
156. Gore Browne to Duke of Newcastle, 26 November 1860, AJHR, 1861, E-3, p 6.
157. Gore Browne to Duke of Newcastle, 26 November 1860, AJHR, 1861, E-3, p 6.
158. Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 114–116.

peace to the colony through a combination of military strength when needed, and 'fairness and consideration' otherwise.[159] The first Taranaki War (from 1860 to 1861) had ended by the time he arrived, but no permanent peace had been concluded with Taranaki or the Kīngitanga; on the contrary, Gore Browne had been preparingfor an invasion of Waikato when he received news that he would be replaced.[160] The issue of responsibility for Māori affairs would preoccupy the imperial and colonial Governments during the early years of Grey's governorship. Grey himself was a key player in the conflict that characterised this debate. Even when it had apparently been resolved in 1864 by the colonial Government's final acceptance of responsibility, Grey prevaricated. He evaded his instructions to finalise the return of British regiments, which finally led to his recall in 1868. It is beyond the scope of this inquiry to examine the details of this struggle. We focus here on the main points at issue between the two governments.

The Secretary of State instructed Grey to clarify the relationship between the Governor and his Ministers with respect to Māori affairs – the previous division of responsibilities being, in officials' eyes, one of the factors that had driven the colony towards war. Grey's instructions made no mention of the Crown standing between settlers and Māori. The Colonial Office had great faith in Grey as an experienced Governor, and Newcastle indicated the imperial government would accept any division of responsibility that seemed both 'safe' (in that it would not provoke further warfare) and likely to win the support of settlers.[161] We add that it was at this point that Newcastle also asked Grey to work with the settler administration to bring institutions of civil government and 'some rudiments of law and order' to Māori communities. He suggested that the Governor might establish 'native districts' (evidently in conjunction with section 71 of the New Zealand Constitution Act) in which Māori could in the meantime continue to govern themselves, albeit with the guidance of magistrates.[162]

Soon after Grey's arrival, the Premier William Fox wrote a series of papers to the Governor on the affairs of the colony. In the second minute, outlining the views of his Ministers on 'the machinery of government for Native purposes', Fox explained their opposition to Gore Browne's 1856 decision. In particular, it is clear that they resented the Governor's reliance for guidance on Māori issues on a single adviser who was not a Minister but who exercised 'absolutely (subject only to instructions from the Governor himself) all the executive functions of Government in relation to Native affairs'. This was Donald McLean, who since 1856 had held the positions of both Native Secretary and Chief Land Purchase Commissioner, until the House succeeded in pressuring the Governor to secure his resignation from the Native Secretaryship in 1861. The antipathy of Ministers to McLean was evident;

159. Newcastle to Grey, 5 June 1861, AJHR, 1862, E-1, pp [92]–[93].

160. Governor to Native Secretary, 13 April 1861, AJHR, 1862, E-1, pp 18–19; Belich, *The New Zealand Wars*, p 119; Dalton, *War and Politics in New Zealand*, pp 127–131.

161. Newcastle to Grey, 5 June 1861, AJHR, 1862, E-1, pp [92]–[93]; Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 146–147; Dalton, *War and Politics in New Zealand*, p 142.

162. Newcastle to Grey, 5 June 1861, AJHR, 1862, E-1, pp [92]–[93]; Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 146–147.

Fox described the existence of the Native Secretary's Department, free from all ministerial control, and a barrier to ministerial action, as 'a very serious evil'. Fox also urged that McLean's tenure in both roles had led to Māori mistrust of the Government: 'they have learned to look upon the Government as a gigantic land broker'.[163] This comment reflected the then enthusiasm among settlers for 'direct purchase' of Māori land, and criticism of the Native Land Purchase Department's monopoly and (it was claimed) inadequate supply of land for settlement.[164] According to Fox, the Government's Native Council Bill – though 'not very popular' in the House – was supported because it subordinated all the executive functions of government to responsible Ministers. The current position, he explained, was that Her Majesty's assent had been withheld until Sir George Grey reported on it.[165]

Grey agreed with his Ministers that the existing division of responsibility for Māori affairs was unworkable. In a despatch of 30 November 1861, clearly written after the event, he stated that he had agreed to act on ministerial advice regarding Māori affairs, just as he did on other matters. If there was any 'serious difference' between them, he must 'resort to other advisors', and appeal to the General Assembly. Grey did not seek approval of his decision in so many words; rather he invited Newcastle to let him know if he wished to 'discontinue this arrangement', adding that he thought it would be best to leave it in operation permanently.[166] Dalton considered this an 'airy gesture', which Newcastle received 'a little sourly'.[167]

Within weeks, Grey's new arrangement for ministerial responsibility was showing signs of tension. According to Dr Orange, Ministers found Grey to be 'disconcertingly ambivalent in attitude and devious in dealings'. According to Fox's Attorney-General, William Sewell, it was evident that the Governor 'intended to have the determining say in Maori affairs, yet hold the ministry responsible – a "sham" responsibility'.[168]

Despite Grey's transfer of responsbility to Ministers before the end of 1861, the matter was not resolved until the conclusion of 1864, three years later. At issue was the cost of British troops – in other words, the cost of the Crown's war in Waikato and Tauranga over that period. Imperial concern about the expense of troops was evident from the outset of Grey's term. He was under instructions to make use of imperial troops 'in suppresssing native disturbances' only if he were fully acquainted with, and had agreed to, every measure of his Ministers which might have led to the need to use them. He was in fact to retain a power of veto over

163. Fox, minute, 8 October 1861, AJHR, 1862, E-2, p 9.

164. Fox himself, however, was a critic of the Waitara purchase – though it has been suggested that he and others who were dubbed 'philo-Maori' were 'no more sympathetic towards Maori society, society or goals than were their opponents': R Dalziel and K Sinclair, 'William Fox', in *1769–1869*, vol 1 of *The Dictionary of New Zealand Biography*, ed WH Oliver (Wellington: Allen and Unwin; Department of Internal Affairs, 1990), p 136.

165. Fox, minute, 8 October 1861, AJHR, 1862, E-2, p 9.

166. Grey to Newcastle, 30 November 1861, AJHR, 1862, E-1, p 35.

167. Dalton, *War and Politics in New Zealand*, p 146.

168. Sewell, journal, December 1861 (cited in Orange, *The Treaty of Waitangi*, p 161).

native policy so long as imperial troops remained in New Zealand, since under those circumstances any misstep by colonial politicians could involve considerable cost for the imperial government – a point we return to when we later discuss the 'new institutions'.[169]

Within months, the colonial Government would transfer responsibility for Māori affairs back to the Governor, following a blunt reply from Newcastle to Grey's despatch. In May 1862, Newcastle approved the steps Grey had taken to place 'the management of the Natives under the control of the [General] Assembly', noting that the existing system had 'failed' (that is, failed to prevent war) and that it was 'mischievious' for the imperial government to retain 'a shadow of responsibility' when it no longer had effective control of Māori affairs. But Newcastle warned that settler control of Māori affairs also required settlers to bear the costs – notably the costs of defending settlers and settlements. Accordingly, the colony should 'expect, though not an immediate, yet a speedy and considerable diminution' in the number of imperial troops, and must themselves provide a military police force to protect their out-settlers. Likewise, it must pay for the costs of local militia and volunteers. Later, we will discuss the financial arrangements Newcastle agreed to in respect of imperial government sums to be expended towards the cost of Grey's 'new institutions', which were to be counted as military contributions.[170]

Newcastle's despatch provoked a critical response from the colonial Parliament. While still eager to influence policy on Māori affairs, settler politicians were unwilling to take on the considerable costs of the expected war against the Kīngitanga. In July 1862, Fox had moved a resolution asserting ministerial responsibility for the 'ordinary conduct of Native Affairs' while asserting that the Governor should take decisions on matters involving imperial interests. The imperial government should continue to fund the colony's internal defence. Parliament did not support this resolution, and Fox resigned.[171]

It was left to the new Premier, Alfred Domett, to respond to Newcastle's despatch. In August, he moved a resolution aimed at transferring responsibility for Māori affairs back to the Governor. Specifically, Domett moved that Ministers should administer and advise on Māori affairs, but only at the Governor's discretion; the decision 'in all matters of Native policy' was reserved to the Governor, and Ministers' advice 'shall not . . . bind the colony to any liability, past or future, in connection with Native affairs beyond the amount authorized or to be authorized by the House of Representatives'.[172] Domett listed several reasons the imperial government should retain responsibility for the colony's defence, including the prospect that '[a]ny war carried on wholly by the colonists against the Native would . . . leave feelings of hostility which would not die out for many years'.[173]

169. Newcastle to Grey, 5 June 1861, AJHR, 1862, E-1, sec 3, pp 3–4, 5–6; Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 140, 146–147.

170. Newcastle to Grey, 26 May 1862, AJHR, 1862, E-1, pp [102]–[103].

171. 'Native Affairs', 25 July 1862, NZPD, vol D, pp 436–437; Dalton, *War and Politics in New Zealand*, p 146; Orange, *The Treaty of Waitangi*, pp 161–162.

172. 'Native Affairs', 8 August 1862, NZPD, vol D, pp 518, 568.

173. 'Native Affairs', 8 August 1862, NZPD, vol D, p 515.

The General Assembly adopted the resolutions on 19 August 1862. Domett later moved an Address to the Queen objecting to the policy outlined in Newcastle's despatch, arguing that responsbility for governing Māori might not at that moment be transferred to the colony because of the associated costs, especially the cost of troops, who could not be dispensed with. Grey informed the Assembly that he would for now act in accordance with their resolution, but would also 'refer the question for the consideration of Her Majesty's Government'.[174]

The response of the General Assembly led Newcastle to express the imperial government's frustration in no uncertain terms. In essence, from its point of view, colonial politicians sought authority over Māori affairs at least partly to fulfil settlers' demands for access to Māori land – yet the same politicians were not willing to bear the responsibility or the costs for these policies. In a lengthy despatch to Grey on 26 February 1863, Newcastle charged that the Parliament was in essence rejecting the power it had been seeking for several years.[175]

In fact, Newcastle said, colonial authorities had already been exerting considerable influence over Māori affairs since responsible government was first granted in 1856. Up to that time, in his view, the imperial government had sought to use its sovereign authority in a manner that would protect Māori from the harms arising from settlement. Adopting the moral high ground, he asserted that the Government had aimed to maintain that protective authority either until Māori and settlers had amalgamated, or until a system of government had emerged that provided Māori with 'some recognised constitutional position' that would provide a 'guarantee against oppressive treatment' and 'thus at once satisfy and protect them'.[176]

Yet, since 1856, the imperial government had stepped back from its position of 'imperial trusteeship', as the colonial Parliament instead used its legislative and budgetary authorities to increasingly determine policy on Māori affairs. In particular, Newcastle argued, pressure from colonial politicians – including Executive Council resolutions – had led Gore Browne to complete the Waitara Purchase by force and thereby start a 'settlers' war' in Taranaki.[177] The growing influence of the colonial Parliament and Government meant that the Governor no longer had sufficient power to carry out the imperial government's role as trustee. He could not tax Māori or relieve them from taxation. He had no power to make laws for them. He had no adequate revenue at his disposal for administrative, educational, or police purposes; the sums reserved for these objects in the Constitution Act were inadequate.[178] Therefore, the imperial government had little choice but to hand authority to responsible Ministers. Attempting to retain authority under the

174. 'Native Affairs', 19 August 1862, NZPD, vol D, pp 573–574; 'Native Affairs, 19 August 1862, Journal of the House of Representatives, pp 79–80.

175. Newcastle to Grey, 26 February 1863, AJHR, 1863, E-7, pp 2–5;

176. Newcastle to Grey, 26 February 1863, AJHR, 1863, E-7, p 4.

177. Newcastle to Grey, 26 February 1863, AJHR, 1863, E-7, pp 5–7.

178. This was a reference to the Civil List of £7,000 provided for in the Constitution Act for 'Native purposes'.

circumstances was 'not really of use to the natives'.[179] In Newcastle's view, the colonial Government should accept responsibility for Māori affairs, and also accept 'the cost of all war and government', since those costs were incurred to benefit settlers. The British taxpayer did not benefit. And it was clear that 'the duty of civilizing and controlling the aborigines of New Zealand, rests in the first place with the inhabitants of the colony, who are primarily interested in the order, prosperity, and tranquillity of their own country'.[180]

Newcastle concluded by reiterating that responsibility for Māori affairs now lay with the colonists, as they wished; the imperial government had already accepted the New Zealand Government's request for responsibility over Māori affairs, and had therefore 'resigned' its own responsibility – a decision that remained effective regardless of the views of the colonists. Grey was no longer required by the imperial government to take charge of the Native Secretary's department; if he did so, it would only be because his responsible Ministers requested him to do so. Accordingly, Newcastle instructed Grey:

> Your constitutional position with regard to your advisers will (as desired by your late Ministry) be the same in regard to native as to ordinary colonial affairs; that is to say, you will be generally bound to give effect to the policy which they recommend for your adoption, and for which, therefore, they will be responsible.[181]

There were, however, some exceptions to this general policy:

> You would be bound to exercise the negative powers which you possess, by preventing any step which invaded Imperial rights, or was at variance with the pledges on the faith of which Her Majesty's Government acquired the Sovereignty of New Zealand, or [was] in any other way marked by evident injustice towards Her Majesty's subjects of the native race.[182]

In other words, the Governor should not assent to legislation that contravened the treaty (at least as Britain understood that agreement). If any policy was 'clearly disastrous', the Governor might also appeal to the General Assembly; that is, as legal experts Dame Alison Quentin-Baxter and Professor Janet McLean explain, he might dismiss the leader of a Government, and appoint a new leader who was prepared to advise a dissolution so that a new election might be held.[183] This, in their view, was the first time that, in relation to New Zealand, a Governor's only alternative (other than his own resignation) to accepting the advice of his responsible Ministers had been spelt out.[184]

179. Newcastle to Grey, 26 February 1863, AJHR, 1863, E-7, p 5.
180. Newcastle to Grey, 26 February 1863, AJHR, 1863, E-7, p 4.
181. Newcastle to Grey, 26 February 1863, AJHR, 1863, E-7, p 7; see also Quentin-Baxter and McLean, *This Realm of New Zealand*, pp 20–22.
182. Newcastle to Grey, 26 February 1863, AJHR, 1863, E-7, p 7.
183. Newcastle to Grey, 26 February 1863, AJHR, 1863, E-7, p 7.
184. Quentin-Baxter and McLean, *This Realm of New Zealand*, p 21.

The Governor was also instructed to make his own decisions regarding the use of imperial forces; although he could seek advice from Ministers, 'the responsibility would rest with yourself and with the Officer in Command'. Finally, given that imperial forces were still defending the colony, the imperial government retained 'a right to require from the colonists that their native policy, on which the continuance of peace or renewal of war depends, should be just, prudent, and liberal'. Britain's willingness to leave troops in New Zealand would depend on the Government pursuing policies that removed existing difficulties and placed future race relations 'on a sound basis'.[185] Altogether, these instructions provided Grey with significant scope to veto policies that might breach the treaty's land guarantees or otherwise result in injustice to Māori.

Ironically, the despatch reached New Zealand as Governor Grey was finalising his plans for the British invasion of Waikato, and the injunction to pursue 'just, prudent and liberal' policies did not deter him. Since June 1862, armed forces had been building a military road into the district, and on 12 July 1863 imperial troops crossed the Mangatāwhiri River, entering Waikato and starting the invasion. The Waikato War would last for nine months until April 1864; the peoples living south of Auckland and in Waikato were ejected from their villages into exile, to be replaced by military settlers. Peace between the Crown and Kīngitanga would not be finalised until many years later.[186] A series of disagreements between Grey and his Ministers would erupt during and immediately after the war, as the Whitaker–Fox ministry asserted ministerial responsibility and presided over the passing of the Suppression of Rebellion Act 1863 and the confiscation legislation (the New Zealand Settlements Act 1863). The tension would see the imperial government clarifying that the Governor had sole responsibility for control of the Queen's troops and the conduct of war, and for concluding peace. Grey, outraged by the extent of the planned confiscations, was assured that he could reject Ministers' advice with respect to these; he must be 'personally satisfied with the justice' of any particular confiscation before it could proceed.[187]

Against the background of a war concluded, conflict over the policy of confiscation, and the collapse in October 1864 of the ministry led by Frederick Whitaker and William Fox after the imperial government refused to guarantee the whole of the large loan sought by Whitaker, came political change. Colonial politicians were willing both to accept authority over Māori affairs and to bear the costs of doing so. In November 1864, a new Government was formed under Premier Frederick Weld, who believed firmly that war would only end when imperial control of Māori affairs ended and was replaced by full settler control. Weld came into office promising a 'self-reliant policy' – that is, the colony would fund its Māori and defence policies, and rely on its own resources for internal defence; in return, it would be given full control over matters relating to Māori and manage its

185. Newcastle to Grey, 26 February 1863, AJHR, 1863, E-7, p 7.

186. See Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pts I, II, pp 436–438; Belich, *The New Zealand Wars*, pp 119–125.

187. Cardwell to Grey, 26 November 1864, AJHR, 1865, A-6, p 7.

relationships with them.[188] Weld was regarded by his colleagues as a man of principle; he was committed to ensuring that responsible government worked and had seen 'little chance' of that happening with Grey in command and a Whitaker–Fox Government advising him.[189]

At the beginning of December 1864, the two houses of the General Assembly each adopted resolutions in support of the Government. In a series of resolutions, they asked that the Governor be guided entirely by ministerial advice 'in native as in ordinary affairs', except in matters that directly affected imperial interests or the Crown's prerogative. Weld had taken office only when Grey agreed to formally assent to a written statement of policy that included a statement that if Ministers had any 'material difference' with the Governor, they would resign immediately.[190] Recognising that the imperial government would not hand over control of its troops, and opposed to the increased annual payment it sought for them, a further resolution asked that the 'whole of its land force' be removed from New Zealand.[191] The division between Governor and Ministers, the motion said, had caused 'great evil' to both Māori and settlers, and had imposed heavy costs on Britain and New Zealand; in essence, the Assembly was asserting that this division of responsibility had caused the New Zealand Wars.[192] Weld, we note, was a firm believer that the war at Waitara had begun not because of a small land dispute but in reaction to 'an intolerable challenge to the Queen's sovereignty'.[193]

The following month, the Weld administration formally requested that responsibility for Māori affairs transfer to the colonial Government, in return for it agreeing to bear the costs of future internal defence.[194] In February 1865, the imperial government indicated its 'entire satisfaction' with the Assembly's resolutions – noting that Grey had previously been instructed to provide for responsible government, and that the Governor retained responsibility for Māori affairs and defence only so long as imperial troops were engaged in New Zealand. Those troops, wrote the new Secretary of State for the Colonies, Viscount Cardwell, would be gradually removed as land confiscations were completed and peace restored.[195] Cardwell's relief that Grey's relations with his new ministers seemed to have turned a corner was palpable. But as it turned out, this would not be the end of the conflicts of the

188. Jeanine Graham, 'Frederick Aloysius Weld', in *The Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, https://teara.govt.nz/en/biographies/1w10/weld-frederick-aloysius, last modified 1990; Loveridge, 'Institutions for the Governance of Maori' (doc E38), p 221.

189. Jeanine Graham, *Frederick Weld* (Auckland: Auckland University Press, 1983), p 77.

190. Dalton, *War and Politics*, p 209.

191. That is '£40 per head per annum, as opposed to the rate of £5 per head which had been set in 1862': Loveridge, 'Institutions for the Governance of Maori' (doc E38), p 21.

192. 'Native Affairs', NZPD, 1864–1866, vol D, pp 47–48.

193. Graham, *Frederick Weld*, p 76.

194. Ministers to Governor Grey, 30 December 1864, AJHR, 1865, A-1, p 1; see also Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 18, 20–21, 22–23; Martin, 'Refusal of Assent', pp 60–61, 63–64, 66–67.

195. Secretary of State for the Colonies to Governor Grey, 27 February 1865, AJHR, 1865, A-6, p 15; see also Duke of Buckingham (Secretary of State for the Colonies) to Governor Bowen, 1 December 1868, AJHR, 1869, A-1A, p 10.

1860s, and the colonial Government had to find its own forces when there were further Māori challenges to its war and confiscation policies in other parts of the North Island.

In this despatch, as in most others after the end of 1864, there is no evidence that the imperial government regarded itself as having any ongoing obligations to Māori, under the treaty or otherwise. Perhaps Cardwell was sufficiently reassured by Weld's assurance of the 'sincere and earnest desire on the part of the colonists to advance the condition of the native inhabitants' – as was evident in the legislation they had passed since 1852.[196]

Certainly, Cardwell's despatch did not suggest any further steps to protect Māori rights and interests if they happened to differ from those of the settler majority. Cardwell expressed hope that the colonial Government would take steps to prevent any repeat of the circumstances that had led to war in Taranaki, and that – except where land was to be confiscated – Māori would feel 'safe in the possession and peaceful occupation of all their remaining land'. Otherwise, Cardwell was concerned that the colonial Government should assert authority over 'insurgent' Māori, 'place the Colony in a position of self-defence against internal aggression', and relieve the imperial government 'from responsibilities which we have most unwillingly assumed, and from an interference in the internal affairs of the Colony which nothing but a paramount sense of duty would ever have induced us to exercise'.[197]

The transfer of responsibility was completed when the last imperial troops left New Zealand in 1870,[198] thus concluding what Dr Orange described as an 'untidy, ill-defined retreat' by the imperial government from the 'principle of trusteeship' under which it had taken responsibility for protecting Māori from settlers.[199] As constitutional theorist Professor F M Brookfield has written, the imperial government 'shed its Treaty responsibilities on to the colonial government in Wellington' by extending the convention of responsible government to include Māori affairs. This 'shift in paramount power from London to Wellington occurred without Māori consent and in a manner beyond Māori control.[200]

7.3.2.4 *Why did the Government never use section 71 of the Constitution Act 1852?*

We turn here to a question of particular concern to claimants. As we have seen, the New Zealand Constitution Act 1852 provided that the Queen, by letters patent, could establish native districts in which Māori would continue to govern themselves according to their own 'laws, customs and usages'.[201] This important

196. Ministerial memorandum for the imperial government, 30 December 1864, AJHR, 1865, A-1, pp 1–3 (cited in Loveridge, 'Institutions for the Governance of Maori' (doc E38), p 221.

197. Secretary of State for the Colonies to Governor Grey, 27 February 1865, AJHR, 1865, A-6, p 15; see also Duke of Buckingham to Governor Bowen, 1 December 1868, AJHR, 1869, A-1A, p 10.

198. Orange, *The Treaty of Waitangi*, p 160.

199. Orange, *The Treaty of Waitangi*, p 160.

200. F M Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland: Auckland University Press, 2006) chapter 5, pp 126–127.

201. New Zealand Constitution Act 1852, s 71.

Colonial Government Responsibility for Māori Affairs: A Timeline

New Zealand's transition to responsible government began in 1856 and was substantially completed by 1870 – but the British Parliament retained some residual responsibility for New Zealand affairs until well into the twentieth century. The following are the key steps in the constitutional transition.

1840: The Crown proclaims sovereignty over New Zealand.
1846: The imperial parliament passes the New Zealand Constitution Act 1846 – but it is never brought into operation.
1852: The imperial parliament passes the New Zealand Constitution Act 1852 providing for the establishment of a representative Parliament and six provincial legislatures in New Zealand.
1854: New Zealand's General Assembly meets for the first time.
1856: The imperial government grants responsible government to New Zealand, though the Governor chooses to retain responsibility for Māori affairs (as well as defence and foreign affairs).
1858: The General Assembly enacts its first legislation concerning Māori affairs.[1]
1861: Governor Grey agrees to transfer responsibility for Māori affairs to the colonial ministry.
1862: The imperial government approves the transfer of responsibility for Māori affairs so long as the colonial authorities fund the colony's defence. The General Assembly rejects this, and Governor Grey resumes control over Māori affairs.
1864: After the Waikato War, the colonial Government finally accepts full responsibility for Māori affairs and commits to meet the associated costs. The Governor retains control of imperial armed forces in New Zealand.
1865: The imperial government accepts this new arrangement.
1870: The last imperial troops depart from New Zealand, leaving the colonial Government in full control of Māori affairs.[2]

1. The General Assembly passed the Native Districts Regulation Act 1858, the Native Commission Act 1858, and the Native Schools Act 1858. The Assembly also passed the Native Territorial Rights Bill 1858, but the Governor reserved this, and the imperial parliament refused assent: Martin, 'Refusal of Assent', pp 59–60.

2. Brookfield, *Waitangi and Indigenous Rights*, ch 5; Brookfield, 'The Monarchy and the Constitution Today'; Martin, 'Refusal of Assent'; Williams, 'Genealogies of the Modern Crown'; W David McIntyre, 'Self-Government and Independence', Te Ara – Encyclopedia of New Zealand, accessed 24 February 2022; John Wilson, 'New Zealand Sovereignty: 1857, 1907, 1947, or 1987?', Parliamentary Research Paper, Wellington, 2007.

provision (section 71) reflected the existing political reality that most Māori populations were already self-governing and unlikely at that time to submit to laws made by a settler Parliament; yet Crown officials expected Māori to ultimately assimilate into settler society, and therefore saw the provision as a temporary expedient until that occurred. At various times before 1865, Governors and officials considered whether to use this provision to provide for some form of Māori self-government and ease Māori–settler tensions. However, section 71 was ultimately never brought into effect.

In the previous section, we discussed the struggle between the imperial and colonial Governments over authority for Māori affairs that formed an important context for debates over the governance of Māori communities. Throughout this period, Governors Gore Browne and Grey faced pressure from settlers and colonial politicians to establish Crown control over Māori communities and overcome Māori resistance to Crown land purchasing, leading to the outbreak of war in Taranaki and Waikato during the 1860s. In the following sections, we ask why the Crown did not use section 71 to make provision for Māori tino rangatiratanga as the Crown transferred governing authority to the colonial Government.

A number of claimants submitted that section 71 was a means by which the Crown could have protected Māori autonomy and tino rangatiratanga.[202] The Crown did not see itself as having any treaty obligation to use the provision and said that it had caused no prejudice to Te Raki Māori by not doing so.[203]

7.3.2.4.1 Why did Grey not use section 71 when it first became available in 1852?

The Constitution Act 1846 had provided for a system of local government through Māori districts and settler municipalities. Crown officials regarded such arrangements as a temporary measure until Māori – under the influence of missionaries and other agents of British civilisation – assimilated into settler society.[204] The architects of the Constitution Act 1846 therefore assumed that municipalities would gradually expand, and Māori districts would commensurately shrink.[205]

While some colonial officials favoured this gradual approach, others – including Governor George Grey, in his first term in office (1845 to 1853) – sought to actively bring Māori under the rubric of the colonial system of law and government. Colonial officials essentially argued that 'amalgamation' was necessary to protect vulnerable Māori from exploitation and violence at the hands of the growing settler population. Such paternalistic views were heavily coloured by underlying beliefs about British racial and cultural superiority, including the superiority of the British system of government.[206]

202. Claimant closing submissions (#3.3.228), pp 268–270; see also closing submissions for Wai 1477, Wai 1522, Wai 1531, Wai 1716, Wai 1957, Wai 1968, Wai 2061, Wai 2063, Wai 2377, Wai 2382, and Wai 2394 (#3.3.338(a)), pp 3–4.

203. Crown closing submissions (#3.3.402), p 111.

204. Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 11–12.

205. Ward, *A Show of Justice*, pp 85–86; Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 11–12.

206. Ward, *A Show of Justice*, pp 85–86.

Grey, in his response to the 1846 Act, argued that the formal establishment of native districts would perpetuate 'the barbarous customs of the Native Race', and once established, would become impossible to eradicate.[207] As several scholars have observed, Grey's paternalism masked another agenda, under which the Crown sought to hasten the breakdown of Māori tribal authority in order to pave the way for settlement and an extension of the Crown's de facto sovereignty.[208] Whatever his reasons, Grey had little interest in perpetuating any system under which (in McLintock's words) 'the Maori race [would] progress along lines dictated by its own needs and guided by its traditions'.[209]

Grey's preferred approach, which he presented to the Colonial Office in 1850, was for representative government to apply only in the main Pākehā towns and cities, while the Crown retained direct rule over territories in which Māori were the majority. Under this scheme, Māori would effectively possess neither self-government nor any prospect of representation in the colonial Parliament; their personal relationship with the Governor would be their sole means of influencing the colony's laws.[210] According to historian Dr Alan Ward, Grey intended to use direct rule 'to draw the Maori into the web of government control by a variety of devices designed to manage and placate them, without open discussion of the fundamental questions about land, law, police power, or political representation'.[211]

One of these measures was the Resident Magistrates Court Ordinance, which Grey brought into force in November 1846, extending the Crown's legal system into most parts of the country as well as making provision for Māori assessors to resolve some civil disputes.[212] He also proposed to expand Crown support for health care, education, and the development of Māori communities, while continuing his 'flour and sugar' policies, which sought to buy the allegiance of influential rangatira by granting them salaries and gifts.[213] At that time, Grey misleadingly advised the Colonial Office that Māori would be fully amalgamated into the colonial system of law and government within a matter of years.[214]

The imperial parliament accepted only part of what Grey suggested. The 1852 Act provided for representative government throughout the colony, for the enfranchisement of Māori who could meet a property test couched in terms of English law, and for the retention of self-governing Māori districts. Specifically, section 71 provided that it would be lawful for the Crown to establish such districts, on the basis that

207. Grey to Earl Grey, 15 December 1847 (cited in Ward, *A Show of Justice*, p 86).
208. Ward, *A Show of Justice*, pp 85–86; McLintock, *Crown Colony Government*, pp 394–395.
209. McLintock, *Crown Colony Government*, p 395.
210. Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 14–15.
211. Ward, *A Show of Justice*, p 86.
212. Loveridge, 'Institutions for the Governance of Maori' (doc E38), p 14; O'Malley, 'Northland Crown Purchases' (doc A6), p 48. In practice, Māori in this district resolved most internal disputes among themselves until the 1870s, as we discuss in chapter 11.
213. Loveridge, 'Institutions for the Governance of Maori' (doc E38), p 14; see also Ward, *A Show of Justice*, p 90.
214. Loveridge, 'Institutions for the Governance of Maori' (doc E38), p 19; Ward, *A Show of Justice*, p 90.

> it may be expedient that the laws, customs, and usages of the Aboriginal or Native Inhabitants of *New Zealand*, so far as they are not repugnant to the general principles of humanity, should for the present be maintained for the government of themselves, in all their relations to and dealings with each other. [Emphasis in original.][215]

We note that it went on to clarify that Māori laws, customs, and usages might be maintained even if they were incompatible with the law of England or to any law in force in New Zealand.

This was identical to the native districts provision in the 1846 Act.[216] Britain's Secretary of State for the Colonies, Earl Grey, explained that it had been retained because of 'the uncertainty which must necessarily attend an experiment of this kind as to its effects on the native race'. Section 71 had, in essence, been retained as a backstop in case this constitutional experiment should go wrong. Nonetheless, Earl Grey continued, 'I have not sufficient information to enable me to judge whether there is any present or probable necessity for the use of that power.'[217] In the same despatch, Earl Grey explained his reasons for rejecting any special franchise for Māori in the new colonial Parliament.

Earl Grey's successor, Sir John Pakington, was even less enthusiastic: 'This is a power not to be exercised without strong ground, and which, it is rather to be hoped, you may not find it necessary at present to exercise.'[218] Dr Loveridge was unable to find that any instructions relating to the districts were issued during the 1850s, and he pointed out that there was no provision for extra funding, such as Grey had proposed, which would have enabled a Governor to encourage Māori development 'within a segregated system.'[219] Yet, Loveridge added, if the Act had required any fixed percentage of the proceeds of the land fund to be set aside for Māori purposes, even a small percentage of the land receipts from the 1850s (over £3.6 million between 1853 and 1865) would have produced a very substantial sum.[220]

In other words, the Crown retained the provision for self-governing districts without having any clear intention to use it. Governor Grey certainly did not intend to. To the end of his first governorship in 1853, he remained determined that his policies would (in Professor Ward's words) placate Māori 'until the spread of settlement had encompassed them.'[221] In Ward's view, Grey's approach revealed a fundamental dishonesty at the heart of the Crown's policy, both then and later: its officials favoured assimilation if that meant denying Māori self-government, but not if it meant providing for effective Māori involvement in the colo-

215. New Zealand Constitution Act 1852, s 71.
216. Loveridge, 'Institutions for the Governance of Maori' (doc E38), p 16.
217. Earl Grey, 23 February 1852 (cited in Loveridge, 'Institutions for the Governance of Maori' (doc E38), p 16).
218. Pakington to George Grey, 16 July 1852 (cited in Kawharu, 'Te Tiriti and its Northern Context' (doc A20), pp 164–165).
219. Loveridge, 'Institutions for the Governance of Maori' (doc E38), p 16.
220. Loveridge, 'Institutions for the Governance of Maori' (doc E38), p 16 n
221. Ward, *A Show of Justice*, p 90.

nial Government.[222] The rhetoric of humanitarian assimilation disguised other motives, including racial prejudice and hunger for Māori land, which were incompatible with enduring Māori authority:

> If Grey's rejection of the Native Districts concept had been accompanied, not by the mere rhetoric of assimilation, but by a genuine attempt to engage the Maori in the mainstream of politics and administration, his solution would have been much more satisfactory. But . . . a frank inclusion of the Maori leadership in state power was just what Grey and the settlers could not make. Their deep-seated notions of racial and cultural superiority, and the competition for land, persistently worked against it.[223]

7.3.2.4.2 Why did Gore Browne not use the provision during his term of office?

Grey's first term as Governor ended in 1853, before the colonial Legislature had been established. His successor, Thomas Gore Browne, arrived to a land in which Māori and settlers were far from amalgamated. On the contrary, he informed the Colonial Office in 1860, 'English law has always prevailed in the English settlements, but remains a dead letter beyond them', enforceable against neither Māori nor settlers. Colonial officials who attempted to enforce the law were 'exposed to contempt'.[224] As a result, in Gore Browne's view, most territories of the North Island continued to be 'native districts' in practice, if not in law.[225]

Gore Browne's views echoed those of the colony's Native Minister, William Richmond, who, in an 1858 memorandum, had conceded the impossibility of enforcing English law against Māori, even in the main settler townships: '[T]he British Government in New Zealand has no reliable means but those of moral persuasion for the government of the Aborigines'. It was 'powerless to prevent the commission by natives against natives of the most glaring crimes', and in cases of Māori aggression against settlers was 'compelled to descend to negotiation with the native chiefs for the surrender of the offender'.[226] Such was the gap between the Crown's presumed sovereignty and its authority on the ground, in this and many other North Island districts.

In 1857, after a visit to Waikato, Gore Browne wrote to the Secretary of State for the Colonies saying that he had no power to establish native districts, since doing so would interfere with the authority of the provincial government. Furthermore, he expressed concern that section 71 provided only for the maintenance of pre-existing customary law: 'it does not provide for the establishment of any other law'. In his view, Māori at that time needed a new legal code that was 'different from but not repugnant to English law', yet the Constitution Act provided no

222. Ward, *A Show of Justice*, pp 90–91.
223. Ward, *A Show of Justice*, p 86.
224. Browne to Duke of Newcastle, 3 November 1860, AJHR, 1861, E-3, p 4.
225. Mark Hickford, 'Looking Back in Anxiety: Reflecting on Colonial New Zealand's Historical-Political Constitution and Laws' Histories in the Mid-Nineteenth Century', NZJH, vol 48, no 1 (2014), p 11.
226. Memorandum by Responsible Advisors, 29 September 1858 (cited in Dr Donald Loveridge, 'The Origins of the Native Land Acts and Native Land Court of New Zealand' (doc E26), p 35).

means of establishing such a code, and in particular made no provision for Māori law covering matters such as adultery to apply to settlers within a native district.[227] The following year, the chief justice advised that section 71 would allow Māori to adapt their laws to new circumstances. The Central North Island Tribunal's view was that Gore Browne took an unnecessarily restrictive view of section 71 at that point, and we agree.[228]

While the Governor appears to have accepted the chief justice's advice, he retained other concerns about section 71. In 1860, he wrote to the Colonial Office arguing that, during the early years of the colony, the Crown should have formalised a division between Māori and Crown territories. Instead, 'English law was by a fiction assumed to prevail over the whole Colony.' Gore Browne said he would have liked to use section 71 to 'declare English Provinces and leave Maori districts beyond their pale, to be governed by laws specially adapted to the people inhabiting them'. But he retained some practical reservations. First, the New Zealand Constitution Act required the Crown to suppress warfare and violence among Māori communities, and more generally 'customs which are repugnant to the principles of humanity', when it had no practical means of doing so. Secondly, section 71 had an uncertain effect on settlers 'who have been permitted to scatter themselves thinly over the whole Northern Island'. If section 71 was brought into force, those settlers would be beyond the reach of the colony's laws without being legally subject to Māori law. In the Governor's view, this situation would inevitably lead to trouble.[229]

From 1856, as the colonial Parliament had increasingly asserted its right to be involved in decisions about Māori affairs, it pressed for the establishment of 'some system of government' for Māori, 'adapted to their circumstances'.[230] Over the next two years, Gore Browne and his Ministers cooperated (with some disagreements) on plans to draw Māori into the colony's system of law and government, and more specifically to undermine the emerging Kīngitanga movement by providing Māori with an alternative system of self-government under the Crown's control. To this end, they proposed a system of local administration that would recognise the status of rangatira and provide for some degree of local autonomy, without establishing any authority that was outside the reach of the colony's laws.[231]

Accordingly, in 1858, the colonial Parliament enacted a series of laws applying to Māori affairs. The Native Circuit Courts Act 1858 modified the existing system of resident magistrates and expanded the role of native assessors. The Native

227. Gore Browne to Labouchere, 9 May 1857, AJHR, 1860, F-3, p 111; Loveridge, 'Institutions for the Governance of Maori' (doc E38), p 42.

228. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, p 227.

229. Gore Browne to Duke of Newcastle, 3 November 1860, AJHR, 1861, E-3, p 4; Loveridge, 'Institutions for the Governance of Maori' (doc E38), p 42.

230. 'Native Affairs', 11 August 1856, NZPD, vol B, p 351 (cited in Loveridge, 'Institutions for the Governance of Maori' (doc E38), p 32).

231. Loveridge described these events in detail: Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 32–89. For the Government's motivations, see in particular pp 34, 37–38, 40–43, 63–64.

Districts Regulation Act 1858 empowered the Governor to make local regulations for Māori communities, with their consent, and was intended to pave the way for the recognition of local rūnanga under the colony's system of law. Both these Acts applied only to Māori customary lands, and both had Gore Browne's support.[232] According to the author and researcher Dr Phil Parkinson, these were the first Acts of the colonial Parliament to be translated into Māori and circulated among Māori communities, albeit there had been no consultation on either law prior to enactment.[233]

As the Tribunal noted in the *He Maunga Rongo* report, Māori had no hand in devising this suite of laws, and they 'had some limitations in Treaty terms'. Notably, they offered less than section 71 in terms of Māori autonomy – their objective being to create institutions that were compatible with existing Māori law and authority but would ultimately evolve into an English-style system of local government. Nonetheless, as the Tribunal found, the legislation provided for some Crown recognition for and empowerment of Māori self-government.[234]

The Native Territorial Rights Act (mentioned earlier in section 7.3) provided for the Governor, acting on ministerial advice, to award certificates of ownership to Māori tribes or individuals. These certificates were intended as a transitional step towards Crown grants and reflected the determination of settler politicians to bring Māori land under the colony's laws and open the way for free trade.[235] As the Tribunal found in *He Maunga Rongo*, this was a 'sting . . . in the tail' of the colonial Parliament's suite of legislation for Māori.[236] The imperial government rejected this law, since it constrained the Governor's right to reject ministerial advice on Māori affairs.[237]

As we noted in section 7.3.2.3, in 1859 various proposals were made for a native council or board to advise the Governor about Māori affairs. Gore Browne drew on these to draft his own proposal for a native council of seven members, responsible to the Crown, which would assist him and would also operate a system of land purchase and land development. The Governor would retain his right of veto. In other words, his proposal would have strengthened his powers under the 1856 agreement on the control of Māori affairs. The proposal was sent to the Colonial Office, but Ministers, unsurprisingly, found it unacceptable.[238]

Ultimately, this consideration of a native council would lead to a brief revival of a debate among politicians about Māori self-government. Gore Browne had

232. Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 69–70; Hickford, 'Looking Back in Anxiety', p 11; Ward, *A Show of Justice*, p 107; see also Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, pp 227–228.

233. Phil Parkinson, '"Strangers in the House": The Maori Language in Government and the Maori Language in Parliament, 1865–1900', *Victoria University of Wellington Law Review*, vol 32, no 3 (2001), pp 4–5.

234. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, pp 227–228.

235. Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 65, 70–71.

236. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, p 228.

237. Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 65, 70–71.

238. Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 101–103; Gore Browne to Newcastle, 20 September 1859, BPP, vol 11, pp 93–99.

circulated his proposal to a number of (largely sympathetic) parties, among them New Zealand's first Anglican Bishop, George Augustus Selwyn. Early in 1860, Selwyn suggested that one or more new Māori provinces be created in the central and eastern North Island, and that the powers of existing provinces be restricted to districts where 'native title' had been or would very soon be extinguished. The Governor thought this a promising idea. Representative James FitzGerald, later the Native Minister in the Weld Government, was also enthusiastic and advocated for the establishment of Māori provinces under existing provincial government legislation. He suggested that the Governor might appoint superintendents, and the 'whole tribe assembled' should elect the council.[239] Loveridge stated that the idea of Māori provinces 'fared less well in the House', where it led to detailed consideration of various resolutions about the management of Māori affairs, and how land purchase was to be conducted. The final consensus that emerged there by September 1860 was in favour of urging Māori to adopt the 1858 legislation,[240] with a chief or chiefs nominated in each district 'as organs of communication with the Government', and a greater emphasis on rūnanga as decision-making bodies. The reconvening of another national meeting of chiefs was also strongly supported.[241]

It was against this background that a new bombshell arrived from London. As we discussed earlier, the Colonial Office had drawn up a Bill 'for the better Government of the Native Inhabitants of New Zealand, and for facilitating the Purchase of Native Lands' (the New Zealand Bill 1860), which was its response to the Governor's proposals sent in 1859. The Bill provided for the establishment of a native council of appointed members empowered to declare native districts under section 71 of the Constitution Act 'within which Native Law shall be maintained', at least while Māori lands remained under customary title. The council could also 'declare, record, and amend the Native Law' thereby addressing Gore Browne's concerns over the jurisdiction. Councillors were furthermore empowered to develop a system for ascertaining title to Māori lands, as a transitional step towards opening those territories for settlement.[242]

The colonial Government perceived the Bill to be an intrusion into its sphere of responsibility and lobbied furiously against the measure.[243] Ministers also opposed the specific provision for self-governing Māori districts on grounds that it was contrary to the Government's assimilationist agenda.[244] Native Minister Richmond declaimed that separate Māori legislative institutions were 'worse than useless' and

239. Loveridge, 'Institutions for the Governance of Maori (doc E38), pp 103–105.

240. That is, the Native Districts Regulation Act 1858, which provided for the proclamation of native districts for which the Governor in Council could, with consent of the inhabitants, make regulations having the force of law; the intention was that rūnanga would take the initiative in the scheme. Also the Native Circuit Courts Act 1858, which provided for circuit magistrates to deal with offences under the first Act; magistrates were to be assisted by Māori juries and Māori assessors.

241. Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 106–112.

242. 'New Zealand Bill 1860', AJHR, 1860, E-6(b), p 4; Loveridge, 'Institutions for the Governance of Maori' (doc E38), p 113.

243. Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 113–116; Martin, 'Refusal of Assent', p 61.

244. Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 108–110.

'highly dangerous'.[245] The Bill did not proceed, and the colonial Parliament passed its own Native Council Act which included no reference to the creation of native districts under section 71.[246] As we noted in section 7.3.2.3, Gore Browne considered that this was a suitable compromise.[247]

In sum, then, Gore Browne did not use section 71 because of concerns about its legal effects – in particular, its effect on settlers living within native districts, and on Māori actions that were 'repugnant' to British sensibilities. Working with Ministers, he therefore sought to develop other options that would bring Māori under the rubric of the colony's system of government while also providing some flexibility for a continuation of Māori laws and customs. Legislation aimed at supporting this policy later provided a basis for Governor Grey's district rūnanga, which we discuss in section 7.5.

7.3.2.4.3 Why did Grey not establish native districts under section 71 in 1861–62?

In June 1861, with the colony still in a turbulent state after the first Taranaki War, the Secretary of State (Newcastle) encouraged Governor Grey to consider means by which 'some institutions of Civil Government, and some rudiments of law and order' might be introduced 'into those Native Districts whose inhabitants have hitherto been subjects of the Queen in little more than name'. He recommended a system in which 'a certain number of the native chiefs should be attached to the Government, by the payment of salaries and the recognition of their dignity', to keep order in their territories, with assistance from resident magistrates.[248]

Yet, he also suggested that law and order might best be achieved through the establishment of native districts under section 71. The power to declare native districts was, in Newcastle's view, 'the most important of the Crown's powers, not hitherto exercised'. Any district declared under section 71 would become exempt from the jurisdiction of colonial or provincial government. Grey was asked to consider whether taking this step, through which would be established 'a distinct legislation and administration, in which the natives themselves should take a part', might not 'better promote the present harmony and future union of the two races, than the fictitious uniformity of law which now prevails'.[249]

Despite the clear invitation from the British government in its own New Zealand Bill to make use of section 71, the colonial Government subsequently fell back on the rūnanga model provided for in the Native Districts Regulation Bill 1858, and Newcastle ultimately accepted this approach in March 1862.[250] As we will

245. William Richmond, 10 August 1860 (cited in Loveridge, 'Institutions for the Governance of Maori' (doc E38), p 109).

246. Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 113–116; Martin, 'Refusal of Assent', p 61.

247. Gore Browne to Duke of Newcastle, 26 November 1860, AJHR, 1861, E-3, p 7.

248. Newcastle to Grey, 5 June 1861 (cited in Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 146–147); Newcastle to Grey, 5 June 1861, AJHR, 1862, E-1, p 4.

249. Newcastle to Grey, 5 June 1861 (cited in Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 146–147); Newcastle to Grey, 5 June 1861, AJHR, 1862, E-1, p 4.

250. Newcastle to Grey, 14 March 1862, AJHR, 1862, E-1, p 8.

discuss in section 7.5.2, rūnanga operated in this district from 1861 until the Crown withdrew support in 1865.[251]

After that, as settlers tightened their control over the Crown's agenda, government policy and legislation increasingly moved in the direction of assimilation and Crown control. Successive Native Land Acts sought to bring Māori land into the colony's system of land tenure and make it available for sale. The Native Rights Act 1865 declared that Māori were natural-born subjects of the Crown and therefore were subject to the colony's laws and court system. The Outlying Districts Police Act 1865 empowered the Crown to confiscate lands from Māori communities that harboured anyone accused of murder or other violent crimes – the essential aim being to impose the colony's laws on Māori while relieving the settlers of the costs.[252] The Maori Representation Act 1867 (which we discuss in chapter 11) provided for limited Māori representation in Parliament. These laws, according to historian Professor Keith Sorrenson, 'set the seal for an assimilation policy that lasted for a hundred years'.[253] While the Crown did subsequently consider other schemes for local self-government by Māori communities, these offered powers that were much more limited than section 71 and were always under the control of the Crown.[254]

To summarise, the Crown did not establish native districts under section 71 because it chose to pursue a different course, aimed not at supporting autonomous Māori institutions but at hastening Māori integration into the colony's system of law and government. It furthermore pursued this course without providing for Māori to play any substantive role within the machinery of government, aside from very limited Māori representation in the Legislature. Gore Browne's questions about jurisdiction over settlers in native districts required consideration, but this was not insurmountable. Far more significant was the transfer of authority to settlers who were less inclined than the Governor to protect Māori interests and more determined to bring Māori land into the colony's legal system.[255]

We have seen no evidence that the Crown informed Te Raki Māori about section 71 at any time during the period under consideration in this chapter, let alone consulted them about whether the section should be brought into force or how settlers should be governed in Māori districts. The same is true of proposals for Māori provinces (though it does not seem that it was intended such a province

251. Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 281–282, 297–298; Ward, *A Show of Justice*, pp 196–197; David Armstrong and Evald Subasic, 'Northern Land and Politics: 1860–1910' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2007) (doc A12), p 264. Regarding Newcastle's approval, see Newcastle to Grey, 26 February 1862, AJHR, 1862, E-1, p 7.

252. Outlying Districts Police Act 1865, ss 2–4, 6; Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 247, 262–263. The Act was little used nationally, and not at all in our inquiry district; it was repealed in 1891: Hazel Riseborough, 'Background Papers for the Taranaki Raupatu Claim', 1989 (Wai 143 ROI, doc A2), p 39.

253. Keith Sorrenson, 'Giving Better Effect to the Treaty: Some Thoughts for 1990', NZJH, vol 24, no 2 (1990), pp 137–138.

254. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 571–573.

255. Loveridge, 'Institutions for the Governance of Maori' (doc E38), p 65.

might be formed north of Auckland) and of a succession of proposals and Bills relating to the establishment of a Native Council. Rather, successive Governors made decisions based on advice from colonial officials or Ministers, with occasional input from others who had worked in Māori districts, such as missionaries.[256] The Governor and Ministers discussed how best to 'manage' Māori and their lands; they talked about Māori, rather than to them.

In 1894, the Northern Māori Member of the House, Hōne Heke Ngāpua, complained that his people had never been given an opportunity to exercise the rights provided for in section 71.[257] We therefore cannot know how Te Raki Māori would have responded if they had been offered a self-governing district. In practice, during the period covered by this chapter, they were already self-governing in terms of their day-to-day affairs and engaged with the Crown principally to seek economic partnership or to use the resident magistrate as a neutral mediator (see section 7.4.2.1).

Some scholars have argued that the Crown did practically recognise Māori districts through measures such as the Resident Magistrates Ordinance 1847, the Native Circuit Courts Act 1858, and the Native Districts Regulation Act 1858.[258] As legal scholar Mark Hickford observed, those measures demonstrated that the possibility of establishing Māori districts was 'very much within the lexicon of colonial governance'.[259] However, as we will see, those Acts were not intended to recognise and preserve Māori self-government; rather, they were intended to bring existing Māori governance structures under the control of colonial authorities. Furthermore, these provisions assumed that Māori customary authority must necessarily give way as soon as Māori were awarded Crown title to their lands.[260]

As we will see in later chapters, section 71 assumed considerable importance to Te Raki Māori from the 1870s through to the end of the century, as they sought to protect their tino rangatiratanga from the rising tide of settler influence. As one example, in 1888, the Northern Māori representative Hirini Taiwhanga asked Parliament to pass an Act granting Māori self-government under section 71, along with 'a Council of their own'. War had broken out, and mistrust had developed between Māori and the Crown 'because this Act was hidden from the Natives'.[261] On rare occasions, the Crown briefly considered making use of the section, particularly in Waikato, but for the most part its path from the late 1850s through to the

256. Parkinson, 'Strangers in the House', p 4; Martin, 'Refusal of Assent', p 73.

257. Hōne Heke Ngāpua, 10 September 1894, NZPD, vol 85, p 553.

258. Hickford, 'Looking Back in Anxiety', p 11; Brookfield, *Waitangi and Indigenous Rights*, pp 116–118. In Hickford's view, although section 71 'was never explicitly activated or engaged, so-called "native districts" were recognized to exist, albeit with some complexity on occasion and some deliberate administrative elision on others'. From 1852, colonial officials chose to define such districts as areas 'over which Native title has not been extinguished'.

259. Hickford, 'Looking Back in Anxiety', p 11; Ward, *A Show of Justice*, pp 107–108; Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 253.

260. The Acts applied only to lands that remained under Māori customary title: Brookfield, *Waitangi and Indigenous Rights*, p 118.

261. Taiwhanga, 14 June 1888, NZPD, vol 61, p 82; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1075.

end of the century and beyond was aimed at bringing Māori under the authority of its system of government.[262]

7.3.2.5 *Were Te Raki Māori appropriately represented in the colonial Legislature and Government between 1840 and 1865?*

The first legislative body in the new colony was the Legislative Council, comprised of three nominated members. None were Māori. The 1846 constitution was suspended for five years. Governor Grey did pass a Provincial Councils Ordinance in 1848 which provided for the establishment of a provincial council in the two provinces, New Ulster and New Munster. The members were officials or nominated members. The northern New Ulster council never met. The first opportunity for Māori (as for settlers) to have any representative institutions came with the passing of the Constitution Act 1852.

The Constitution Act 1852 enfranchised all New Zealand males aged 21 or over who met certain property tests – specifically, that they owned freehold property worth £50, or they held a leasehold interest worth £10 per year, or they were householders occupying a 'tenement' worth £10 a year in a town or £5 a year in the country. Men could vote in every electorate where they met any of these tests.[263] These property tests have been described as 'minimal', reflecting a nineteenth-century trend in Britain and its colonies towards broadening a franchise that had previously been held only by property-owning elites.[264] Māori men were not specifically excluded from voting in New Zealand elections, but in practice very few could vote because their property was held in common and was not under Crown title.[265] In the first national election in 1853, only about 100 of the 5,849 registered voters were Māori.[266] New Zealand's first elected Parliament comprised 37 European males, at a time when Māori were a majority of the population and held the vast majority of the North Island's land.[267]

Crown officials had been aware that Māori would be effectively excluded from representation, and that this was a potential point of tension between Māori and the Crown. While the Constitution Act 1852 was being framed, they considered other options, including the establishment of a special Māori franchise. On the one hand, they feared – presciently – that excluding Māori would lead to

262. According to Professor Brookfield, in 1875 and 1878 the Crown briefly considered applying section 71 to Waikato-King Country lands that remained under Māori control: Brookfield, *Waitangi and Indigenous Rights*, p 118.

263. The Act provided that the property interests must have been held for at least six months: Constitution Act 1852, s 7.

264. Dalziel, 'The Politics of Settlement', p 93; see also Neill Atkinson, 'Parliament and the People: Towards Universal Male Suffrage in 19th Century New Zealand', *New Zealand Journal of Public and International Law*, vol 3, no 1 (2005), p 167.

265. Waitangi Tribunal, *Maori Electoral Option Report*, Wai 413 (Wellington: Brooker's, 1994), pp 4–5; see also Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 579.

266. Waitangi Tribunal, *Tauranga Moana 1886–2006: Report on the Post-Raupatu Claims*, Wai 215, 2 vols (Wellington: Legislation Direct, 2010), vol 1, p 381.

267. David Williams, 'Indigenous Customary Rights and the Constitution of Aotearoa New Zealand', *Waikato Law Review*, vol 14 (2006), pp 123–124.

significant Crown–Māori tensions; on the other hand, their notions of racial and cultural superiority meant they could not conceive of Māori playing a full role in any Legislature established along British lines.[268] In 1849, Under-Secretary for the Colonies Merivale summed up this dilemma, writing that Māori were a people 'whom it is obviously impossible to admit to full & adequate representation; and yet extremely dangerous to leave unrepresented'.[269]

The property franchise was the Crown's solution to this perceived dilemma. We note the irony of this idea: even though Māori owned by far the greater part of land in New Zealand under customary title, they would be disenfranchised under the system proposed. As Earl Grey put it in 1852, the Crown had rejected any special enfranchisement and chosen instead to trust that Māori would 'advance in civilisation and the acquisition of property' to a point that would 'enable them, by degrees, to take their share in elections along with the inhabitants of the European race'. Put another way, Māori would be excluded for the time being but would be entitled to representation once they had submitted to the Crown's authority, at least with respect to their lands. For the Crown, this seemed to resolve two issues. It could keep Māori out of Parliament without enacting legislation that specifically excluded them; and it could provide an incentive for Māori to convert their lands to Crown grant.[270] As we discuss in chapter 8, Chief Native Land Purchase Commissioner McLean soon afterwards introduced his repurchase scheme that encouraged Māori to agree at the point of sale of hapū land to spend the proceeds buying back individual sections under Crown grant. One of his key incentives to Māori to adopt his scheme was that their Crown grants would confer on them the right to vote. The scheme was not a marked success in Te Raki (see chapter 8, sections 8.4.2.4 and 8.5.2.7).

Initial Māori responses to the establishment of the General Assembly were mixed. Some (including leaders in this district) regarded it as a settler institution of little relevance to their day-to-day lives or their treaty relationship with the British monarch. They therefore paid it little attention and made scant effort to secure voting rights.[271] Others (such as Waikato Māori) recognised its potential implications for the Crown–Māori relationship and explicitly rejected its authority while also working to establish their own institutions of government.[272] In Otago, 78 Māori (doubtless Ngāi Tahu) put forward their claims to register as electors,

268. Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 10–11.

269. Merivale, 12 July 1849 (cited in Loveridge, 'Institutions for the Governance of Maori' (doc E38), p 10).

270. Earl Grey, despatch, 23 February 1852 (cited in Loveridge, 'Institutions for the Governance of Maori' (doc E38), p 15).

271. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 479–480. This view was acknowledged in parliamentary debates: see, for example, Colonel Russell, 13 August 1867, NZPD, 1867, vol 1, pt 1, p 414.

272. Waikato leaders derisively labelled the colonial Parliament 'the English Committee' and refused to engage with it: Vincent O'Malley, 'Te Rohe Potae Political Engagement, 1840–1863 (comissioned research report, Wellington: Waitangi Tribunal, 2010) (Wai 898 R01, doc A23), p 142; see also Vincent O'Malley, 'Runanga and the Komiti: Maori Institutions of Self-Government in the Nineteenth Century', doctoral thesis, Victoria University of Wellington, 2004 (doc E31), p 25.

which led to a split among local settler dignitaries, and a fierce correspondence published in the local newspaper. The Māori claims hinged on their status as freeholders or leaseholders of lands or buildings in the native reserves. In reply to a letter signed by eminent Otago colonists, the Attorney-General of New Munster (comprising the lower North Island, South Island, and Stewart Island), Daniel Wakefield, clarified from Wellington on 13 May 1853 that

> the qualification required by the Act from Aboriginal Natives is precisely the same as that which is required from any other British subjects. . . . [But t]hese qualifications must be possessed severally or separately as individuals. I conceive, therefore that few, if any, Aboriginal Natives will be entitled to be placed on the register. I believe they dwell together in their Pahs just as they do here. If so, there will hardly be found a freeholder, a leaseholder, or an occupant, in his own right as required.[273]

Subsequently, Wakefield was able to be more precise, as he had discovered that the native reserves in question (made by the New Zealand Company at the time of its Otakou purchase in 1844) were held back from the purchase by Ngāi Tahu, and as such were still in native title. Thus, none of those who lived on the reserves qualified as voters.[274]

The equality of Māori to vote therefore depended, as Wakefield explained, on their holding property 'by some tenure known to the law of England, as that law exists in the Colony'.[275] On the one hand, the British government expected that Māori would, in time, convert their land tenure to a recognisably British form and secure for themselves the right to vote. Meanwhile, however, the Government was willing for Māori – the majority of the population – to remain disenfranchised in both provincial and national elections.

Other Māori protested at their exclusion from the General Assembly and sought representation partly on the basis of equity and partly as a means of protection against the land hunger of settlers.[276] Māori who did register to vote often

273. Wakefield to Reynolds, Cargill, and Macandrew, 13 May 1853, *Otago Witness*, 25 June 1853, p 2.

274. Wakefield to Reynolds, Cargill, and Macandrew, 13 May 1853, *Otago Witness*, 25 June 1853, p 2. The New Zealand Native Reserves Act 1856 provided for the establishment of native reserves; that is, 'Lands set apart for the benefit of the Aboriginal Inhabitants of New Zealand'. Reserves could either be set aside during sale or, in the case of customary lands, established with the owners' consent (sections 14, 17). All reserves were managed by a commissioner on the owners' behalf (section 6).

275. Wakefield, 13 May 1853, *Otago Witness*, 25 June 1853, p 2.

276. Anderson, Binney, and Harris, *Tangata Whenua*, pp 250–253; M P K Sorrenson, 'A History of Maori Representation in Parliament', app B in Royal Commission on the Electoral System, *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (Wellington: Government Printer, 1986), pp B15–B16. An 1855 letter from Te Rangikaheke to other Ngāti Whakaue rangatira is often cited as representative of Māori views at this time. He wrote that the constitution provided for 'no recognition of the authority of the native people, no uniting of the two authorities': Wiremu Maihi Te Rangikaheke to Te Arawa, 3 December 1855 (cited in Anderson, Binney, and Harris, *Tangata Whenua*, p 251). For examples of Māori seeking representation, see 'Letters from Native Chiefs to Mr Fitzgerald MHR', AJHR, 1864, E-15; Major Heaphy, 14 August 1867, NZPD, vol 1, pt 1, p 459; John Williamson, 14 August 1867, NZPD, vol 1, pt 1, pp 461–462; Pāora Tūhaere quoted in 'Maori Representation – The Meeting at Kaipara', *Daily Southern Cross*, 10 March 1868, p 2.

met resistance from colonial politicians and Crown officials, sometimes on the basis that they did not meet the property qualification but often because of settler fears that Māori enfranchisement would dilute their own power.[277] In 1859, after a request by the House of Representatives, the imperial government clarified that Māori could qualify only if they held property rights (whether freehold, leasehold, or rights of occupancy) under English law. Therefore, Māori could not be enfranchised on the basis of property held communally or under native title.[278]

By the early 1860s, with the colony at war in Taranaki and heading towards war in Waikato, colonial politicians began to turn their attention to the question of Māori enfranchisement. While some settler politicians were completely resistant,[279] others were aware that continued disenfranchisement posed a threat to the colony's peace, especially as the General Assembly drew a considerable portion of its revenue from Māori and was increasingly legislating to govern their affairs.[280]

Accordingly, on several occasions during the 1860s, the House of Representatives considered proposals for a special franchise for Māori until such time as the Native Land Court had converted most or all Māori land to Crown-derived titles. These proposals provided for a small number of Māori electorates, typically between two and five. Some proposals envisaged Māori electing settlers to represent them, others provided for the universal enfranchisement of Māori men, while still more sought to expand the property qualification in general electorates to include land held by Māori under communal and customary tenure.[281]

In essence, the sponsors of these proposals hoped to reduce Māori dissatisfaction with the colonial Government and to encourage Māori assimilation into the colony's system of government. The most detailed proposal came from the Lyttelton member, James FitzGerald, whose 1862 motion that Māori be represented in the executive branch and in both Houses of Parliament was narrowly defeated. FitzGerald acknowledged that his aim was to undermine both the Kīngitanga and Grey's district rūnanga. 'I admit that what the natives want is a separate nationality,' he told the House. 'But is not this pining for a nationality the offspring of a desire for law and order?' Parliament should therefore say to Māori, FitzGerald

277. For examples, see Wakefield to Reynolds, Cargill, and Macandrew, 13 May 1853, *Otago Witness*, 25 June 1853, p 2; 'Correspondence Relative to the Registration of Native Voters', AJHR, 1858, E-2, pp 2–3.

278. 'Papers Relative to the Right of Aboriginal Natives to the Electoral Franchise', AJHR, 1860, E-7, pp 5–6, 8.

279. The Bay of Islands member Hugh Francis Carleton told the House of Representatives in 1858 that Māori 'have a natural right not to vote, *but to be well governed*' (emphasis in original): 'Papers Relative to the Right of Aboriginal Natives to the Electoral Franchise', AJHR, 1860, E-7, pp 5–6.

280. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 579, 611.

281. Sorrenson, 'A History of Maori Representation in Parliament', pp B18–B19; Paul Moon, 'A Proud Thing to Have Recorded: The Origins and Commencement of National Indigenous Political Representation in New Zealand through the 1867 Maori Representation Act', *Journal of New Zealand Studies*, no 16 (2013), pp 58–60; see also 'Representation Bill', 26 September 1865, NZPD, vol E, 1864–66, p 599.

continued, 'Accept our nationality. Accept a far higher and nobler nationality . . . than any which you can create for yourselves.'[282]

In 1865, the Weld Government, which had assured the Colonial Office that it wished to see Māori make further 'advances', considered a new proposal for Māori representation.[283] According to Henry Sewell, then Attorney-General, 'the question of defining Native Political rights' was at the top of their agenda for the forthcoming parliamentary session.[284] It was decided not to appoint chiefs to the Legislative Council because of the difficulty of choosing some without offending others. The decision therefore was that Māori should be represented in the lower house. And a further decision was taken that rather than create a 'distinctive franchise' and add additional Māori members to the House, the existing franchise would be broadened so that Māori could vote in existing electoral districts. The Maori Electoral Bill that was drafted provided that any adult male would be eligible to vote who possessed 'a right or title in the nature of an absolute proprietary right or title according to Maori custom in or to land or share of land to which Maori title shall not have been extinguished of the value of Fifty Pounds'. The value of property was to be estimated on the basis of certain set values per acre (10 shillings in towns, and an unstated value elsewhere). But the Bill also made provision for adult members of a tribe, hapū, or family who held their land communally. The total acreage of land held would be divided by the number of adult males. And if the quotient amounted to a certain value (discussed earlier), all those men could vote. Those qualified to vote would also be eligible to become Members of the House of Repesentatives, the superintendent of a province, or members of a provincial council.[285]

The Bill however was strongly opposed by the Native Minister Walter Mantell, and Sewell's efforts to work out a compromise with him were unsuccessful. Soon afterwards, Mantell resigned. This resulted in a change to the ministry's electoral policy.

The new Native Minister, James FitzGerald, introduced the Native Commission Act 1865, which provided for the establishment of a temporary commission, comprising some 20 to 35 rangatira and three to five Pākehā, to inquire into the best means of providing for Māori representation. So far as we can determine, this was the Crown's only attempt to directly consult Māori about representation in Parliament. Soon after the legislation came into force, the Weld Government was defeated and the commission never met.[286] As we will see in chapter 11, in 1867 the

282. James Fitzgerald, 6 August 1862, NZPD, vol D, pp 489–490.

283. Loveridge, 'Institutions for the Governance of Maori' (doc E38), p 221.

284. The discussion of the Maori Electoral Bill that follows relies on Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 239–241.

285. Dr Loveridge noted that this proposal was not entirely news in terms of New Zealand electoral practice. He pointed to the Miners Representation Act 1862 which had moved away from a Crown-grant-based franchise by giving the vote to men who held a valid 'Miner's Right' under the Gold Fields Acts. He added that the proposal was similar to one made by Grey much earlier: Loveridge, 'Institutions for the Governance of Maori' (doc E38), p 241.

286. Sorrenson, 'A History of Maori Representation in Parliament', pp B18–B19.

colonial Parliament would enact legislation providing for four Māori electorates (including one for Northern Maori) to be established on a temporary basis.[287]

7.3.3 Conclusions and treaty findings

The treaty, as we have explained, provided for the Crown and Māori to share authority, each within distinct though potentially overlapping spheres of influence. A significant element of the Crown's power of kāwanatanga involved its promise to control settlers and settlement, thereby keeping the peace and protecting Māori interests.[288] In the Tiriti debates, and in the preamble to the treaty itself, the Crown placed considerable emphasis on its protective intent; indeed, it presented the treaty as a necessary step to ensure that uncontrolled settlement did not threaten Māori lands and lives.[289]

The terms used in te Tiriti confirmed Te Raki leaders' understanding that they were making a personal agreement with the Queen, and that she was giving them personal assurances in her capacity as head of the British empire.[290] As discussed in our stage 1 report, Ngāpuhi had deliberately cultivated relationships with British kings during the 1820s and 1830s, explicitly to secure British protection while advancing trade and technological advancement.[291] Viewing these relationships in personal terms was consistent with the lens of whanaungatanga through which rangatira understood political leadership and alliance building.[292] From a Māori perspective, the Queen's mana was also that of her people, and her word was tapu.[293] In Ngāpuhi tradition, this personal dimension – and the inference that the Queen could and would personally guarantee their tino rangatiratanga – was crucial in persuading rangatira to sign.[294]

Yet this image of Queen Victoria as offering Māori her personal protection was (as some legal scholars have said) 'a fiction'.[295] To British officials, the 'Kuini' referred to in te Tiriti was not the Queen in her personal capacity, but 'the Crown' – a term that is capable of many meanings, but in the context of the treaty in 1840 can best be understood as referring to the sovereign power of the state, or

287. Maori Representation Act 1867, ss 2–6, 12.
288. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 528, 529.
289. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, ch 6.
290. Grant Phillipson, 'Bay of Islands Maori and the Crown, 1793–1853' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2005) (doc A1), pp 205–206; Orange, *The Treaty of Waitangi*, p 46; Brookfield, *Waitangi and Indigenous Rights*, ch 5.
291. We described these events in our stage 1 report, *He Whakaputanga me te Tiriti*, Wai 1040, ch 3–5. For briefer summaries, see Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), ch 5 (esp pp 206–207); Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), ch 6.
292. Janet McLean, 'The Many Faces of the Crown and the Implications for the Future of the New Zealand Constitution', *Commonwealth Journal of International Affairs*, vol 107, no 4 (2018), p 478.
293. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 207–208.
294. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 207–208.
295. Brookfield, *Waitangi and Indigenous Rights*, pp 119–120; McLean, 'Crown, Empire and Redressing the Historical Wrongs', p 199.

the political authority exercised in the sovereign's name.[296] Thus, as Professor McLean has explained, officials distinguished between 'personal Queen and political Crown' in a way that was never explained to Māori who signed te Tiriti.[297] In practical terms, the 'political Crown' in fact referred to numerous institutions that exercised power in nineteenth-century Britain and its colonies. Within Britain, by 1840, the feudal notion of an all-powerful monarch had long since given way to the tradition of constitutional monarchy, and the Queen's legislative powers were therefore exercised by the imperial parliament. Her executive powers were exercised on the advice of Ministers or directly by Ministersm themselves, while they retained the confidence of parliament to which the imperial government (including the Colonial Office) was answerable. While power was exercised in the Queen's name, she had very little residual authority.[298]

Within New Zealand during the Crown colony period, there was no Parliament in which sovereign authority could reside. The Governor was required to act in accordance with the Royal Instructions issued by the sovereign, acting on the advice of her British Ministers. In practice, they were composed by the Colonial Office. Although the Governor acted under these Colonial Office instructions, his powers were broad and encompassed both legislative and executive authority in a manner that (according to legal scholar Professor David Williams) was 'somewhat reminiscent of the powers exercised by Stuart kings'.[299] Dr Orange observed that Governor Grey (and to a lesser extent, other Governors) deliberately fostered personal relationships with leading rangatira, and so reinforced the notion that the treaty could be understood in personal terms.[300] The rangatira–Governor relationship became 'an acceptable adjunct to traditional Maori authority structures', which officials deliberately used 'to reinforce the concept of a personal relationship between the Crown and the Maori people'. Rangatira, 'disposed by custom to favour reciprocity, often responded with expressions of loyalty [and] with the wish to be one with settlers'.[301]

Yet, having proclaimed sovereignty in 1840 unilaterally in breach of treaty guarantees (see chapter 4), the Crown took only six years before it took steps to transfer

296. McLean, 'Crown, Empire and Redressing the Historical Wrongs', pp 188–189. Professor McLean has written several articles about the various meanings of 'Crown' in New Zealand's constitutional history; see also F M Brookfield, 'The Monarchy and the Constitution: A New Zealand Perspective', *New Zealand Law Journal*, 1992, pp 439–440.

297. McLean, 'Crown, Empire and Redressing the Historical Wrongs', pp 188–189.

298. For discussion about these developments in a New Zealand context, see Janet McLean, 'Crown Him with Many Crowns: The Crown and the Treaty of Waitangi', *New Zealand Journal of Public and International Law*, vol 6, June (2008), pp 44, 49–50, 54–55; McLean, 'Crown, Empire and Redressing the Historical Wrongs', pp 195–197, 209–210; see also David W Williams, 'Genealogies of the Modern Crown: From St Edward to Queen Elizabeth II' (cited in Cris Shore and David V Williams, eds, *The Shapeshifting Crown: Locating the State in Postcolonial New Zealand, Australia, Canada and the UK* (Cambridge: Cambridge University Press, 2019), pp 32, 36, 38).

299. Quentin-Baxter and McLean, *This Realm of New Zealand*, p 18; Williams, 'Genealogies of the Modern Crown', p 45.

300. Orange, *The Treaty of Waitangi*, pp 140–141.

301. Orange, *The Treaty of Waitangi*, pp 140–141.

authority to settlers. While the 1846 constitution was never put into effect, the New Zealand Constitution Act 1852 provided for elected provincial and national assemblies – the latter with authority over the colony's budget, taxation, and legislative agenda. The colonial Parliament first met in 1854; the first responsible ministry was formed in 1856; Governor Gore Browne – despite his retention of responsibility for Māori affairs – began to accept the advice of settler Ministers on Māori affairs (1858); the General Assembly began to legislate on Māori affairs (1858); Governor Grey accepted the principle of ministerial responsibility for Māori affairs (1861); Secretary of State Newcastle rejected Ministers' attempts to give up responsibility (1863); Weld's new settler ministry accepted full responsiblity, including its financial costs (1864); and the imperial government confirmed that principle (1865). From that time, the colonial Parliament and Government had almost complete control of the Crown's relationship with Māori – all that remained for the imperial government was the conduct of warfare against Māori. Even then, the colonial Government did assemble its own forces, as Weld had planned, who would specialise in bush fighting. But for several years, the struggle over who would have responsibility for Māori affairs became little more than a struggle over which government would pay for British troops engaged in quelling Māori resistance. It was a bad beginning to the establishment of colonial Government.

British officials did not understand the treaty as Māori did, but they were nonetheless aware of the Crown's duty to use its power in a manner that protected Māori rights and interests – to provide 'a guarantee against oppressive treatment', in Newcastle's words,[302] or (as Dr Orange put it) 'to stand between settlers and Maori'.[303] Officials were also aware that any transfer of authority to a growing settler population would potentially threaten Māori authority, possession of land, and lives.[304] Yet, by February 1865, the imperial government had effectively delegated its power of kāwanatanga to colonial institutions of government under the control of settlers, who were a small minority of the population in 1852 and a bare majority in the early 1860s. This was undemocratic as well as antithetical to treaty rights.

The transfer of authority from imperial to colonial Government was of immense significance for the treaty relationship. In their traditional history of Ngāpuhi, Drs Manuka Henare, Hazel Petrie, and Adrienne Puckey described this transition as 'a significant change in the socio-political landscape' of the fledgling colony. 'Māori had signed Te Tiriti o Waitangi in expectation of an enduring direct relationship with the British monarch', they said, 'whereas the New Zealand Constitution Act of 1852 effectively severed that relationship.' This 'affected Māori in a number of ways, one of the most significant of which was the concentration of political power, both formal and informal, in the hands of Pākehā settlers'.[305] Professor Brookfield observed that rangatira who signed te Tiriti could scarcely have been expected

302. Newcastle to Grey, 26 February 1863, AJHR, 1863, E-7, p 4.
303. Orange, *The Treaty of Waitangi*, pp 139–140.
304. Orange, *The Treaty of Waitangi*, pp 139–140.
305. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 479.

to anticipate, let alone consent to, a constitutional arrangement under which the Crown's authority would be exercised by a settler-dominated colonial Parliament and Government, which was empowered to adopt policies inconsistent with the treaty itself. In Brookfield's view, so long as responsibility for the treaty remained with the imperial government, the fiction of the Queen's sovereign powers had little practical effect. But that changed when the imperial government transferred responsibility for Māori affairs to the colonial Government.[306]

This shift towards settler self-government was consistent with constitutional convention for the colonies, and doubtless appeared inevitable to the imperial and colonial Governments by the mid-nineteenth century. But in making the transfer of governing authority to the colonial Government, the Crown left unanswered two crucial questions: how was self-government to be implemented in a colony that had a majority Māori population, and how was provision to be made for the exercise of tino rangatiratanga?

At the very least, under the treaty any such transfer required careful negotiation between the Crown and rangatira – yet there is no evidence of the Crown attempting this. Rather, as we explained earlier, the New Zealand Constitution Act 1852 was drafted by officials with some influence from the New Zealand Company and humanitarian organisations such as the Aborigines' Protection Society. The Act was not translated into te reo Māori and does not appear to have been circulated among or discussed with Māori communities by officials even after it was passed. When Gore Browne arrived in New Zealand, he sought input from missionaries and others he regarded as familiar with Māori. He also visited the Bay of Islands and Mangonui in 1858, and Grey visited in 1861, but there is no record of either of them discussing the colony's system of government. Māori throughout New Zealand were aware that change was occurring, and in many places there was growing unease. It was expressed in different districts in different ways: in Rotorua as disenchantment with the Queen and Governor; in Waikato as dissatisfaction that no code of laws had been provided; and in Hokianga as disappointment that the expected benefits of settlement (so often promised) had not materialised at all.[307]

The only truly substantive Crown–Māori consultation during this period occurred at the Kohimarama Rūnanga held after war had broken out in 1860 (discussed in section 7.4), where Crown officials in essence offered Māori a choice between the Queen's protection and continued conflict. At no point during that rūnanga did Crown officials suggest that settler Ministers might soon take over responsibilities at that time exercised by the Governor; on the contrary, the Governor and Native Secretary played prominent roles in the proceedings while Ministers observed.

The Crown had promised to protect Māori in possession of their tino rangatiratanga, their lands, and their independence, yet none of these protections were

306. Brookfield, *Waitangi and Indigenous Rights*, pp 119–120; see also Brookfield, 'The Monarchy and the Constitution Today', p 239.

307. Orange, *The Treaty of Waitangi*, pp 139, 141–142.

built into the colony's constitutional arrangements. According to Dr Orange, neither did the Crown ever consider any formal transfer of the Crown's treaty obligations to the colonial Parliament.[308] As mentioned earlier, the Wesleyan Missionary Society argued that the colonial Government should be legally required to act in accordance with the treaty, but the imperial authorities took no action on this issue.[309] Neither the New Zealand Constitution Act 1852 nor any subsequent constitutional instrument provided meaningful safeguards for treaty rights. Section 71 of the Constitution Act provided for self-governing Māori districts but contained no requirement that these be established or recognised. Section 7 enfranchised males aged 21 or over, subject to a property test that effectively excluded almost all Māori men. (Māori women, like Pākehā women, were not enfranchised at all.) Officials were aware that the property test would effectively disenfranchise almost all Māori, meaning they would go unrepresented in the colonial and provincial assemblies.

Yet it need not have been the case. The Maori Electoral Bill (1865) provided for Māori male voting rights – and rights to become members of the House of Representatives and provincial councils, and to be provincial superintendents – by reason of ownership of customary land. It provided a creative formula for allocating votes to hapū members on the basis of their collective ownership of land. Yet the Bill foundered before it got to the floor of the House. The Native Commission Act 1865 fared better. It provided for real consultation of rangatira as to the best means of providing for Māori representation in Parliament. But the ministry which passed the legislation fell soon afterwards, and it never came into effect. That, too, was an initiative that showed that Pākehā governments could engage with the important issues of Māori representation and suggest useful approaches to them. What was much harder was making them work.

The Crown's obligations went beyond protecting Te Raki Māori interests from the whims of colonial politicians. The guarantee of tino rangatiratanga over their people and territories was paramount to the 1840 agreement. As previous Tribunal reports (including our stage 1 report) have found, the Crown was not entitled to impose institutions of government on Māori without their consent – yet the establishment and transfer of responsibility to colonial institutions of government had exactly this effect, at least under English law.[310] The Crown had a further obligation to ensure that any institutional arrangements established after 1840 did not interfere with tino rangatiratanga and Māori rights and interests. On both counts, the Crown failed in its treaty duties.

308. Orange, *The Treaty of Waitangi*, p 160.

309. Wesleyan Missionary Committee, *Correspondence between the Wesleyan Missionary Committee and Sir James Pakington* (London: P P Thomas, 1852) (cited in Orange, *The Treaty of Waitangi*, p 138).

310. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pts 1, 11, pp 183, 186–187; Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, p 191. In our stage 1 report, we found more generally that the practical details of any Crown–Māori relationship required negotiation between the parties: Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 527, 528, 529.

It is striking that colonial officials agonised over settler calls for responsible government while giving only limited regard to Māori interests. The Constitution Act 1852 made elaborate provision for settler representative institutions. Officials in the 1850s and 1860s were acutely aware that many Māori in this district and elsewhere continued to live in self-governing communities that were either mostly or wholly beyond the reach of English law. Though section 71 of the Act made what we consider a positive constitutional provision for tribal self-governing districts and recognition of tikanga, the decision to declare such districts remained in the hands of the Governor. The failure of successive Governors to implement the provision was a significant missed opportunity. Governor Gore Browne did consider using section 71 during the 1850s but chose not to for various reasons, including uncertainty about whether it would allow Māori to adopt new forms of law and government (as opposed to maintaining customary law), and about the application of the colony's laws to settlers within Māori districts and Māori who committed acts that were 'repugnant' in British eyes. The first of these concerns arose from the Governor's misunderstanding of the section, as he later appears to have accepted; the other issues, in our view, were not insurmountable, though they would have required discussion with Māori.

In the early 1860s, the Colonial Office encouraged Governor George Grey to use section 71, but he chose not to, this time because he did not want to entrench Māori independence. Grey instead chose to introduce new institutions that provided for limited Māori self-government through district rūnanga under the control of the Governor and colonial officials. Crown counsel submitted to us that it was not obliged to declare Māori districts under section 71 of the Constitution Act, and had caused Māori no prejudice by choosing not to do so. It argued that the district rūnanga arrangement introduced by Grey provided for the exercise of tino rangatiratanga and was therefore treaty compliant. We will consider whether that was the case in section 7.5.

During the 1860s, the colonial Parliament enacted a series of laws aimed at extending the Crown's authority over Māori lands and communities. These included the Native Lands Acts of 1862 and 1865, which established the Native Land Court (discussed in chapter 9); the Native Rights Act 1865, which confirmed the article 3 rights of Māori as British subjects; and the Maori Representation Act 1867 (chapter 11) which made temporary provision for Māori representation in the House of Representatives. These laws reflected a general view among colonial politicians that both the colony's safety and Māori welfare would be served by bringing Māori communities under the authority of the colony's system of law and government – a course that the Crown would continue to pursue after 1865, as we will see in chapter 11.

Accordingly, we find that:

- The Crown failed to recognise, respect, and give effect to Māori political rights when it enacted a constitution that provided for provincial and national representative assemblies in 1852 without negotiating with Te Raki Māori, without ensuring that Te Raki Māori were able to exercise a right to vote alongside settlers, and without providing safeguards that would secure

ongoing Te Raki Māori autonomy and tino rangatiratanga. These Crown actions and omissions, which came at a crucial juncture in New Zealand history, breached te mātāpono o te tino rangatiratanga. These actions also breached te mātāpono o te houruatanga me te mātāpono o te whakaaronui tētahi ki tētahi/the principles of partnership and of mutual recognition and respect.

- By providing for responsible government by colonial ministries from 1856, and ultimately allowing those ministries to assume responsibility for the Crown–Māori relationship, the Crown fundamentally undermined the treaty relationship. The Crown did not negotiate with Te Raki Māori or provide safeguards to ensure that Māori could continue to exercise autonomy and tino rangatiratanga. This breached te mātāpono o te tino rangatiratanga. It also breached te mātāpono o te houruatanga me te mātāpono o te whakaaronui tētahi ki tētahi/the principles of partnership and of mutual recognition and respect.
- By failing to declare self-governing Māori districts under section 71 of the Constitution Act 1852, and thus to ensure provision was made for Māori autonomy within its own kāwanatanga framework, the Crown breached te mātāpono o te houruatanga/the principle of partnership.
- By effectively denying the great majority of Māori representation in the General Assembly prior to 1867, the Crown breached te mātāpono o te mana taurite/the principle of equity. The Crown also breached this principle by failing to ensure that Māori were represented in the Legislative Council and in provincial assemblies (the Auckland Provincial Council in the case of Te Raki Māori).

7.4 What Was the Significance of the 1860 National Rūnanga at Kohimarama for the Exercise of Te Raki Tino Rangatiratanga?

7.4.1 Introduction

Growth in the settler population and settlers' political influence during the 1850s had significant impacts on the Crown–Māori relationship – in particular by threatening Māori authority and possession of land. Māori responded in various ways, due among other things to variations in local circumstances and the historical treaty relationship. Some rejected the Queen, Governor, and colonial Parliament, and asserted their rights of self-government. Some resisted the Crown's attempts to purchase and survey land. In this district, Māori continued to value their alliance with the Queen while also expressing disappointment that the promised benefits of settlement had not come to fruition.

During 1860, the Crown–Māori relationship reached a crisis point. War broke out in Taranaki; and the Kīngitanga, which Governor Gore Browne perceived as a direct threat to the Crown's sovereignty, was growing in strength and support. The Governor responded to these circumstances by calling a national rūnanga of Māori leaders, aimed at defusing Māori opposition and thereby shoring up support for the Crown's authority. Te Runanga o Nga Rangatira Maori (more

commonly known as the Kohimarama Conference) took place over five weeks in July and August, at Kohimarama (which then lay outside Auckland township). More than 200 rangatira attended, including a significant contingent of Te Raki leaders. Waikato had few representatives, and Taranaki was notably absent, but the rūnanga was nonetheless, according to Dr Orange, the most representative gathering of Māori ever called by the Crown up to that point.[311] For leaders from this district, which the Crown had neglected since the Northern War, it was a chance to meet and hold discussions with the Governor and other Government leaders.[312]

For those who were present, the rūnanga provided a rare opportunity for meaningful dialogue about the nature of the treaty relationship and the mutual rights and obligations involved. In order to achieve its objectives, the Crown made significant concessions, presenting itself as a source of protection for Māori mana and proposing that rangatira should exercise significant influence within the colony's system of government. In return, officials sought expressions of loyalty to the Queen, and condemnation of Taranaki and Kīngitanga 'rebels'. According to historians for the claimants, both the Crown and rangatira saw the rūnanga as a renewal and reaffirmation of the treaty which would pave the way for Crown and Māori spheres of authority to coexist.[313]

Notwithstanding this apparent meeting of minds, the parties in our inquiry had contrasting perspectives on the outcomes of the rūnanga. To the claimants, its significance was in the promises made by Gore Browne and other Crown representatives that Māori would become equal participants in the machinery of the State through a combination of annual assemblies, local self-government, and self-determination over land. In the claimants' view, these promises amounted to a restatement of the treaty guarantees of ongoing Māori rights to exercise their collective authority in accordance with tikanga. Their principal concern was with the Crown's subsequent backtracking on its promises: its unilateral abandonment of annual national rūnanga, and its failure to implement a system that provided for Māori control over land.[314]

In the Crown's view, rangatira at Kohimarama acknowledged the Queen's sovereign authority, expressed their desire to live under the colony's laws, and accepted that any future exercise of tino rangatiratanga would occur under the Queen's protective authority or mantle. The Crown acknowledged that it had not kept all

311. Orange, *The Treaty of Waitangi*, p 145; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 102–103; see also O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), pp 144–152; Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 91–96; Orange, 'The Covenant of Kohimarama', pp 63–64; Lachy Paterson, 'The Kohimārama Conference: A Contextual Reading', *Journal of New Zealand Studies*, no 12 (2011), pp 29–30, 32–33.

312. After the Northern War, Governor Grey visited the district in 1849 and Governor Gore Browne in 1858. Otherwise, the Government was conspicuously absent from Te Raki: O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 121; Johnson, 'The Northern War' (doc A5), p 404.

313. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 103–104; O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 151.

314. Claimant closing submissions (#3.3.228), pp 166–167, 217–218.

The Kohimarama Rūnanga

The meeting of Māori leaders that took place at Kohimarama during July and August 1860 is commonly known as 'The Kohimarama Conference'. But throughout the event, Māori leaders referred to it as a rūnanga – a formal decision-making body. The government newspaper the *Maori Messenger/Te Karere Maori* also used the term, describing the event as 'Te Runanga o Nga Rangatira Maori e noho nei i Kohimarama'.[1] In English, the official minutes referred to the event as a 'council' or 'assembly',[2] the same constitutional terms as were used for the colony's institutions of government (the General Assembly, and Executive and Legislative Councils). We do not think that the word 'conference' captures the event's significance as a national decision-making body for rangatira and the Crown. For this reason, we choose to refer to the event as a rūnanga.

1. 'Te Hui ki Kohimarama', *Te Karere Maori*, 14 July 1860, p 1.
2. See 'Minutes of the Proceedings of the Kohimarama Conference of Native Chiefs', AJHR, 1860, E-9.

its promises, while submitting that the course it took was reasonable and did not prejudice Te Raki Māori.[315]

7.4.2 The Tribunal's analysis

7.4.2.1 *What was the state of the relationship between the Crown and Te Raki Māori before the Kohimarama Rūnanga?*

Te Raki Māori had signed te Tiriti expecting that they would retain their lands, and their autonomy and authority; that they would receive the Crown's protection from foreign powers and troublesome settlers; and furthermore, that they would strengthen their economic partnership with the Crown and settlers, securing ongoing peace and prosperity.

By 1846, the Crown had already taken several steps that were inconsistent with Māori expectations. It had declared its *de jure* sovereignty over the whole of New Zealand, moved its capital to Auckland, interfered with Te Raki Māori trade, attempted to impose its laws within the district irrespective of Māori consent, asserted its authority over Māori lands through its land commission, and asserted its sovereign authority through warfare. In the years following the Northern War, Te Raki Māori retained a very high degree of autonomy. On a day-to-day basis, they largely continued to manage their own affairs in accordance with tikanga – partly because the Crown had no means of asserting its authority other than by

315. Crown closing submissions (#3.3.402), pp 89–92.

force, and partly because the Crown and settlers chose to neglect the district. In the post-war years, Te Raki Māori had autonomy and peace, but not prosperity.[316]

As discussed in chapter 5, Te Raki leaders made a series of post-war attempts to restore their relationship with the Crown, while the Crown showed a marked reluctance to involve itself in the district for fear of renewing hostilities. On several occasions in the late 1840s, Ngāpuhi leaders, including Heke and Kawiti, sought to involve the Crown in a joint project to rebuild the flagstaff, but Governor Grey variously refused or avoided the issue.[317] Grey did eventually meet Heke and Kawiti in 1848, prior to a formal peacemaking hosted by Ngāti Manu in 1849.[318]

Notwithstanding this peacemaking, the Crown and settlers continued to neglect the north. From the late 1840s, northern leaders regularly appealed for a restoration of the relationship, and especially for townships to be established to restore the declining local economy. Notably, hapū who had supported the Crown during the Northern War suffered as much hardship as those who had fought with Heke and Kawiti.[319] Things drifted for several years until the rise of the Kīngitanga sparked a reaction from the Crown. In 1856, responding to apparent threats from Waikato, Mohi Tāwhai and other Hokianga leaders wrote to the Governor reminding him of the long-standing Crown–Ngāpuhi relationship.[320]

The following year, they wrote again, saying they had called a hui to discuss the emergence of the Kīngitanga movement. The letter that survives is in English. Anxious to reassure the Crown of their peaceful intentions, they wrote that 'the only King is the Queen of England for these Islands' (that is, they were loyal to the Queen and the terms of the treaty, not to King Tāwhiao). They wrote of their plans to hold a hui at Maiki Hill, 'when the flagstaff at Maiki is to be again erected; which is the King the Ngapuhi acknowledge'.[321]

In January 1858, a few months before Pōtatau Te Wherowhero was confirmed as King, Governor Gore Browne visited the north. There, rangatira repeated their assurances that they would not align with the Kīngitanga. On 7 January at Kororāreka, Nene and others met the Governor, urging him to establish a town in their midst and assuring him that they accepted the Queen '[h]ei rangatira mo

316. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), pp 107–110; Phillipson, 'Bay of Islands Maori and the Crown, 1793–1853' (doc A1), pp 305, 360–361. With respect to the Crown's inability to enforce its laws in the north, see doc A6, pp 88–95.

317. Johnson, 'The Northern War' (doc A5), pp 397–401.

318. Erima Henare, transcript 4.1.4, Te Rito Marae, p 122; see also 'The Governor's Visit to the North', *Daily Southern Cross*, 6 May 1848, p 2; *New Zealander*, 3 May 1848, p 2.

319. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), pp 87–88, 108–110, 134–135; see also Nicholas Bayley, 'Aspects of Maori Economic Development and Capability in the Te Paparahi o Te Raki Inquiry Region (Wai 1040) from 1840 to c 2000', report comissioned by the Waitangi Tribunal, 2013 (Bayley, doc E41), pp 51–55; Phillipson, 'Bay of Islands Maori and the Crown, 1793–1853' (doc A1), p 361.

320. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 115; Phillipson, 'Bay of Islands Maori and the Crown, 1793–1853' (doc A1), pp 255–260; Kawharu, 'Te Tiriti and its Northern Context' (doc A20), pp 202–203, 222–223.

321. Tawhai to Governor, 31 July 1857 (cited in O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 115).

ratou' (which we translate as: 'as a rangatira for them'), and 'ki ona Ture hoki ka whakarangona e ratou akenei akenei' ('to obey the Queen's laws in future'). The government newspaper the *Maori Messenger/Te Karere Maori* translated these sentiments as a 'resolution to acknowledge Her Sovereignty and to obey Her laws in future'.[322]

We think this statement must be seen in context. This was the first visit by a Governor since Grey had formally made peace with Heke and Kawiti in 1849.[323] Both Grey and his predceessor FitzRoy had emphasised that any relationship must be based on acknowledgement of the Queen's authority, and in return that authority would be used to protect Māori rights and interests.[324] Having made peace many years earlier, Ngāpuhi leaders in 1858 were seeking to restore their economic partnership with the Crown, in particular by attracting settlers and establishing a township. In this context, it is not surprising that they would express respect for the Queen's status as their protector, or for her 'ture', which in this context might be understood as a commitment to peaceful relations under the Queen's protection. As a symbol of this commitment, the rangatira told the Governor they planned to restore the flagstaff on Maiki Hill and had already prepared a spar. Gore Browne told those present that Ngāpuhi had misunderstood the flag as a symbol of oppression, when in fact it was a symbol of protection. If they had now seen their error, that was well.[325]

The following morning, Kawiti's son Te Kūhanga met the Governor on board the HMS *Iris* seeking an assurance that the Crown and Ngāpuhi were now reconciled and to offer land at Kawakawa for a township. As symbols of his commitment to peace, Te Kūhanga gifted the Governor a taiaha and repeated the offer to re-install the flagstaff at Maiki Hill.[326] In fact, Ngāpuhi had spent several months making preparations to rebuild the flagstaff. Some 1,379 individuals and 32 hapū had contributed funds; Te Kūhanga had personally overseen the selection and felling of a tree, and its transport to Ōkiato (known today as 'Old Russell') where carpenters were paid to complete the work.[327] Gore Browne assured Te Kūhanga that the past had been forgotten, and that Ngāpuhi were now 'looked upon as friends'.[328]

322. 'The Visit of His Excellency Governor Gore Browne to the Bay of Islands and the North', *Maori Messenger/Te Karere Maori*, 1 February 1858, p 2; O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), pp 121–122.

323. Johnson, 'The Northern War' (doc A5), p 404.

324. Specifically, FitzRoy emphasised the Queen's protection during the major hui at Waimate in September 1844, and Grey conveyed the same message at Kororāreka in November 1845: Johnson, 'The Northern War' (doc A5), pp 119–121, 126–127, 140, 345.

325. 'The Visit of His Excellency Governor Gore Browne to the Bay of Islands and the North', *Maori Messenger/Te Karere Maori*, 1 February 1858, pp 4–5.

326. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 123.

327. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 115.

328. 'The Visit of His Excellency Governor Gore Browne to the Bay of Islands and the North', *Maori Messenger/Te Karere Maori*, 1 February 1858, p 5 (cited in O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 123).

Later the same day, some 600 Māori attended a hui with the Governor at Waitangi. There, rangatira offered expressions of unity with the Crown ('kua hono te ngakau o te Maori ki to te Kuini') while making it clear that they expected the Governor to reciprocate by promising them a town.[329] As historian Dr Vincent O'Malley observed, from a Ngāpuhi perspective '[t]he re-erection of the flagstaff provided a basis of mutual reconciliation and forgiveness, and a token of their commitment to a peaceful and prosperous future together, which demonstrated their readiness to receive a township.'[330]

Gore Browne duly obliged, telling the assembled rangatira that one of his principal objectives 'was the selection of a proper site for a township', where Māori and settlers could 'cultivate their fields and build their houses side by side' and so show the world 'the reality of the union between the two races'. Many of the rangatira offered lands within their rohe, including Te Kēmara who offered Waitangi as a site and reminded Gore Browne that Ngāpuhi had invited the Crown into New Zealand only for it to remove its capital to Auckland.[331] According to the *New Zealander* newspaper, Gore Browne's promise was unambiguous: 'A township would be laid out wherever the most eligible site could be found.'[332] Gore Browne also visited Waimate and Māngungu, where Māori similarly appealed for a township and for government spending in their territories. Nene told the Governor that his claim was the greatest, since he had bled for the Crown.[333]

Towards the end of the month, Te Kūhanga went ahead with his plan to rebuild the flagstaff on Maiki Hill. On 29 January, some 500 rangatira gathered to carry the flagstaff up from the beach and install it in place. Once it was erected, rangatira gathered at its foot and cheered.[334] The flagstaff was named 'Te Whakakotahitanga o Ngā Iwi', referring to the unification of Te Raki Māori with the Crown and settlers. Kawiti told those assembled:

> [T]e Pou kua nei na Heke na Kawiti i turaki, na matou i whakaara inaianei, e kore tetahi o matou a tae a muri nei ki te tapahi i tenei pou ka tapaia te ingoa mo te Pou ko te whakakotahitanga. Ka tukua atu te kara ki te kawanatanga ka tukua atu he whenua hei whariki mo te kara oti atu kei kawanatanga anake te tikanga mo tena kara inaianei, kahore i te maori.

329. 'The Visit of His Excellency Governor Gore Browne to the Bay of Islands and the North', *Maori Messenger/Te Karere Maori*, 1 February 1858, pp 5–7 (cited in O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 124.

330. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 124.

331. 'The Visit of His Excellency Governor Gore Browne to the Bay of Islands and the North', *Maori Messenger/Te Karere Maori*, 1 February 1858, pp 5–7; O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), pp 124–125.

332. 'The Visit of His Excellency Governor Gore Browne to the Bay of Islands and Hokianga', *New Zealander*, 27 January 1858, p 3; O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 125.

333. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), pp 125–127.

334. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), pp 118–119.

> The pole which stood before this one, was felled by both Kawiti and Heke. The one which we have raised today, will not ever be touched by an axe by any of us. The pole shall be named whakakotahitanga.
>
> The flag belongs to the Government. Some land will be given as a mat for the flag. The flag belongs to the Government and not to the Maori.[335]

According to the Ngāti Hine kaumātua Erima Henare, Maihi Parāone was asking the Crown to take responsibility for the flag. He expected the land, the Tirohanga block, to be held in trust and used to pay for the flag's maintenance. Te Kūhanga, Mr Henare continued, was 'signalling his willingness to try and work with the Kāwanatanga'. His expression of unity was 'not the language of someone who believes that he has surrendered his rangatiratanga or has had any of his power or authority taken from him'.[336] Five days after Whakakotahitanga was erected on Maiki Hill, Whangaroa Māori also erected a flagstaff at Mangonui, naming it 'Victoria and Albert' and also describing it as a symbol of Māori–Crown unity:

> It is symbolical of the love of the Maories to the Queen and the Government. This Flagstaff shall be named Victoria and Albert, and shall be considered a token of our love and friendship for the Europeans.
>
> no reira ano hoki tenei kara i meinga ai kia whakaarahia e nga Maori, he tikanga ano hoki tana; i mea ai, ko tena heo whakakotahitanga i runga i te tino aroha ki a Te Kuini, me Te Kawanatanga ano hoki. Na, ka mea ano ia, kia karangatia te ingoa o te kara ko Te Kuini Wikitoria raua ko Arapata; hei tohu ano hoki mo to ratou aroha, whakahoatanga hoki ki te Pakeha.[337]

Though still in the Bay of Islands at this time, Gore Browne avoided these ceremonies due to fear that Māori 'might change their mind and throw down the flag as quickly as they raised it'.[338] As Dr O'Malley observed, this was

> a measure of how nervously the Crown looked upon the north, even more than a decade [after the war], that officials continued to lack confidence in their ability to successfully defend the flagstaff there and remained suspicious of the overt statements of loyalty and friendship expressed by northern Māori.[339]

Gore Browne did meet Te Kūhanga soon afterwards, proposing that the rangatira adopt his surname as a symbol of the friendly relations between them. Te Kūhanga gave up his birth name and adopted the name Marsh Browne or Maihi

335. Ngāti Hine, brief of evidence (doc M24(b)), August 2014, p 112.
336. Erima Henare, transcript 4.1.4, Te Whitiora Marae, p 123.
337. Ururoa, cited in O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 118.
338. Gore Browne to McLean, undated, ca 30 January 1858 (cited in O'Malley, Northland Crown Purchases – 1840–1865' (doc A6), doc A6, p 119).
339. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 120.

Parāone, the name we will use from this point. According to Mr Henare, this was 'akin to a tatau pounamu', one that placed Maihi Parāone and Gore Browne in positions of equality.[340] Either during this meeting or soon afterwards, Maihi Parāone asked the Governor to provide him with a seal, of the rangatira's own design, to be called Te Rongomau. Gore Browne agreed, and promised to send the seal as soon as it was made. As Mr Henare explained when the seal was shown to us during the hearing at Whitiora Marae in 2010, its handle is in the shape of Queen Victoria's clasped hand:

> the metaphor is this; this is Victoria's hand, the seal sitting on the table doesn't jump onto the wax by itself, but with Victoria's hand and my hand then the seal can be applied. So me and her the same – her hand, my hand and we can apply the seal, that is the metaphor, that is what Maihi believed he was signing when he signed Te Tiriti o Waitangi, side by side with God above.[341]

Gore Browne departed soon afterwards in late January 1858, leaving Ngāpuhi under the impression that their decades-old alliance with the Queen had been revived after a period of neglect following the Northern War, and that their wish for a township (and the associated economic benefits) would soon be fulfilled.[342]

As we discussed in chapter 4, the Crown subsequently chose Kerikeri as a site for the township and quickly enacted the Bay of Islands Settlement Act 1858, which allowed it to set aside up to 250,000 acres for the purpose.[343] The site did not possess the best anchorage in the bay but was regarded as easier to defend than the bay at Kororāreka – an indication that the risk of Māori uprising continued to occupy officials' minds.[344] The Crown already owned a considerable portion of the necessary land, or expected to acquire it as a result of the old land claims processes of the Bell commission; and the Act allowed private land to be taken (with compensation) if needed.[345] Officials hoped the scheme would be self-funding, with proceeds from sales of town sections used to cover development expenses, establish schools, and promote immigration and settlement.[346]

Introducing the legislation, Native Minister Richmond presented the township as a kind of insurance against any renewal of Ngāpuhi nationalism. The Bay of Islands was like an 'extinct volcano' whose 'slumbering fires might break out again' if the Government did not safeguard against that possibility. Māori were 'well-disposed', having 'of their own accord . . . re-erected the flagstaff, the emblem of the Queen's sovereignty'. The Government therefore sought to take the opportunity

340. Erima Henare, brief of evidence (doc D14(b)), 4 October 2010,), p 22; Erima Henare, transcript 4.1.4, Te Whitiora Marae pp 123–124.
341. Erima Henare, transcript 4.1.4, Te Whitiora Marae, p 124.
342. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 110.
343. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), pp 131–132.
344. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 136.
345. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), pp 132, 135.
346. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 132.

'to form a settlement in which Natives and Europeans could meet upon absolutely equal terms, and be governed in reality by the same laws'.[347]

This, like other legislation passed in 1858, was aimed at bringing Māori under the authority of the colony's laws. Richmond hoped that Māori would be induced to give up their existing lands in return for town sections – in his view, allowing them to 'ascend another step in the social scale'. While they would enjoy equality before the law, the town itself would be administered 'by old and experienced settlers'.[348] The legislation received Royal Assent in August 1859, causing considerable excitement in the Bay of Islands, and the Crown continued to acquire land from Māori and settlers into the early 1860s. But the outbreak of war in Taranaki undermined confidence in the scheme's prospects for success and diverted Government funding away from land development. These and some other factors delayed the development, leaving Te Raki Māori still waiting into the early 1860s for the promise to be kept.[349]

7.4.2.2 *Why did the Crown call the Kohimarama Rūnanga?*

The Kohimarama Rūnanga took place against the backdrop of growing tension between Māori, the Crown, and settlers over questions of relative authority. In the late 1850s, the national settler population had surpassed that of Māori for the first time, though Māori remained in a majority in the northern part of this district for several more decades (see appendix III). Settlers were increasingly exerting influence over the Crown's relationships with Māori, pushing for policies that would support further settlement by opening Māori lands and extending the colony's laws over Māori communities. To Crown officials, the challenge was to secure Māori acquiescence and thereby avoid outright conflict. In turn, Māori leaders, including those in Te Raki, were seeking new ways to manage their relationships with the Crown and settlers, and to invite commerce and peace, while also preserving their traditional authority and tikanga. By 1860, these questions had come into stark relief.[350]

For several years, while Governor Gore Browne and the colonial Parliament had been testing proposals for local government in Māori districts, Native Secretary Donald McLean had been advocating for a national conference of Māori leaders. McLean reasoned that the Crown had little hope of exerting its authority in the north or in many other parts of the country except through the influence of rangatira, and that the Crown had therefore better work with them. He proposed a conference that would occur every year or two, at which rangatira could explain their

347. C W Richmond, 11 June 1858, NZPD, vol B, pp 515–516 (cited in O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 132). The Bay of Islands member, Hugh Carleton, regarded settlement of the north as a question of military strategy. In the event of conflict breaking out, Auckland must not be left 'between two fires', those of Ngāpuhi and Waikato: Carleton, 11 June 1858, NZPD, vol B, p 519 (cited in O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 134).

348. Richmond, memorandum, 29 September 1858 (cited in O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 136).

349. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), pp 138–141.

350. Anderson, Binney, and Harris, *Tangata Whenua*, pp 248–253.

'wants, requirements, and grievances', and put forward suggestions that would benefit their communities and reconcile them as much as possible to the Crown's system of law and government.[351]

By 1857, Gore Browne too was entertaining the idea of a national conference similar in conception to McLean's. In June of that year, Waikato Māori leaders called for such an event, and this might have encouraged the Governor. At some point after that, the Governor asked the General Assembly to fund a conference – though it was not until he renewed his call, a month after the outbreak of war in Taranaki in 1860, that (he said) the Stafford ministry 'got alarmed & engaged to let me have the money'.[352]

The Crown presented the conference as an opportunity for open discussion about the future relationship between Māori and settlers.[353] But, as many scholars have observed, the Crown's underlying objectives were to isolate Taranaki and Waikato leaders, placate 'friendly' Māori, and secure expressions of loyalty to the Crown – and by these means extend its effective authority over the rest of the island.[354] At this time, the Crown's practical authority in the North Island was mainly confined to the principal Pākehā settlements, even if English law and international law assumed the Crown to be sovereign over all New Zealand territories.[355]

The Crown therefore sought means by which it could secure and extend this de facto authority while avoiding the costs, uncertainty, and destruction associated with a general war.[356] As Orange has observed, this forced the Crown to walk a fine line: 'British sovereignty somehow had to be confirmed', and it was therefore 'essential to obtain Maori assent without appearing to trespass on Maori rights, or mana, particularly those relating to land'. To achieve these objectives, the Crown needed to persuade Māori that its intentions were entirely protective, and consistent with chiefly authority.[357]

In their turn, rangatira attended because they were seeking ways to engage with the Crown and settlers, consistent with the original treaty promise of mutual protection and benefit. Many, including those in the north, believed they had missed

351. McLean, 16 November 1857, AJHR, 1860, F-3, p 97 (cited in Loveridge, 'Institutions of Governance for Maori' (doc E38), p 93); see also O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 151.

352. Gore Browne to Gairdner, 28 April 1860 (cited in Loveridge, 'Institutions of Governance for Maori' (doc E38), p 93).

353. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 102; Loveridge, 'Institutions of Governance for Maori' (doc E38), p 94.

354. Orange, 'The Covenant of Kohimarama', p 64; Orange, *The Treaty of Waitangi*, p 145; Paterson, 'The Kohimārama Conference', pp 31–32, 33, 35. Paterson listed numerous other sources for this interpretation. The Governor told the House of Representatives that he had called the conference in direct response to the situations in Taranaki and Waikato: Paterson, 'The Kohimārama Conference', p 32 n; 'Governor's Speech', 30 July 1860, NZPD, vol C, pp 165–166.

355. Phillipson, 'Bay of Islands Maori and the Crown, 1793–1853' (doc A1), p 370; Paterson, 'The Kohimārama Conference', p 32.

356. Paterson, 'The Kohimārama Conference', pp 29, 32–33.

357. Orange, 'The Covenant of Kohimarama', pp 73–74.

out on the promised benefits of settlement, and that the Crown was now increasingly focusing on land purchasing and the advancement of settler interests.[358] As Ward has explained, Māori wanted to foster a positive treaty partnership and 'to engage with the European order',

> [B]ut they did not want to do so on terms of subordination and contempt for their values. Rather, they wanted to be involved, as responsible and well-intentioned parties, in the machinery of state and the shaping of laws and institutions appropriate to the emerging bi-racial New Zealand.[359]

The conference also provided an opportunity for rangatira to seek dialogue and reassurance about the Crown's intentions. Although the Crown's neglect of this district had to some degree insulated it from the forces that had brought war to Taranaki, northern rangatira nonetheless viewed those events with some concern – and in any case were still seeking opportunities to engage with the Government and rebuild the economic partnership. The rūnanga provided one such opportunity.[360]

7.4.2.3 *Who was at the Kohimarama Rūnanga?*

The Kohimarama Rūnanga began on 10 July 1860 and continued for a month and a day.[361] The proceedings were recorded in the *Maori Messenger/Te Karere Maori*.[362] Altogether, some 200 rangatira were invited, from among those Gore Browne and McLean considered 'the intelligent chiefs and leading men in the country'[363] – that is, according to Dr Loveridge, those who were known to be well disposed towards the Crown and settlement.[364] Commenting on the rūnanga in 1860, Chief Justice William Martin stressed that the invitees were a 'carefully selected body' of people who, 'with few exceptions . . . were known to be friendly to the government'.[365]

Some 112 rangatira were present at the beginning of the rūnanga,[366] and another 41 arrived after proceedings had begun.[367] Others could not attend, giving various reasons including illness and bereavement. Some declined their invitations

358. Paterson, 'The Kohimārama Conference', pp 32–33.
359. Ward, *A Show of Justice*, p 118; Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 134.
360. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 143; Kawharu, 'Te Tiriti and its Northern Context' (doc A20), pp 220–221.
361. 'Minutes of Proceedings of the Kohimarama Conference of Native Chiefs', 10 August 1860, AJHR, 1860, E-9, pp 3, 24.
362. All translations of speeches come from *Te Karere* unless otherwise stated.
363. Native Department to the Reverend Duncan, 24 April 1860 (cited in Loveridge, 'Institutions of Governance for Maori' (doc E38), p 94).
364. Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 93–94.
365. William Martin, *The Taranaki Question*, 3rd ed (London: WH Dalton, 1861), pp 125–126; Orange, 'The Covenant of Kohimarama', p 64; see also Paterson, 'The Kohimārama Conference', p 39.
366. *Maori Messenger/Te Karere Maori*, 14 July 1860, p 2.
367. 'Kohimarama Conference', 11 August 1860, AJHR, 1860, E-9, p 25.

for political reasons.[368] Waikato was poorly represented, and no one was present from Taranaki. This led to claims that the Crown had stacked the rūnanga, which Dr Orange remarked were 'officially denied' but concluded were 'substantially true'.[369] She noted that Gore Browne, for instance, informed the Colonial Office that all tribes had been invited, irrespective of their opinions, 'except those in arms against Her Majesty, and a very few of the most violent agitators or supporters of the King movement'.[370]

From Ngāpuhi, according to the Crown's official minutes of the rūnanga, 18 rangatira attended. Tāmati Waka Nene was present at the beginning of the rūnanga, as were Wiremu Kaitara, Huirua Mangonui, Wiremu Hau, Tango Hikuwai, Wiremu Te Tete, and Hori Kingi Tahua. Those who arrived later (because their invitations did not reach them in time[371] included Patuone, Maihi Parāone Kawiti, Hōri Te Hau, Honetana Te Kero, Wī Tana Pāpāhia, Wetiriki Te Mahi, Kuhukuhua, Wiremu Te Hakiro, Wiremu Kawiti, Matiu, Wiremu Te Whatanui, and Hāre Pōmare.[372] Several Hokianga leaders – Hōne Mohi Tāwhai, Arama Karaka Pī, Makaore Taonui, and Rangatira Moetara – did not receive their invitations in time and were absent. Whangaroa leaders such as Hāre Hongi Hika were also absent, apparently for the same reason.[373]

Te Parawhau of Whāngārei was represented by Te Manihera Te Iwitahi, Wiremu Pohe, Taurau, and Te Tirarau.[374] Te Hemara Tauhia represented Mahurangi.[375] Te Hakitara Wharekawa represented Te Rarawa after arriving late. The official minutes recorded seven Kaipara rangatira as attending: Paikea Te Wiohau, Hōne Waiti, Parāone Ngāwake, Tīpene Te Awhato, Te Matenga Te Whe, Arama Karaka

368. *Maori Messenger/Te Karere Maori*, 14 July 1860, p 2; Paterson, 'The Kohimārama Conference', p 39.

369. Orange, 'The Covenant of Kohimarama', p 64.

370. Gore Browne to Newcastle, 6 July 1860 (cited in Orange, 'The Covenant of Kohimarama', p 64).

371. 'Kohimarama Conference: Chiefs Present/Chiefs Invited and Not Present' (cited in O'Malley, supporting papers (doc A6(a), vol 6, p 1935).

372. 'Kohimarama Conference', AJHR, 1860, E-9, pp 3, 25; Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 104–105; see also *Maori Messenger/Te Karere Maori*, 10 August 1860, pp 7–9 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, pp 101–102). Armstrong and Subasic drew their information from an unpublished record, 'Kohimarama Conference: Chiefs Present/Chiefs Invited and Not Present' (cited in O'Malley, supporting documents, doc A6(a), vol 6, pp 1934–1936). The minutes recorded Patuone as Eruera Maihi Parāone, and contained other variations in spelling. The unpublished schedule also recorded Mangonui Kerei as attending.

373. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 104; O'Malley, supporting documents, doc A6(a), vol 6, pp 1934.

374. 'Kohimarama Conference', 11 August 1860, AJHR, 1860, E-9, p 25; see also Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 104.

375. O'Malley, supporting documents, doc A6(a), vol 6, p 1936. The other Kaipara leaders were: Te Ōtene Kikokiko, Pakihi Tania, Taurau, Wiremu Tīpene, Pairama, Ihikiera Te Tirarau, Nōpera, Tamati Rēwiti, and Matitikua.

Haututu, and Manukau Matohi.[376] The Kaipara and Waipoua leader Parore Te Āwha also attended.[377]

The Crown was represented by Gore Browne and McLean (the president of the rūnanga), as well as members of the Executive Council, the chief justice, the commander of the armed forces in Auckland, and several members of the House of Representatives.[378]

7.4.2.4 *At the rūnanga, what was the Crown's stance on the treaty relationship?*

Particularly in the context of challenges to settler Government authority by Waikato and Taranaki iwi, the rūnanga offered a valuable opportunity for rangatira to clarify the Crown's understanding of the treaty in practical terms – including the rights and obligations it bestowed on each party, and the extent to which Māori could exercise their rights without provoking the Crown. While the choice between the Māori King and the British Queen was a major focus for the rūnanga, discussions also traversed other topics concerning the administration of Māori communities and lands. McLean chaired the rūnanga and guided discussion on these topics, introducing each by reading a statement from the Governor. Often, these debates were derailed by disagreements over the Taranaki War or the more general Crown–Māori relationship, but nonetheless Gore Browne and McLean made several significant promises.[379]

Gore Browne opened the rūnanga on 10 July, with a lengthy speech about the treaty relationship and the threat (as he perceived it) posed by the Kīngitanga and the Taranaki resistance. He presented the treaty as a protectorate arrangement, under which the Crown had agreed to provide Māori protection from both foreign and settler threats, and to provide other significant benefits, in return for their acceptance of the Crown's kāwanatanga. He asked that rangatira either commit to the Crown and continue to receive these benefits, or side with King Tāwhiao (the second Māori King, who succeeded his father Pōtatau Te Wherowhero after his death at the end of June 1860) and lose the Crown's support and protection.[380] The speech is notable, because this threatened Crown withdrawal from its treaty obligations (which we will return to later), and also for the Crown's explanations of the treaty's key terms.

7.4.2.4.1 The Governor's comments on the treaty's key terms

The Governor began his speech by restating the terms of the treaty as the Crown understood them:

376. 'Kohimarama Conference', AJHR, 1860, E-9, pp 3, 25; see also Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 104.
377. 'The Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 14 July 1860, p 4.
378. 'Kohimarama Conference', AJHR, 1860, E-9, p 3.
379. 'Kohimarama Conference', AJHR, 1860, E-9, pp 9, 10, 16, 21–22.
380. Gore Browne, AJHR, 1860, E-9, pp 4–5; see also Orange, 'The Covenant of Kohimarama', p 65; Anderson, Binney and Harris, *Tangata Whenua*, p 227.

3. On assuming the Sovereignty of New Zealand, Her Majesty extended to her Maori subjects her Royal protection, engaging to defend New Zealand and the Maori people from all aggressions by any foreign power, and imparting to them all the rights and privileges of British subjects; and she confirmed and guaranteed to the Chiefs and Tribes of New Zealand, and to the respective families and individuals thereof, the full, exclusive and undisturbed possession of their lands and estates, forests, fisheries, and other properties which they may collectively or individually possess, so long as it is their wish to retain the same in their possession.

4. In return for these advantages the Chiefs who signed the Treaty of Waitangi ceded for themselves and their people to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which they collectively or individually passed or might be supposed to exercise or possess.[381]

McLean's translation, which he read after the Governor had delivered his address, was as follows:

3. I te whakaaetanga a Te Kuini ki a ia te Kawanatanga o Niu Tirani ka whakatauwharetia mai tona maru kingi ki runga ki nga tangata Maori hei tiaki; ka whakaae hoki ia mana a Niu Tirani me nga Iwi Maori e tiaki kei tikina mai e tetahi hoa riri Iwi ke; ka whakawhiwhia hoki e ia nga tangata Maori ki nga tikanga katoa rite tahi ki o Ingarani tangata: a i whakaaetia, i tino whakapumautia hoki e ia ki nga Rangatira Maori me nga Iwi Maori ki nga hapu ki nga tangata hoki, ko o ratou oneone, me o ratou whenua, me o ratou ngaherehere, me o ratou wai mahinga ika, me o ratou taonga ake, o te iwi, o ia tangata o ia tangata: whakapumautia ana e ia ki a ratou hei noho mo ratou, hei mea mau rawa ki a ratou, kaua tetahi hei tango, hei whakaoho, hei aha, ara, i te painga ia o ratou kia waiho ki a ratou mau ai.

4. Na, he meatanga ano ta nga Rangatira Maori i tuhituhia nei o ratou ingoa ki taua Pukapuka ki te Kawenata o Waitangi, hei ritenga hoki ia mo enei pai i whakawhiwhia nei ratou; ko taua meatanga he meatanga mo ratou mo o ratou iwi hoki; tino tukua rawatia atu ana e ratou ki Te Kuini o Ingarani nga tikanga me nga mana Kawanatanga katoa i a ratou katoa, i tenei i tenei ranei o ratou, me nga pera katoa e meinga kei a ratou.[382]

As Dr Orange has observed, the Governor's speech reversed the treaty clauses, placing the guarantee of tino rangatiratanga first and Crown's power of kāwanatanga second – implying that kāwanatanga was of secondary importance.[383] McLean translated 'sovereignty' on first mention as 'Kawanatanga' and on second

381. Gore Browne, AJHR, 1860, E-9, pp 4–5.
382. 'The Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 14 July 1860, p 6.
383. Orange, 'The Covenant of Kohimarama', p 74.

mention as 'nga tikanga me nga mana Kawanatanga katoa', a significant shift from just 'kawanatanga' as used in te Tiriti in 1840.[384]

Anthropologist Dr Merata Kawharu (now Professor) doubted that rangatira would have signed te Tiriti in 1840 if this translation had been used, on grounds that it could be interpreted as diminishing the mana of rangatira.[385] Orange, on the other hand, suggested that 'mana kawanatanga' referred to 'the authority and all the powers of governorship', and was consistent with the original treaty text, especially as Gore Browne and McLean had presented this power as granted in exchange for the Queen's protection ('te maru Kuini').[386]

Dr Orange noted that the speech had been through many drafts. In her view, the Crown obscured the meaning of 'sovereignty' under English law, just as it had in 1840, and instead presented the treaty as a protective arrangement which would win the chiefs' approval.[387] The use of 'te maru Kuini' is significant in this context. The term 'maru' refers to shelter or protection, and to power and authority – that is, it connotes protective authority. McLean used it as a translation of the phrase 'her [the Queen's] Royal Protection'. However, as we will see in section 7.4.2.4, sometimes when rangatira acknowledged the Queen's 'maru' during the rūnanga, Crown officials translated this as 'sovereignty', 'power', or 'rule'.

This, in our view, was misleading. As we explained in our stage 1 report, no straightforward explanation of sovereignty can avoid the term 'mana'; and he Whakaputanga used 'mana' together with 'kīngitanga' and 'rangatiratanga' to convey the highest authority to make and enforce law. We saw no evidence that the treaty's translators ever considered using the word 'maru' for 'sovereignty; nor did any of the linguists or other scholars whose evidence we considered.[388] The simple reason is that 'maru' does not equate to 'sovereignty', though it does equate to 'protection'. With respect to the rights of Māori, whereas the original Tiriti text guaranteed Māori tino rangatiratanga (full chieftainship) over their whenua, kāinga, and taonga katoa, McLean's translation omitted this guarantee, replacing it with his own wording: 'a i whakaaetia, i tino whakapumautia hoki e ia ki nga Rangatira Maori . . . ko o ratou oneone, me o ratou whenua, me o ratou ngaherehere, me o ratou wai mahinga ika, me o ratou taonga ake'.[389] This was much closer to the English text of article 2, and in effect confirmed ('whakapumautia') Māori in permanent possession of lands, territories (whenua), forests, fishing grounds, and all other possessions.[390] We regard this as a highly significant, and almost certainly deliberate, rephrasing that emphasised the property guarantees and omitted the authority guaranteed by the original article 2 guarantees of te Tiriti.

384. 'The Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 14 July 1860, pp 5–6.
385. Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 226.
386. Orange, 'The Covenant of Kohimarama', pp 74–75.
387. Orange, 'The Covenant of Kohimarama', p 74.
388. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 514, 521.
389. 'The Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 14 July 1860, pp 5–6.
390. 'The Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 14 July 1860, pp 5–6; Orange, 'The Covenant of Kohimarama', p 73; Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 227.

We note also that the full text of the treaty was read out later in the rūnanga, and that Pāora Tūhaere questioned whether rangatira who first signed te Tiriti at Waitangi had understood that they were consenting to the Queen's authority. If they had, Tūhaere said, they would not have turned against her soon afterwards. To this, McLean replied that the rangatira had understood – they had seen a need for protection from harm, and had therefore applied to the Queen to become a 'kai-tiaki mo ratou' (literally, a guardian or caretaker for them).[391]

7.4.2.4.2 The Governor's ultimatum to Māori

Having set out his interpretation of the treaty's key terms, Gore Browne then referred to the Kīngitanga, which, he said, aimed to persuade the Māori tribes to 'throw off their allegiance to the Sovereign whose protection they have enjoyed for more than 20 years', set up a Māori King, and declare themselves to be an 'independent Nation':

> E kiia ana, ko nga whakaaro o nga kai hanga o taua tikanga he penei: ko nga Iwi Maori katoa o Niu Tirani kia honoa, ko to ratou piri ki Te Kuini i noho ai ratou i raro i tona maru ka rua tekau nei nga tau, kia mahue; a me whakatu tetahi Kingi Maori, me motuhake atu ratou hei Iwi ke.

Here, McLean translated 'allegiance' as 'piri' (literally, to cling or keep close), and 'the Sovereign' was translated literally as 'Te Kuini'.[392]

Uniting behind the King, Gore Browne said, would bring 'evils' (translated as 'hē': fault or blame) upon 'the whole Native Race'. Kīngitanga leaders had already proposed joining the war in Taranaki, and armed parties had gone there to support the Taranaki leader Wiremu Kīngi. In fact, the Governor claimed, these leaders planned to 'assume an authority' over all other tribes, using force if necessary ('Tetahi tikanga hoki a aua tangata he whakatupu Rangatira ki runga ki era atu Iwi Maori o Niu Tirani. E mea ana hoki ko ratou hei runga whai tikanga ai ki aua Iwi ki te Kawanatanga hoki, a ko nga Iwi Maori ekore e pai ki a ratou hei Rangatira me pehi maori e ratou.')[393]

Gore Browne then assured rangatira that the Crown had 'faithfully observed' its obligations to Māori. Successive Governors had been instructed 'to maintain the stipulations of this Treaty inviolate' (translated as: 'Ko te kupu a Te Kuini ki nga Kawana i haere mai i mua . . . kia tiakina paitia nga tikanga katoa o taua Kawenata o Waitangi kei taka tetahi'). Under the Queen's protection, there had been no foreign invasions; and Māori had kept their lands, unless they wished to sell, and had enjoyed their privileges as British subjects, including the rights to seek protection

391. 'Proceedings of the Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 3 August 1860, pp 35–36. The phrase 'kai-tiaki mo ratou' was not translated directly.

392. Gore Browne, AJHR, 1860, E-9, pp 4–5; 'The Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 14 July 1860, pp 7–8.

393. Gore Browne, AJHR, 1860, E-9, pp 4–5; 'The Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 14 July 1860, pp 7–8.

and redress through the courts. Through its 'kindness' ('atawhai'), the Crown had given them hospitals and schools, and supported their economic development.[394]

In Dr Orange's view, the use of 'kawenata' was significant: McLean was attempting to present the treaty as a covenant protected by tapu. Orange also observed that the Crown had not in fact honoured all of its treaty promises; in her view, rangatira would have understood Gore Browne's statements as a commitment that te Tiriti would at least be honoured in future.[395] While attempting to impress his audience with the Crown's humanitarian credentials, Gore Browne also commented:

> Your people have availed themselves of their privileges as British subjects, seeking and obtaining in the Courts of Law that protection and redress which they afford to all Her Majesty's subjects. But it is right you should know and understand that in return for these advantages you must prove yourselves to be loyal and faithful subjects, and that the establishment of a Maori king would be an act of disobedience and defiance to Her Majesty which cannot be tolerated.
>
> Ko o koutou Iwi kua whai mahi ki runga ki nga tikanga i whakawhiwhia nei ratou i te whakanohoanga ki roto ki to Ingarani Iwi. Kua tae ratou ki nga whare whakawa ki te rapu kai tiaki, ki te rapu kai whakaora mo ratou, a kua whiwhi, kua kite i nga tikanga whakaora tangata e puare tonu nei ki o Te Kuini tamariki katoa. Otira, he mea tika tenei kia tino matau pu koutou, kia tino marama hoki ki tenei; ko koutou kua whakawhiwhia nei ki enei pai me whakakite koutou hei tamariki piri pono ki a Te Kuini. Ko tera ko te whakatu Kingi Maori, ehara tera, he tutu tera, he whakahihi marire ki a Te Kuini, a ekore rawa e whakaaetia.[396]

He continued:

> I may frankly tell you that New Zealand is the only Colony where the Aborigines have been treated with unvarying kindness. It is the only colony where they have been invited to unite with the Colonists and to become one people under one law. In other colonies the people of the land have remained separate and distinct, from which many evil consequences have ensued. Quarrels have arisen; blood has been shed, and finally the aboriginal people of the country have been driven away or destroyed.
>
> He kupu tenei me korero nui atu e au ki a koutou. Kia rongo mai koutou; ko Niu Tirani anake te whenua noho e te Pakeha i waiho tonu ai i te atawhai te tikanga ki nga tangata whenua. Ko Niu Tirani anake te whenua noho e te Pakeha i karangatia ai nga tangata whenua kia uru tahi ki te Pakeha hei iwi kotahi, hei noho tahi ki raro i te ture kotahi. Kei etahi whenua, waiho ana nga tangata whenua kia motuhake atu ana hei iwi ke. He tini nga he kua tupu i runga i tenei tikanga. Noho ana a, na te aha ra, kua

394. Gore Browne, AJHR, 1860, E-9, pp 4–5.
395. Orange, 'The Covenant of Kohimarama', pp 65–66.
396. Gore Browne, AJHR, 1860, E-9, p 5; 'The Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 14 July 1860, pp 9–10.

ngangare, muri iho kua maringi te toto, a tona tukunga iho, ko nga tangata whenua kua pana, kua whakangaromia.[397]

Having learned from these conflicts, Gore Browne said, the Crown had taken a humanitarian approach to its colonisation of New Zealand, thereby saving Māori from the 'evils' ('he') that had befallen other indigenous people. Because Māori had become the Queen's subjects ('tamariki': literally, children), they could never be unjustly dispossessed of their lands ('whenua') and other property ('taonga': literally, treasures). All Māori were members of the British nation ('te Iwi o Ingarani') and were protected by the same laws as British subjects ('tangata o Ingarani'). The Queen regarded them as her people, and for that reason Governors had shown them peace and goodwill ('te rangimarie me te pai'). Gore Browne continued:

> It is therefore the height of folly for the New Zealand tribes to allow themselves to be seduced into the commission of any act which, by violating their allegiance to the Queen, would render them liable to forfeit the rights and privileges which their position as British subjects confers upon them, and which must necessarily entailed [*sic*] upon them evils ending only in their ruin as a race.
>
> No konei i meatia ai ko tona tino mahi poauau tenei kia tahuri nga Iwi o Niu Tirani ki te whakawai mo ratou, kia anga ki tetahi mahi e mutu ai to ratou piri ki a Te Kuini. Kei wehea hoki, na, kua kore nga tikanga e whakawhiwhia nei ratou inaianei i runga i te hononga ki te Iwi o Ingarani, tona tukunga iho hoki, ko nga tini kino ka tau ki runga ki te Iwi Maori, a, te ngaromanga e ngaro rawa ai.[398]

The Governor then asked the assembled rangatira to consider their options and advise him of their decision.[399] As Kawharu observed, the Crown's protection was, in effect, being made 'conditional upon Maori behaving in ways the Crown wanted them to behave, which included demonstrating their allegiance and support to the Crown'.[400] In Orange's view, 'the governor was threatening a withdrawal of Crown obligations under the treaty, by making that agreement conditional on a continuing Maori acceptance of government authority'. The inference, she said, was not lost on the rangatira present.[401] Having completed his speech, Gore Browne departed from the rūnanga, leaving McLean to guide proceedings.[402]

397. Gore Browne, AJHR, 1860, E-9, p 5; 'The Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 14 July 1860, pp 9–10.
398. Gore Browne, AJHR, 1860, E-9, pp 4–5; 'The Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 14 July 1860, p 10.
399. Gore Browne, AJHR, 1860, E-9, p 5.
400. Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 228.
401. Orange, 'The Covenant of Kohimarama', p 65.
402. Gore Browne, AJHR, 1860, E-9, p 5; Paterson, 'The Kohimārama Conference', p 40.

7.4.2.5 *How did Te Raki rangatira respond to the Crown's stance?*

In essence, then, Gore Browne was offering the assembled rangatira a choice between alignment with Britain, with all the promised benefits, and alignment with King Tāwhiao, a course (he argued) that would result in the country being 'thrown into anarchy and confusion'.[403]

For Te Raki leaders, and especially for Ngāpuhi, this was not a difficult choice. Ngāpuhi and Waikato Māori had long had a tense relationship. Further, Ngāpuhi had already chosen to align themselves with the Crown on multiple occasions since 1820, and to enter into an equal relationship with it in 1840. Even after the rupture of the Northern War a few years later – when some rangatira challenged the Governor's authority, others supported the Governor, and many remained neutral – the rangatira had reaffirmed their commitment to the treaty relationship in 1858 when the flagstaff on Maiki Hill was restored.

As a result of the Northern War, they had acquired a deeper understanding of how British officials viewed kāwanatanga and had seen that the price of the Crown's protection was higher than treaty signatories had understood. Significantly, they had learned that the officials demanded expressions of peaceful intent and loyalty to the Queen – including the symbols of her mana. These were prices that Te Raki leaders were willing to pay in order to restore the economic partnership and prevent any future Crown invasions of their territories. Accordingly, in response to Gore Browne's requirement that they choose between the Queen and the King, Te Raki rangatira chose the Queen.

Tāmati Waka Nene was the first Ngāpuhi rangatira to speak in response to the Governor: 'Ara, ko taku whakaaro i a Kawana Hopihana ra ano kia tangohia tera Kawana hei tiaki i a tatou.' (He had accepted Governor Hobson in 1840, he said, 'in order that we might have his protection'.) The intentions of the United States and France were unknown, so Ngāpuhi had chosen Britain:

> na konei ahau i mea ai ko te Pakeha hei tiaki i a tatou. . . . ko te Kawana nei hei Kawana mo tatou – ko te Kuini hei Kuini mo tatou. Me tango ra tatou ki tenei Kawana mo tatou katoa. Kia ki atu au . . . kotahi nei toku Kawana. Hei Kingi tenei mo tatou. . . . Na te ture ra o te Atua i huihui mai ai tatou i tenei ra, ki te whare nei; na taua ture o te Atua, o te Pakeha hoki. Koia hoki ahau ka mea ai, ko taku Kingi tenei, ara ko te Kuini, ake, ake, ake. Kei te taha o te Pakeha ahau e haere ana.

Te Karere Maori translated this as:

> therefore, I say, let us have the English to protect us. . . . let this Governor be our Governor, and this Queen our Queen. Let us accept this Governor, as a Governor for the whole of us. Let me tell you . . . I have but one Governor. Let this Governor be a King to us. . . . it is through the teaching of [the Word of God] that we are able to

403. Gore Browne, AJHR, 1860, E-9, p 5; see also Paterson, 'The Kohimārama Conference', p 41.

Translations in *Te Karere Maori*

The Māori language newspaper *The Maori Messenger/Te Karere Maori* published a full record of the proceedings of Te Runanga o Nga Rangatira Maori, in Māori and English. *Te Karere Maori* was a government newspaper, published under the oversight of Native Secretary Donald McLean. Any translations of the speeches made by rangatira can therefore be regarded as official government translations and as part of a broader government effort to win Māori support and undermine the Kīngitanga. Except as otherwise noted, throughout section 7.4 we have reported the translations from *Te Karere Maori* while also noting alternative translations for important terms.

meet together this day, under one roof. Therefore, I say, I know no Sovereign but the Queen, and I shall never know any other. I am walking by the side of the Pakeha.[404]

Here, Nene plainly accepted Gore Browne's terms: he would reject King Tāwhiao and continue to accept the Crown's protection as he had since 1840. The original treaty bargain remained unbroken. While the official translation used the term 'Sovereign', Nene's phrase 'ko taku Kingi tenei, ara ko te Kuini, ake, ake, ake' can literally be translated 'therefore I say that this is my King, my Queen forever'; that is, his king and protector was Victoria, not Tāwhiao. Nene spoke again on three other occasions, reiterating these main points. He urged others not to blame the Governor for the war in Taranaki, or to follow Tāwhiao and Te Rangitāke (Wiremu Kingi) into war against the Crown and settlers.[405]

Nene also said Tāwhiao's father Te Wherowhero had been friendly towards settlers, but then had been taken away and made a king. Now that Te Wherowhero had died, 'taua mahi a Waikato' ('the work of Waikato') should end: 'Ko taku patu ra tenei i nga kino. Kia atawhai, kia atawhai ki te Pakeha, a taea noatia te mutunga; e atawhai ana hoki au ki aku Pakeha.' ('This is the way I propose to destroy evil, – by kindness, – kindness as to the pakehas, even to the end, even as I cherish my pakehas.') Māori retained their lands, Nene said, and had allocated only a portion for settlers.[406]

He returned to these themes in his final speech before leaving the rūnanga. Although other tribes might cry 'He Kingi! He Kingi!', he, Nene, would not consent. Without the Queen and Governor there would be no protection for Māori.

404. 'The Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 14 July 1860, p 15 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a))), vol 1, p 8).

405. *Maori Messenger/Te Karere Maori*, 31 July 1860, p 53 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a))), vol 1, p 52).

406. *Maori Messenger/Te Karere Maori*, 31 July 1860, p 53 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 52).

Either another nation would come and take the land – as had occurred when France colonised Tahiti in the 1840s – or settlers would buy it all.

> Na konei hoki au i ki iho ai whakamutua tenei karanga Kingi, whakamutua. Ko taku tohe tenei, aua e whakahokia te ingoa o te Kuini i te whenua nei, ta te mea ko te whenua kua kuinitia, ko nga tangata kua kuinitia . . . Na te Kuini i ora ai o tatou whenua. Na te Kawana i ora ai tatou. . . . Mehemea kahore a Kawana i kumea mai ki uta, na kua riro te whenua nei i te Pakeha te hokohoko. . . . No te taenga mai o Kawana ka turea te whenua, ka waiho mana anake e hoko. . . . A, e kore tatou e matau ki nga iwi ke. Akuanei, ka puta te rongo o Niu Tirani, na, ka u ko te Wiwi, ka u ko te Merikana. Inahoki te mahi a te Wiwi ki a Pomare. Kua riro tana whenua i te Wiwi. Na, ki te karangatia tenei Kingi apopo, na kua he.
>
> Therefore I say again, Put an end to this clamour for a King – put an end to it. What I urge is this. Do not let the name (or protection) of the Queen be withdrawn from this country; inasmuch as the land, and the inhabitants also, have become the Queen's . . . We owe the protection of our lands to the Queen. We owe our protection to the Governor. . . . If the Governor had not been drawn ashore (the Queen's protection solicited) then our lands would have become the Pakehas by purchase. . . . But when the Governor came, the land was placed under the restrictions of the law, and it was enacted that he alone should purchase. . . . We don't know the mind of other nations . . . Look, for instance, at the conduct of the French towards Pomare (the Queen of Tahiti). The French have taken all her land. Should you persist in clamouring for a King hereafter, you will go wrong.[407]

Other Ngāpuhi rangatira spoke briefly during the rūnanga, echoing Nene's main points. Wiremu Te Tete of Waikare said that Pākehā had long since been accepted as mātua (parents) for New Zealand,[408] and furthermore: 'Kua whakakotahi tatou ki runga ki a te Kuini.' ('We have now become one people under the Queen.') Therefore, if the Governor asked him to go to Taranaki to fight against Wiremu Kīngi, he would go.[409] Wī Tana Pāpāhia also said the Queen had long ago been acknowledged 'hei matua pumau mo tatou' ('as an abiding parent for us').[410] Tango Hikuwai of Kerikeri said he would not support Te Rangitāke, and would unite with the Governor if asked, though he preferred to leave them to resolve their own quarrel.[411]

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407. 'Proceedings of the Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 3 August 1860, pp 16–17 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 66).

408. 'The Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 14 July 1860, p 19 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 10).

409. *Maori Messenger/Te Karere Maori*, 31 July 1860, p 20 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 36).

410. *Maori Messenger/Te Karere Maori*, 3 August 1860, p 54 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 85).

411. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 107.

Honetana Te Kero, of the Bay of Islands, said Ngāpuhi had been the first Māori to receive Pākehā, missionaries, and the Governor; they had united under law and Christianity; and had raised the flag at Maiki, acknowledging 'te mana o te Kuini' in so doing. In this way, Te Kero said: 'Ko te Kuini hei upoko ki au, ko ahau me oku rohe hei tinana ki te Kuini' ('the Queen is now my head; I and my boundaries (land) will constitute the body'). *Te Karere Maori* translated 'te mana o te Kuini' as 'The Queen's Sovereignty'.[412]

As we noted earlier, Orange observed that 'te mana o te Kuini' can also be understood as acknowledging that the Queen had her own mana, distinct from that of rangatira and consistent with the Queen's maru (shelter or protection) of Māori authority.[413] By raising the flag, Honetana was therefore restoring the Queen's mana in the Bay of Islands, but not necessarily diminishing his own. Dr O'Malley, similarly, has cautioned that 'northern Māori declarations of allegiance to Queen Victoria did not translate into ready acceptance of the applicability of English laws to their own affairs'.[414]

After some rangatira dismissed te Tiriti as a covenant for Ngāpuhi, or as being signed in error, Maihi Parāone responded: 'Ka mea ahau he tika taua Tiriti' ('I say that Treaty was right'). The rūnanga should therefore not condemn the treaty:

> Ko te he i he ai, kei te he a Heke raua ko Kawiti, koia na ko te whainga ki te Pakeha. E kapi ana ano te tuanui o taua whare, tikina ana e Heke raua ko Kawiti, hura ana nga toetoe o te Tiriti, akirikiritia ana, ka ua iho te ua puta ana te matao ki roto: ka tahi ka tikina ka hipokina e ahau: koia na te kara ki Maiki; ka wharikiria e ahau ki te whenua, hei matua mo te whakakotahitanga.

Te Karere Maori translated this as:

> That which was wrong was the error of Heke and Kawiti, that is, the fighting against the Europeans. But the roof of that house was yet perfect when Heke and Kawiti went and uncovered the thatching of the Treaty and threw it away. When the rain came it passed through and the cold was felt. I then went and covered it over: witness the flagstaff at Maiki. I spread out the land for it to rest upon, and as parent for our becoming one.[415]

412. 'Proceedings of the Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 3 August 1860, p 41 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 78).

413. Orange, 'The Covenant of Kohimarama', pp 73–76. Orange noted that, earlier in 1860, *Te Karere Maori* had concluded that the Queen's 'mana' in New Zealand was nothing more 'than a right to protect' ('he mana tiaki'), and furthermore that the Queen's mana did not exist to the exclusion of Māori mana over their lands: *Maori Messenger/Te Karere Maori*, 15 March 1860, p 7 (Orange, 'The Covenant of Kohimarama', p 75 n).

414. Vincent O'Malley, 'English Law and the Māori Response: A Case Study from the Runanga System in Northland, 1861–65', JPS, vol 116, no 1 (2007), p 15.

415. 'Proceedings of the Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 3 August 1860, p 71 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 93).

Maihi Parāone's comments here must be seen in the context of the post-war Ngāpuhi view of the Northern War as having arisen from a mutual misunderstanding between Hōne Heke and Governor FitzRoy. Heke's error was to presume that the Governor intended to seize control of Ngāpuhi lands and assert authority over Ngāpuhi territories – hence his symbolic challenge against the flagstaff (or pou rāhui) on Maiki Hill – and FitzRoy's error was to respond with troops instead of dialogue. Therefore, Heke and Kawiti were not rejecting the alliance between Ngāpuhi and the Queen, but they were repudiating the Governor's claim to authority over Māori lands. Heke explained this version when he wrote to Queen Victoria in 1849, and throughout the rest of the century Ngāpuhi leaders continued to assert that they had remained loyal to the Queen even as they rejected the authority of the colonial Government (see chapters 5 and 11).[416]

Maihi Parāone told the rūnanga that the flagstaff had been restored in 1858 as a symbol of kotahitanga (unity) between Māori and Pākehā. More specifically, the flag had been restored as 'a symbol of union by which to acknowledge the Queen, and also of the union of Ngapuhi with other tribes, that we may together respect the Queen's name' ('hei whakakotahitanga tenei moku e tomo ai ki te Kuini, hei whakakotahitanga ano hoki mo Ngapuhi ki nga iwi ke, kia rite ai te whakapai ki te ingoa o te Kuini').[417] Maihi Parāone used the phrase 'e tomo ai ki te Kuini', which *Te Karere Maori* translated as 'acknowledge the Queen', but is better understood as entering into a relationship with the Queen, literally in the nature of a marriage compact.[418]

Hōri Winiata, a Kaipara rangatira of Ngāpuhi descent, essentially repeated these points – te Tiriti was good and meant protection from foreign threat; and Ngāpuhi had been deceived into believing that the Crown intended to take their lands, so had felled the flagstaff, but the matter had now been put right.[419] Hori Kingi Tahua also referred to the Northern War, saying the harm arising from those events had now been set right. Ngāpuhi had held meetings and decided to erect the flagstaff at Maiki 'and called it the Union of the two Nations . . . I say, let these two people, the Pakehas and the Maori, be united' ('ka huaina tona ingoa ko te Whakakotahitanga o nga iwi . . . e mea ana au, me whakakotahi enei iwi, te Pakeha te Maori').[420]

Patuone, who arrived late to the rūnanga, also emphasised the Queen's protection as the foundation of the treaty relationship:

416. Heke to Queen Victoria, 10 July 1849 (cited in Johnson, supporting papers (doc w48), pp 346–347). For examples of 1880s and 1890s Ngāpuhi interpretations of the war, see 'Petition from Maoris to the Queen', AJHR, 1883, A-6, p 1; and Hone Heke Ngāpua, 1897, NZPD, vol 97, pp 55–56.

417. 'Proceedings of the Kohimarama Conference', *Maori Maori Messenger/Te Karere Maori*, 3 August 1860, pp 71–72 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, pp 93–94).

418. 'Proceedings of the Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 3 August 1860, p 71 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 93).

419. *Maori Messenger/Te Karere Maori*, 1 September 1860, p 23 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 116).

420. 'The Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 14 July 1860, pp 18–19 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 10).

> Naku ano te taha o tenei hui, naku a Kawana Hopihona i whakaae kia noho i uta. Mei kaua ia i noho ki uta kua he tenei motu, kua puta mai tetahi iwi ke ki te tango. . . . Koia tenei e nga iwi nei i piri ai au ki te Pakeha.
>
> I am the foundation of this Conference. I agreed to Governor Hobson's residing on this land. If he had not taken up his abode on this shore, then this island would have been in trouble. Another nation would have come and taken possession of it. . . . For this reason, then, Chiefs, I stick to the Pakehas.[421]

Patuone therefore counselled other rangatira to turn away from the fighting in Taranaki.[422] Like other Ngāpuhi leaders, he did not directly comment on the justice of the Governor's actions in Taranaki; rather, his concern was to assure the Governor of his friendly intent. In other contexts, Ngāpuhi leaders did express concern about the Government's actions, including fears that the Crown might again invade the north.[423]

Ngāpuhi leaders reinforced their sentiments about the Crown–Māori relationship in written responses to the Governor. Wiremu Te Tete of Waikare (of the Bay of Islands) wrote of his desire for peace among Māori and Pākehā; wrongs had been committed on both sides, he said, but they were of no more importance. The only remaining issue was the Kīngitanga: 'he kino tenei, na te mea e pehi ana i te maru o te Kuini'. *Te Karere Maori* translated this as: 'a bad affair as it seeks to do away with (put down) the Queen's sovereignty'.[424]

Tango Hikuwai (who submitted a written reply for Ngāpuhi) also rejected the Kīngitanga because it sought to put down 'te maru o te Kuini'. He understood the Governor's intentions as follows: 'E mea ana hoki koe kia tau te rangimarie ki runga ki te maru o te Kuini, kia noho tika, kia noho pai ki runga ki te maru kotahi.' *Te Karere Maori* translated this as: 'You wish peace to be maintained under the Queen's rule, and that we may all live in an orderly manner and in quietness under one protecting power.'[425] As noted earlier in this section, 'maru' more appropriately connotes shelter, protection, or protective authority. Hikuwai also expressed opposition to Wiremu Kīngi's actions in Taranaki: 'he mea kohuru tana tikanga' (translated as: 'His plan is to murder'). Ngāpuhi, by contrast, planned to remain

421. *Maori Messenger/Te Karere Maori*, 1 September 1860, p 6 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 108).

422. *Maori Messenger/Te Karere Maori*, 1 September 1860, p 20 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 115).

423. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 161–164, 502.

424. 'Proceedings of the Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 30 November 1860, p 8 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 128).

425. 'Proceedings of the Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 30 November 1860, p 9 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 128).

at peace: 'ko te moe matou, ake ake. Amene.' ('we mean to sleep [remain quiet] forever and ever. Amen.')[426]

Te Parawhau leaders expressed similar views. Wiremu Pohe of Whāngārei, who spoke several times, asked the rūnanga to reject the King. He said the restoration of the flag on Maiki Hill represented Ngāpuhi identifying themselves with the interests of the Pākehā; 'this was our consenting forever and ever'. ('Ko te tapokoranga a matou ki te Pakeha, koia tena ko te aranga o te kara ki Maiki. Ko to matou whakaaetanga tenei, ake, ake, tonu atu.')[427] Pohe used several metaphors to describe the relationship between Te Raki Māori and the Crown. He spoke of the belt that the Governor had bound around the chiefs:

> Ko taku tenei i kite ai; na, ko tenei whitiki kua whitikiria nei e koe ki anei rangatira Maori. . . . E kore hoki tenei whitiki, e kore hoki tenei paere e motu; penei he whitiki pongi tenei ka oti nei te paere ki anei rangatira, e motu; tena ko tenei, he whitiki koura, ka mea ahau, e kore e motu.
>
> This belt or bond of union will not break. Had it been a pongi belt . . . it might break; but as it is a belt of gold, I say, it will not part.[428]

And he referred also to the Treaty of Waitangi '[which] has been brought forward, and I say, therefore, that the Ngapuhi have come under your wings like chickens.' ('I whakatapokoria nga kupu o te Tiriti i Waitangi. Koia ahau ka mea nei kua uru tahi Ngapuhi ki raro ki ou pakau, kua pena me te heihei.')[429]

Te Manihera Te Iwitahi of Te Parawhau also urged the assembled rangatira to reject the King and abstain from fighting in Taranaki; these were the causes of tension:

> He takahi tenei i te atawhai o te Kuini ki nga Pakeha kua tupu nei ki Niu Tireni, me nga tangata Maori kua tupu ake nei i te maru atawhai o te Atua; tetahi, i te maru atawhai o te Kuini ki runga i nga tangata Maori i nga Pakeha o Nui Tireni.
>
> It is trampling upon the kindness of the Queen to the Pakehas who have prospered in New Zealand, and to the Maories who have grown up under the merciful care

426. 'Proceedings of the Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 30 November 1860, p 9 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, ppp 128–129).

427. 'The Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 14 July 1860, p 19 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 10).

428. 'Reply from Parawhau, No 1', *Maori Messenger/Te Karere Maori*, 30 November 1860, p 10 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 1:129); *Maori Messenger/Te Karere Maori*, 31 July 1860, p 26 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 39).

429. 'Reply from Parawhau, No 1', *Maori Messenger/Te Karere Maori*, 30 November 1860, pp 10–11 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 129).

of God; and also upon the kind protection which the Queen has extended to both Pakehas and Maories in New Zealand.[430]

Te Hemara Tauhia of Ngāti Rango supported the Queen for different reasons. Before 1840, driven from their lands by the warring Ngāpuhi, Waikato, and Hauraki tribes, his people had become 'he iwi ngaro' ('a lost people'). Since the arrival of the gospel, he had returned to his chieftainship, and with the arrival of the first Governor, he had been able to 'breathe freely'. ('Ko tenei iwi ko Ngatiwhatua he iwi ngaro. . . . Na nga ra o te Rongo-pai ka hoki ahau ki te rangatiratanga . . . tae noa ki nga ra i noho ai te Kawana tuatahi ki Niu Tirani ka tino puta taku ihu ki e ao.') That is, Ngāti Rango had returned to their ancestral lands and once again asserted their mana. Therefore, he would remain with the Queen ('Ka piri ahau ki te Kuini') forever.[431] Ngāti Whātua leaders, similarly, saw their relationship with the Queen as protection from their more powerful Māori neighbours.[432]

The Ngāti Whātua leader Pāora Tūhaere spoke on several occasions, expressing his support for the Governor and the Queen while dismissing te Tiriti as 'Ngapuhi's affair'.[433] Some at the rūnanga agreed with this view, or regarded te Tiriti as being no longer in force due to the Northern War and other Crown–Māori conflicts since. Others disagreed.[434]

On 26 July, about midway through the rūnanga, Tūhaere returned to this theme, arguing that Ngāpuhi had consented to te Tiriti due to ignorance, not fully understanding what it meant. Had they consented ('whakaae') to the Queen in 1840, they would not have subsequently fought against her. He said that Ngāti Whātua had also affixed their signatures because Henry Williams had brought them blankets: 'Koia tenei, e rangi tenei, ko te tino Tiriti tenei e iri ai te mana o te Kuini: ta te mea kua hui katoa ma inga rangatira o ia wahi o ia wahi, o tetahi motu atu hoki, ki konei, ki te rapurapu tikanga.' (*Te Karere Maori* translated this as: 'But this [alluding to the conference] is more like it; this is the real treaty upon which the Sovereignty of the Queen will hang, because here are assembled chiefs from every quarter, and even from the other [South] Island, to discuss various questions and to seek out a path.')[435]

430. *Maori Messenger/Te Karere Maori*, 30 November 1860, p 11 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 129).

431. *Maori Messenger/Te Karere Maori*, 3 August 1860, p 52 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 84).

432. For example, see'Proceedings of the Kohimarama Conference' *Maori Messenger/Te Karere Maori*, 3 August 1860, p 51 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 83).

433. 'The Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 14 July 1860, p 15 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 8); Orange, 'The Covenant of Kohimarama', p 67. Tūhaere also disputed Gore Browne's claim to have left Māori in possession of all of their lands.

434. Orange, 'The Covenant of Kohimarama', p 67.

435. *Maori Messenger/Te Karere Maori*, 3 August 1860, p 35 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 75). Text in square brackets is the Tribunal's.

For the Crown, which regarded the treaty as legitimising its claim of sovereignty, this was an untenable view. McLean asked why Tūhaere was raising unpleasant matters from the past, which reflected the acts of rebellious tamariki against their parents. Treaty signatories in 1840 had been wise, he said, and had foreseen the need for protection ('I whakaaro ano ratou ko etahi atu rangatira ki tetahi kai-tiaki mo ratou'); they had therefore applied to the King of England for this, and the result was te Tiriti o Waitangi. McLean agreed, however, that 'what is done here may be considered as a fuller ratification of that Treaty on your part'. ('He pono ano, ko nga mahi o tenei runanga, ka waiho ia hei tino whakapumau na koutou i taua Tiriti.')[436] In fact, as we found in stage 1 of our inquiry, the Crown's representatives had not explained to Te Raki Māori the full implications of the treaty's English text.[437]

7.4.2.6 *What views did Te Raki rangatira express on the adoption of English law?*

As noted earlier in the chapter, Gore Browne and McLean had arrived at the rūnanga with several topics they wanted to discuss, all of which were aimed at encouraging Māori to move towards adoption of the colony's laws. McLean introduced each topic with a statement on behalf of the Governor, and then opened the floor for discussion.[438]

The first topic discussed concerned the application of English law to Māori communities. The former Chief Justice, Sir William Martin, had prepared a booklet, *Rules for the Proper Administration of Justice*. These rules were intended for use in any territory that lacked access to a resident magistrate and therefore did not apply to northern settlements such as the Bay of Islands.[439] However, Martin intended they would form the basis of a system of Māori law, operating under the Queen's authority, which could evolve from existing Māori experiments with English legal principles.[440]

The rules proposed a justice system under which tribal rūnanga would select a kaiwhakawā (Māori magistrate) and two assistants to administer justice in their territories to deal with civil disputes and with cases of assault and minor violence, theft, drinking spirits, preparing or eating rotten food, and adultery, while leaving homicide and other serious violence to the colony's courts. The magistrates were empowered to levy fines, which would go either to the Crown or the complainant, depending on the circumstances. The work of magistrates, the rules said, should be performed by rangatira ('Ko ta te Kai-whakarite mahi he tino mahi rangatira').

436. *Maori Messenger/Te Karere Maori*, 3 August 1860, p 36 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 76).

437. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, vol 2, p 528.

438. 'Minutes of Proceedings of the Kohimarama conference of the Native Chiefs, July-August 1860', AJHR, 1860, E-9, pp 9, 10, 16, 21–22.

439. 'The Kohimarama Conference' 16 July 1860, AJHR, 1860, E-9, p 9; *Maori Messenger/Te Karere Maori*, 31 July 1860, pp 3, 8 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, pp 27, 30).

440. Loveridge, 'Institutions of Governance for Maori, 1852–1865' (doc E38), p 96.

Nonetheless, kaiwhakawā should take no payments from their people; instead, the Crown would pay their salaries.[441]

Gore Browne saw these rules as a means of suppressing 'objectionable customs' ('ritenga kino') and as a step towards full integration of all Māori into the colony's legal system. In his message to the rūnanga, he explained that they were not put forth as law ('ture') but to provide guidance (translated as 'tikanga') for Māori magistrates and assessors in making their decisions. Some rangatira, he asserted, wanted 'but one law' ('kotahi tonu te ture'), but this was not possible while significant differences remained between Māori and Pākehā law; it was therefore necessary that Māori be gradually initiated into the English system. A translation of the paper was distributed, and Gore Browne (through McLean) invited rangatira to consider the proposals and offer suggestions for improvement.[442]

Given the traditional roles of rangatira in adjudicating disputes and administering justice within their hapū, Martin's system might not have seemed a radical departure, except that it integrated Māori decision-making into a Crown-sanctioned system. Many rangatira sought more time to consult their people before making any final commitments, though gave some initial responses.[443] Te Manihera Te Iwitahi of Whāngārei was among several who objected to Martin's proposal that fines for adultery be paid to the Crown; if a man slept with another's wife and monetary utu was not paid, they explained, the man should instead be killed, in accordance with Māori law.[444]

According to the report in *Te Karere Maori*, Tango Hikuwai of Ngāpuhi accepted the broad principle that serious offences such as homicide could be tried in a Pākehā court, whereas lesser matters would be dealt with by local assessors. So, too, did Pāora Tūhaere of Ngāti Whātua.[445] Maihi Parāone Kawiti said he approved of a proposal by McLean for Pākehā magistrates to assist local rūnanga in settling disputes: 'Ko tenei ture hei oranga mo te tinana; ko te ture o te whakapono hei oranga mo te wairua.' ('Let us have this law to secure our temporal interests; and let us have the law of Christianity for the salvation of the soul.')[446]

Honetana Te Kero said the law should be like the church, through which all peoples could come together and unite their views.[447] Wiremu Pohe of Whāngārei said that Māori should give up the practice of muru:

441. *Maori Messenger/Te Karere Maori*, 31 July 1860, pp 3–8 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, pp 27–30).

442. AJHR, 1860, E-9, p 9.

443. Loveridge, 'Institutions of Governance for Maori' (doc E38), p 96.

444. *Maori Messenger/Te Karere Maori*, 31 July 1860, pp 9, 17–18 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, pp 30, 34–35).

445. *Maori Messenger/Te Karere Maori*, 31 July 1860, pp 3, 11 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, pp 23, 31).

446. *Maori Messenger/Te Karere Maori*, 1 September 1860, pp 12–13 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 111); AJHR, 1860, E-9, p 9.

447. *Maori Messenger/Te Karere Maori*, 3 August 1860, p 41 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 78).

> Ko nga taua mo nga tapatapa, he mana Maori tena. Ko nga taua mo nga wahitapu, he mana Maori tena. Mo nga wahine taea ka tauatia ano hoki tena, he ritenga Maori. Kua tae tatou ki tenei tikanga, kua paihereua ki te tatua koura o te Kuini, me whakaae katoa tatou kia whakarerea enei tikanga katoa.

Te Karere Maori translated this as:

> We have 'tauas' for curses. This is following up Maori custom. We have 'tauas' on account of the desecreation of sacred places; this too is Maori custom. And on account of the violation of women we have 'tauas'. This is Maori custom. Now that we have entered this new order of things, and have been bound in this golden girdle of the Queen, we should all consent to abandon all of these customs.[448]

Several rangatira also argued that the Crown's existing payments to assessors were manifestly inadequate and barely covered costs.[449] Tango Hikuwai of Kerikeri, for example, said he was receiving £5 per year when £50 would be a fairer salary.[450] Later in the rūnanga, McLean proposed the establishment of mixed (half-Māori, half-settler) juries for trials with Māori defendants. The Crown on previous occasions had rejected the idea, believing that Māori would make decisions on the basis of tribal loyalty, but was now prepared to consider adopting this proposal. The proposal received a generally favourable response, including from Te Raki representatives.[451]

The most substantive Ngāpuhi contribution on these matters was from Maihi Parāone, who spoke of the difficulties of reconciling English and Māori law. He explained that, following the restoration of the flagstaff in 1858, Hori Kingi Tahua and other Ngāti Hine leaders had held a rūnanga at which they had resolved to abolish 'evil' Māori customs including adultery, hākari, exhuming the dead, and mākutu. ('No reira i puta ai te kupu a Hori Kingi a te runanga katoa kia whakakahoretia nga he Maori, te puremu, te hakari me te kahunga tupapaku me te makutu, kia kaua e whakamana.')[452] Maihi Parāone said that Ngāti Hine had agreed that

448. *Maori Messenger/Te Karere Maori*, 3 August 1860, pp 25–26 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, pp 38–39).

449. *Maori Messenger/Te Karere Maori*, 31 July 1860, pp 9, 11 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, pp 30–31).

450. *Maori Messenger/Te Karere Maori*, 31 July 1860, p 11 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 31).

451. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 128–129. The mixed jury system had been used since the 1700s in Britain for trials involving foreigners, in which the jury would comprise six citizens and six aliens. A message to the hui from Native Minister C W Richmond acknowledged that Māori were 'virtually, though not technically, Foreigners' under the colony's legal system: AJHR, 1860, E-9, pp 16–17.

452. *Maori Messenger/Te Karere Maori*, 3 August 1860, pp 71-p 72 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, pp 93-p 94); see also *Maori Messenger/Te Karere Maori*, 1 September 1860, pp 12–13 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 111).

cases of adultery should be tried by the Queen's law, but anyone practising mākutu or committing murder should be put to death.

After this rūnanga, Maihi Parāone's elder brother Te Wikiriwhi Te Ohu had died. A further rūnanga had concluded that his killer had been responsible for many previous deaths through mākutu. Maihi Parāone had consented that the man should be put to death, a sentence that, in his view, was consistent with both Māori law and the law of Moses. As a direct result, Maihi Parāone had lost his position as an assessor.[453]

Maihi Parāone went on to explain that such a case could not be brought to an English court because there was no blood, nor any witnesses; it was like a poison case in Pākehā terms. But mākutu could have many victims, and action had to be taken in such cases. Maihi Parāone said his people had joined with the Queen and were giving up the 'mahi kino' ('evil work') of the past.[454] McLean immediately replied with a speech designed to downplay the importance of his offence. '[O]ur forefathers', he said, 'in like manner believed in witchcraft'. Many had been unjustly put to death as a result. The practice prevailed in many places, not just in England. And it was known that this belief continued still among Māori; it was an old one. The Governor thought Maihi Parāone had been punished sufficiently for his 'error', and the matter could now be put aside.[455]

As Dr O'Malley observed, Maihi Parāone's speech was not a repudiation of Māori law but a justification for its continued use, at least in circumstances that the colonial system could not adequately address.[456] Furthermore, this speech, and Pohe's promise to give up taua muru, was ample evidence that customary law endured in 1860, notwithstanding the presence of resident magistrates and in spite of the claims of Crown officials that the Northern War had imposed British sovereignty in the north.[457] The rūnanga ended without rangatira consenting to adopt Martin's proposals. None of the resolutions on the final day addressed them, and Gore Browne ended the rūnanga by asking rangatira to give further consideration to these questions after returning home.[458]

453. *Maori Messenger/Te Karere Maori*, 31 July 1860, p 72 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 94); see also *Maori Messenger/Te Karere Maori*, 1 September 1860, pp 12–13 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 111).

454. *Maori Messenger/Te Karere Maori*, 31 July 1860, p 72 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 94); see also *Maori Messenger/Te Karere Maori*, 1 September 1860, pp 12–13 (cited inArmstrongArmstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 111).

455. *Maori Messenger/Te Karere Maori*, 31 July 1860, p 72 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 94).

456. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 147.

457. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 145.

458. *Maori Messenger/Te Karere Maori*, 15 August 1860, pp 11–13 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, pp 103–104).

7.4.2.7 *What views did Te Raki rangatira express on the administration of Māori land?*

Gore Browne's second message to the rūnanga concerned the administration of Māori land. He proposed means by which, in his view, Māori could resolve land disputes and determine ownership rights in a manner that would be recognised under the Crown's laws. The Governor saw this as a means by which Māori could be brought under the colony's laws and Māori lands opened up – but he also had other reasons for pursuing this course. In light of the conflict in Taranaki, he and other officials were seeking to move away from the former land purchasing system under which Crown officials dealt directly with rangatira and therefore risked becoming caught up in their disputes.[459]

Gore Browne told the rūnanga that it was 'well known that nearly all the feuds and wars between different Tribes in New Zealand have originated in the uncertain tenure by which land is now held'. It was therefore 'very desirable that some general principles regulating the boundaries of land belonging to different Tribes should be generally received and adopted'. Those in clear possession of land, he suggested, could be granted secure title in accordance with English law. Where disputes arose, 'they might be referred to a committee of disinterested and influential Chiefs, selected at a Conference similar to the one now held'. Gore Browne also proposed that Māori adopt a mixed system of land tenure:

> The Governor earnestly desires to see the chiefs and people of New Zealand in secure possession of land which they can transmit to their children, and about which there could be no dispute. Some land might be held in common for tribal purposes; but he would like to see every Chief and every member of his tribe in possession of a Crown Grant for as much land as they could possibly desire to use.[460]

When a dispute arose, the owners 'need neither go to war, nor appeal to the Government', but could simply apply to a court for enforcement of their rights. The only obstacle to such a system was tribal jealousy, which prevented individuals from applying for grants, and would continue to do so 'until men grow wiser, and learn that the rights of an individual should be as carefully guarded as those of a community'. Gore Browne therefore asked the rangatira to return to their communities and consider these matters, while he promised to 'co-operate with them in carrying into effect any system that they can recommend'. McLean added some comments of his own, in essence blaming all disputes about Māori land on the failure of Māori customary land tenure and denying that any had arisen (in Taranaki or elsewhere) from the Crown's land purchasing practices.[461]

In their evidence before us, expert witnesses observed that these messages proposed significant changes in Māori land tenure that clearly intended to facilitate the alienation of Māori land while avoiding the difficulties that had arisen in

459. Gore Browne, 18 July 1860, AJHR, 1860, E-9, p 10.
460. Gore Browne, 18 July 1860, AJHR, 1860, E-9, p 10.
461. Gore Browne, 18 July 1860, AJHR, 1860, E-9, pp 8–10.

Taranaki.[462] According to historians David Armstrong and Evald Subasic, the 'emphasis on securing Maori property rights and ensuring the peaceful retention of land for future generations was thus somewhat disingenuous'.[463]

These messages were clearly intended to appeal to rangatira, who likewise 'sought peace and order as a means of fully participating in the new European economy' and might also have sympathised with the idea of whānau possessing their own farms under Crown grant. As Armstrong and Subasic noted, the proposed system left Māori entirely in charge of decisions about tenure, and about the balance between tribal and whānau or individual possession.[464]

Nonetheless, the response was muted. Rangatira who spoke immediately after McLean questioned why he was changing the subject from questions over Taranaki and the Kīngitanga, and then proceeded to return the discussion to those topics.[465] Among those who spoke about land, most approved the principle of secure tenure and peaceful means of resolving disputes, while some declined to debate the Governor's proposals until they had received a printed copy and could discuss the matter with their people. None of the northern rangatira responded to the proposals.[466]

The following week, McLean attempted to revive the discussion about land, saying that the rūnanga was nearing an end, and this was 'the most important subject for discussion'. McLean also sought to justify the low prices the Crown was paying for Māori land, a subject that had aroused some comment during the rūnanga.[467] Again, there was little response from those assembled. As we see it, rangatira were reluctant to take the Government's lead on a matter that was of such vital importance, and certainly were not willing to make commitments without consulting their people. Pāora Tūhaere pointed out that existing tribal rūnanga were perfectly capable of managing land transactions; difficulties arose only if the Crown chose to bypass these structures, as had occurred in Taranaki.[468] So far as we can determine, the only northern rangatira to comment on land was Maihi Parāone, who,

462. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 118–120; Loveridge, 'Institutions of Governance for Maori' (doc E38), p 128.

463. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 118; see also p 120.

464. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 120.

465. *Maori Messenger/Te Karere Maori*, 31 July 1860, p 33 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 42).

466. *Maori Messenger/Te Karere Maori*, 31 July 1860, pp 33, 35, 38–40 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, pp 42, 44, 47–49).

467. *Maori Messenger/Te Karere Maori*, 3 August 1860, pp 1–2 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, pp 58–59).

468. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 124.

towards the end of the rūnanga, mentioned briefly that he favoured some means of permanently resolving land issues ('kia whakatikaiai, kia pai ai, ake ake').[469]

Again, the rūnanga ended with no clear resolution. Even when promised substantial control over land title and dealings, rangatira were far from persuaded. Some consented to consider the proposals; others warned some communities would reject the proposals outright. As with questions of justice, Gore Browne and McLean asked the rangatira to consult their communities with a view to holding further discussions at the next rūnanga.[470]

7.4.2.8 *What views did Te Raki rangatira express on the administration of Māori communities?*

On 6 August 1860, a few days before the end of the rūnanga, McLean introduced a new subject, the administration of Māori communities:

> I wish you to take under your notice the expediency of considering some regulations for the better management of your settlements. How would it answer if a Chief was appointed in each district to communicate with the Governor and to maintain order among his people?
>
> Ko taku tenei i whakaaro ai, kia ata hurihurihia e koutou etahi tikanga e kake haere ai te pai ki o koutou kainga. E kore ranei e pai kia whakaturia tetahi rangatira ki ia takiwa hei tumuaki, ara, hei whakapuaki korero ki a te Kawana, hei pehi hoki i nga kino o te iwi?[471]

McLean also invited rangatira to consider whether settler magistrates might assist local rūnanga in settling disputes. McLean did not intend this system to operate in territories that were close to British settlements, but rather only in 'remote places' that did not have access to the colony's courts.[472]

Again, the response was muted. Most of the rangatira who followed McLean's speech simply ignored his proposals. This included Patuone, who used his speech to appeal for unity between Māori and Pākehā, and oppose the Taranaki tribes that were at war with the Crown. A few rangatira said they would consider

469. *Maori Messenger/Te Karere Maori*, 1 September 1860, p 13 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 111). In full, Maihi Parāone said: 'E whakapai ana ahau ki nga whenua kia whakatikaia, kia pai ai, ake ake.' *Te Karere Maori* translated this as: 'I approve of the plan proposed for arranging the land, that it may be free from difficulty for ever and ever.' But his words did not refer to any specific plan, only to his approval of lands being made correct and good for the future.

470. *Maori Messenger/Te Karere Maori*, 15 August 1860, pp 11–13 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, pp 103–104); *Maori Messenger/Te Karere Maori*, 1 September 1860, pp 4–6 (cited in Armstrong and Subasic 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, pp 107–108).

471. *Maori Messenger/Te Karere Maori*, 1 September 1860, p 4 (cited inArmstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 107).

472. *Maori Messenger/Te Karere Maori*, 1 September 1860, p 4 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 107).

McLean's proposals or seek decisions from their communities. Among those communities, the settler magistrate was clearly regarded as an advisor or mediator, sent to explain English laws to Māori but not to enforce them.[473] Arama Karaka of Kaipara described the resident magistrate system as 'ko te tumuaki Pakeha, ko te tumuaki Maori' ('the European head (Magistrate) – and the Native head').[474] Again, Gore Browne asked the rangatira to consult their communities with a view to further discussion at the next national rūnanga.[475]

7.4.2.9 *What were the Kohimarama Rūnanga's final resolutions?*

The Kohimarama Rūnanga closed on 10 August with a series of resolutions, each one proposed by an individual rangatira and seconded by another, according to *Te Karere Maori*.[476] The resolutions 'were afterwards written out' so as '[t]o prevent any misunderstanding', and those rangatira who supported them were required to 'sign their names thereto'.[477] The first resolution concerned the treaty relationship:

> E whakaae ana tenei Runanga, i te tikanga o nga rangatira i noho ki roto; kua tino whakaae nei tetahi ki tetahi kia kaua rawa he pakanga ketanga i runga i te kupu kua whakapuakina nuitia mo te mana o te Kuini, mo te whakakotahitanga hoki o nga iwi e rua; a kua whakaae nei tetahi ki tetahi kia whakahengia nga mahi katoa mana e taka ai ta ratou kawenata tapu kua whakatakotoria ki konei.

Te Karere Maori translated this as:

> That this Conference takes cognizance of the fact that the several Chiefs, members thereof, are pledged to each other to do nothing inconsistent with their declared recognition of the Queen's sovereignty, and of the union of the two races; also to discountenance all proceedings tending to a breach of the covenant here solemnly entered into by them.[478]

473. *Maori Messenger/Te Karere Maori*, 1 September 1860, pp 6–7, 15–16 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, pp 108, 112). Regarding Patuone, see also Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 115. Dr Loveridge concluded that the response was 'generally favourable' on this point, citing two who undertook to consider the matter while many more gave no response: Loveridge, 'Institutions of Governance for Maori' (doc E38), p 96.

474. *Maori Messenger/Te Karere Maori*, 1 September 1860, p 15 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 112).

475. *Maori Messenger/Te Karere Maori*, 15 August 1860, pp 11–13 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, pp 103–104).

476. The rangatira were identified as Paikea of Kaipara, Wiremu Nero Te Awaitaia, Winiata Pekamu Tohi Te Ururangi, Wiremu Tamihana, Tamihana Te Rauparaha, Wiremu Patene Whitirangi, and Makarini Te Uhiniko: *Maori Messenger/Te Karere Maori*, 15 August 1860, pp 6–7 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 101).

477. *Maori Messenger/Te Karere Maori*, 15 August 1860, p 8 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 102).

478. *Maori Messenger/Te Karere Maori*, 15 August 1860, p 6 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 101).

As discussed, the Queen's 'mana' was not necessarily sovereignty, but the mana she exercised as head of the British empire. Paikea of Kaipara moved this motion, and according to *Te Karere Maori*, it was passed unanimously. Other motions condemned the Māori King's work as 'he mahi he, he mahi wehe' ('a cause of strife and division') and blamed Wiremu Kīngi for the war in Taranaki. According to *Te Karere*, these motions caused 'a good deal of confusion', with many rangatira choosing not to raise their hands.[479] Witnesses subsequently reported that only one-third of rangatira supported the resolution about Taranaki, even after considerable prompting from McLean.[480]

The resolutions were later printed, and – again with prompting from Crown officials – some 107 rangatira affixed their signatures. From this district, the signatories included Tāmati Waka Nene, Maihi Parāone, Te Manihera Te Iwitahi, Wiremu Pohe, Honetana Te Kero, Hāre Pōmare, and Te Hemara Tauhia.[481] There is no evidence of dissent from any of the northern rangatira.[482] However, the Church Missionary Society secretary Robert Burrows (a former Waimate missionary), who had witnessed the rūnanga's proceedings, later repudiated reports that the chiefs had adopted all resolutions, protesting in the *Daily Southern Cross* that some rangatira had 'afterwards expressed ignorance of what they had signed'.[483]

In brief, then, the rūnanga at Kohimarama ended with rangatira expressing clear support for the treaty, for the Queen's protective relationship with Māori, and for unity between Māori and Pākehā. Rangatira from this district and elsewhere clearly did not want conflict with the Crown. However, support for the Crown's stance against the Kīngitanga and Taranaki iwi was muted at best; and the rūnanga ended without any clear expression of support for the Governor's proposals on the adoption of the colony's laws or the administration of Māori lands and communities.

7.4.2.10 *What was the significance of the Governor's promise to reconvene the rūnanga?*

From the beginning of the rūnanga, Crown officials indicated to rangatira that it heralded a new step for the Crown–Māori partnership. For the first time, the Crown had called together Māori from throughout the country to advise on the colony's laws and policies – and this, in our view, was the Kohimarama Rūnanga's main significance. McLean deliberately cultivated the perception that the rūnanga

479. *Maori Messenger/Te Karere Maori*, 15 August 1860, pp 6–7 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' doc A12(a)), vol 1, p 101).

480. Paterson, 'The Kohimārama Conference', pp 37–38. One of the witnesses was the Church Missionary Society secretary Robert Burrows, a former Bay of Islands missionary; another was Hugh Carleton, editor of the *Daily Southern Cross* and son-in-law of the missionary Henry Williams.

481. Paterson, 'The Kohimārama Conference', p 39; *Maori Messenger/Te Karere Maori*, 15 August 1860, pp 7–9 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, pp 101–102).

482. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 133.

483. Burrows, *Daily Southern Cross*, 24 August 1860, p 3 (cited in Paterson, 'The Kohimārama Conference', p 38).

would become a formal advisory body, analogous to the colony's Executive and Legislative Councils. He introduced Westminster formalities into proceedings,[484] and told the assembled rangatira:

> When an important matter comes before the Queen, she submits it to her Council, and requests them to take it under their consideration, and to give expression to their opinions. The Governor acts in like manner with his Council. Now I request that the same rule be observed here.
>
> Ka tae mai he korero nui ki a te Kuini, ka homai tonu e ia ki tana runanga, mana e ata hurihuri tona tikanga, a ka whakapuaki hoki i ana whakaaro. Ka penei ano hoki te Kawana ki tana runanga; a ko taku tenei i pai ai kia waiho ano ia hei tikanga mo tatou inaianei.[485]

As noted earlier, official minutes described the rūnanga as a 'council' or an 'assembly', terms that were also used for some of the colony's institutions of government. The impression was that Māori were being invited to influence the exercise of kāwanantanga, and more particularly to negotiate the nexus between kāwanatanga and their existing rangatiratanga.[486]

From early in the rūnanga, rangatira asked that it be repeated as an annual or at least regular event. Wiremu Pohe of Te Parawhau was the first to make this request, writing to the Governor on 16 July:

> Na, koia tena, kua timata koe ki te whakamarama i nga tikanga ki a matou, ki nga rangatira Maori, me penei tonu e koe i roto i nga tau. Ki te mea ko tenei ra anake, i roto nei i te tau 1860, ko konei mutu ai te whakamarama i tenei kanara ka tiaho nei ki roto ki tenei whare pouri. E mea aua ahau e ohooho ranei, kahore ranei; koia ahau i mea ai, peneitia ano e koe i roto i nga tau. Kei wawara ke enei hipi kua whakamine nei ki ou pakau, ki o korua pakau ko te ture. Heoi ano tena kupu.
>
> You have commenced to explain matters to us, to the Maori Chiefs. Continue to do so every year. If this is to be the only time – this day in the year 1860 – then the light that shines from the candle in this dark house, will cease at once. I ask, will it have any effect or not? I say, therefore, let this be done every year, lest these sheep which are

484. 'The Kohimarama Conderence' July 1860, AJHR, 1860, E-9, pp 9, 23. Among other things, McLean asked those assembled to stand when they heard messages from the Governor and to give written notices of their proposals.

485. *Maori Messenger/Te Karere Maori*, 14 July 1860, p 37 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 20).

486. For example, see *Maori Messenger/Te Karere Maori*, 14 July 1860, p 45 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 24).

now gathered under your wings and under the wings of the law should stray. Enough of that word.[487]

On 3 August, Tamihana Te Rauparaha of Ngāti Toa presented a petition asking for the rūnanga to become a permanent event:

> E Kawana Paraone, —
> Kua whakaae katoa nga rangatira o tenei runanga, e noho nei ki tetahi wahi o Akarana, ki Kohimarama, kia whakatuturutia mai e koe tenei runanga o nga rangatira Maori o te motu nei o Niu Tireni: hei tahi i nga kino o nga iwi e rua nei, o te Pakeha o te tangata Maori. Ma tenei runanga ka marama haere ai te motu nei, ka ora ai hoki.
>
> Governor Browne, —
> All the chiefs of this Conference, sitting at Kohimarama, near Auckland, have united in a request that this Conference of the Maori Chiefs of the Island of New Zealand should be established and made permanent by you, as a means of clearing away evils afflicting both Europeans and Natives. By such a Conference light, peace, and prosperity will be diffused throughout the Island.
>
> Tamihana Te Rauparaha

The petition was signed by Te Rauparaha and 73 others, including (from this district) Maihi Parāone Kawiti, Te Manihera Te Iwitahi, Te Hemara Tauhia, and Patuone.[488] In the days that followed, several rangatira repeated this call and debated over where future rūnanga should be held.[489] On 2 August, McLean wrote a memorandum for the Governor recommending that the 'conference' become an annual event. The memorandum advised that, in light of tensions between Māori and the Crown, 'fresh measures' were needed through which Māori communities 'may be more effectually controlled and governed':

> To attain this end it will be necessary to devise some general scheme which shall embrace the following objects: A proper organization of the various Native tribes; Adequate provision for the administration of justice; Securing on the side of the Government the influence possessed by the leading chiefs of the country; and

487. 'Reply from Parawhau, No 1', 16 July 1860, *Maori Messenger/Te Karere Maori*, 30 November 1860, p 10 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 129).

488. *Maori Messenger/Te Karere Maori*, 3 August 1860, pp 67–68 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, pp 91–92).

489. *Maori Messenger/Te Karere Maori*, 31 July 1860, pp 56–57, 60 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, pp 54, 56); *Maori Messenger/Te Karere Maori*, 3 August 1860, pp 7, 70, 77 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, pp 61, 93, 96).

establishing as a permanent institution periodical meetings of the Chiefs where questions affecting the interests of both races may be freely discussed.[490]

McLean said he would submit further advice on such a scheme. However, Pohe and other rangatira had asked for the rūnanga to be reconvened in subsequent years, and it was important that an answer be given 'before they separate':

> A conference like the present affords the Natives a legitimate means of making known their wants, and of representing their grievances; it may be regarded as a safety valve to the country, and will prepare the way for their participation in more civilized institutions.[491]

For the Government, further meetings would also provide 'means of ascertaining the disposition of the various tribes' and of 'imbuing the Native mind with correct views' regarding the Government's actions, which relied on Māori cooperation for their success. McLean therefore recommended an annual meeting, held alternately in Auckland and Wellington. Such an event would cost at least £5,000 and may require the construction of additional accommodation.[492]

In another, undated memorandum, McLean suggested that such a meeting be constituted as a '[c]ouncil of the principal chiefs', which would allow Māori 'a legitimate means of having their wrongs redressed in a constitutional manner' and of 'participating in those institutions by which they must in the process of colonisation be governed'.[493] In yet another memorandum, on 6 August, McLean further advised:

> It is abundantly manifest that in the present state of the Colony the Natives can only be governed through themselves. A conference like the present would prove a powerful lever in the hands of the Government for effecting this object.
>
> It might also be made the means of removing many of the difficulties now surrounding the Land Question, and of simplifying the mode of acquiring territory for the purposes of Colonization.[494]

As McLeans's memorandums make clear, although the Crown was preparing for a significant level of ongoing engagement with Māori, it was doing so for its own

490. McLean to Browne, 2 August 1860 (cited in Armstrong and Subasic, Northern Land and Politics: 1860–1910' (doc A12(a)), vol 3, pp 987–988).

491. McLean to Browne, 2 August 1860 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 3, pp 989–990).

492. McLean to Browne, 2 August 1860 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 3, pp 990–991); see also Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 126–127.

493. McLean memorandum (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 127).

494. McLean, 6 August 1860 (cited in O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 152).

purposes – in essence, to control and govern Māori, and acquire lands for settlement. It hoped to achieve these objectives by drawing Māori into the machinery of government and establishing some form of indirect rule at a national level. Implicit in these messages was that the alternative method for asserting Crown authority – warfare – was costly and undesirable.

Governor Gore Browne, seeking funds for another rūnanga in 1861, passed Te Rauparaha's petition on to the House of Representatives.[495] As Dr O'Malley observed, 'The potential for such conferences to form a "powerful lever" in the government's efforts at indirect rule were apparent even to the General Assembly, which approved Browne's request that funding be quickly confirmed.'[496] On the final day of the Kohimarama Rūnanga, 10 August, Gore Browne announced that it would reconvene the following year. In the meantime, he said, the General Assembly would assist him 'in devising measures of the establishment of order, and for the good of your race generally' ('a ka whakauru mai te Runanga Pakeha i runga i te mahi whakatakoto tikanga e tupu ai te pai ki a koutou').[497]

Acknowledging that most of the issues he had placed before the rūnanga remained unresolved, including those concerning land, the administration of justice, and the regulation of Māori communities, the Governor continued:

> In the interval between the present time and the next Conference, I trust you will carefully consider the subjects to which your attention has been directed, in order that you may come prepared to express matured opinions, and to recommend measures for giving practical effect to your wishes.
>
> Ko te takiwa e takoto mai nei i te aroaro tae noa ki tetahi Runanga me waiho hei takiwa hurihuri marire i nga korero maha kua whakaaturia nei hei kimihanga ma koutou, kia haere rawa mai ki tera Runanga, kua pakari nga whakaaro hei whakapuaki ma koutou, kua marama hoki he huarahi korero i runga i nga mea e hiahiatia e koutou.[498]

The rūnanga at Kohimarama had been a significant step in the Crown–Māori relationship – offering an unprecedented opportunity for the leaders of both treaty partners to meet and engage in dialogue about issues of common concern. Gore Browne's promise meant that this approach could continue into the future, providing a basis for ongoing dialogue between the rangatiratanga and kāwanatanga spheres as part of a functioning treaty partnership. Yet the Kohimarama Rūnanga also demonstrated the parties' divergent agendas: Māori continued to look for

495. *Maori Messenger/Te Karere Maori*, 1 September 1860, p 29 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 119).

496. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 152.

497. *Maori Messenger/Te Karere Maori*, 15 August 1860, pp 12–13 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 104).

498. *Maori Messenger/Te Karere Maori*, 15 August 1860, p 13 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 104).

peace and prosperity in partnership with the Crown, while the Crown looked for means of extending its authority over hitherto autonomous Māori communities.

7.4.2.11 *What was the significance of Gore Browne's northern tour in February 1861?*

In the aftermath of the rūnanga, many Te Raki Māori leaders embraced the opportunity to strengthen their relationship with the Crown and expressed willingness to experiment with the new forms of government Gore Browne and McLean had proposed.[499] Rangatira returning to the Bay of Islands from Kohimarama distributed copies of Gore Browne's speech and William Martin's legal guidelines, and local rūnanga met to 'discuss the new tikanga . . . with much interest'.[500] In Mahurangi, Te Hemara Tauhia assembled his tribal rūnanga and forwarded their names to Gore Browne for confirmation, in accordance with Martin's proposed rules.[501] In Hokianga, Hipio Te Whareoneone of Utakura wrote to the Governor professing his aroha for 'the Gospel of God and the law of the Queen'.[502] And Te Tītaha of Ngāti Manu wrote to the Governor in January 1861:

> You have heard the words of the Ngapuhi. They desire to come under the shadow of the Queen. And this is our thought. I seek information from you who point out the way of life and death in the world. This is another word. We wish to enter the house of the Queen, and of the Governor – the house of life.

Ngāpuhi, he continued, 'are orphans, we have no parents, and hence I say, let us embrace the Queen and Governor as our parents'.[503] As Armstrong and Subasic observed, these expressions of support reflected the desire of Ngāpuhi leaders for a closer relationship with the Crown and settlers, but 'should not be interpreted as a wholesale acceptance of Crown authority at the expense of rangatiratanga and tribal authority'.[504] On the contrary, rangatira continued to treat resident magistrates as informal advisors and mediators who could be called on at their discretion, and the magistrates struggled to exert any influence except with the consent of the rangatira.[505] As an example of Ngāpuhi attitudes, the senior Whangaroa leader Hāre Hongi Hika wrote to the Governor saying he would attend the next rūnanga and 'Kia whawhai ki a koe mo nga Ture' ('I would fight you for the laws').

499. For examples from this district, see Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 139.

500. Kemp to Native Secretary, 10 October 1860 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 139).

501. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 139.

502. *Maori Messenger/Te Karere Maori*, 15 December 1860 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 140).

503. *Te Manuhiri Tuarangi/Maori Intelligencer*, 15 July 1861, pp 12–13 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 164); Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 141.

504. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 141.

505. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 142; see also Phillipson, 'Bay of Islands Maori and the Crown, 1793–1853' (doc A1), pp 90, 93, 373.

As on other occasions, Ngāpuhi leaders were not seeking to accept government authority, but to restore the treaty alliance as they had understood it – as a mutually beneficial partnership between Māori and the Queen.[506]

Te Raki Māori responses were undoubtedly coloured by the conflict in Taranaki and the Crown's hostility to the Kīngitanga, which was a constant theme at Kohimarama. Ngāpuhi had only recently begun to restore their relationship with the Crown in the wake of the Northern War, and continued to experience considerable anxiety about the Crown's intentions. Early in 1861, rumours began to circulate that the Crown intended to launch 'a general war' against Māori once it had dispensed with Taranaki.[507] This concerned Gore Browne, who regarded Ngāpuhi as the 'most loyal of Her Majesty's [Māori] subjects'.[508] In a hastily arranged trip to the north in February 1861, he offered reassurance that the Crown was not intending to begin such a war against Māori, and northern leaders in turn assured him that they were 'all living in peace and quietness'.[509]

In the hope of demonstrating the Crown's good faith toward Ngāpuhi, Gore Browne attended two hui, one at Te Tii Waitangi and another at Mangonui. Rangatira had called the Waitangi hui to discuss new laws controlling firearms (which were important for hunting) and control of liquor. The Governor said these matters could be discussed at the next national rūnanga. The kaumātua Hōhaia Waikato, who had travelled to London with Hōngi Hika in 1820, asked that the rūnanga be held at Te Tii, reflecting the special place of Waitangi in the Crown–Māori relationship. Waikato said: 'It was I that brought you from England – I and Hongi – therefore it is right that you should come to us.' However, the Governor made no commitment.[510]

Both hui were overshadowed by the Taranaki War and by general questions about the nature of the Crown–Māori partnership. At Waitangi, rangatira were particularly anxious about the conflict in Taranaki and asked the Governor to make peace as quickly as possible. Some, demonstrating their commitment to the Crown–Māori alliance, and their acknowledgement of its price, offered their assistance in the conflict. Gore Browne, in turn, promised to consult Ngāpuhi, as an 'impartial tribe', on the terms of peace. As he had at Kohimarama, he presented the Crown's protection as being conditional on Māori support for the Crown, and

506. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 141; *Maori Messenger/Te Karere Maori*, 15 January 1861, pp 2–3 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, p 153).

507. Phillipson, 'Bay of Islands Maori and the Crown, 1793–1853' (doc A1), pp 143–144; O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 153.

508. Browne to Pratt, 22 January 1861 (cited in O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 153).

509. 'Bay of Islands', *Daily Southern Cross*, 1 March 1861, p 4.

510. 'Bay of Islands', *Daily Southern Cross*, 1 March 1861, p 4; 'The Governor's Visit to the North', *New Zealander*, 2 March 1861, p 5; O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), pp 154–156.

held out the prospect of local self-government as an incentive for those who demonstrated that support.[511]

According to Ngāti Hine tradition, it was during this tour that Gore Browne delivered 'an ivory seal, Rongomau, in the shape of Queen Victoria's hand', to Maihi Parāone. Ngāti Hine claimants described this 'as a token of unity and lasting peace between Maori and Pakeha.'[512]

7.4.2.12 *Why was the rūnanga never reconvened?*

At the Kohimarama Rūnanga, Gore Browne and McLean had proposed that Māori play significant roles in local dispute resolution and adjudication of land interests, and in the administration of local affairs. They had asked rangatira to discuss these proposals with their communities and report back to another national rūnanga in 1861. Gore Browne, in the meantime, had returned to Auckland and sought advice from Ministers and officials about proposals for governing Māori. Various options were put forward for self-government at local and district levels, and for involving Māori in the machinery of state at a national level.

By September of 1860, the Governor had resolved to establish rūnanga in the country's native districts. They would be able to recommend local bylaws and determine tribal rights in land. One or more rangatira from each district would be appointed to communicate with the Government. Gore Browne also proposed to trial a native land court as well as to the expand the Native Department and native schools system,[513] and considered establishing a national committee, comprising senior rangatira, to advise on Māori affairs. He proposed to seek Māori consent for these new institutions at the 1861 national rūnanga.[514]

As explained in section 7.3, Gore Browne and his advisers hoped that the proposed new institutions would function as a system of indirect rule, allowing the Crown to manage and control Māori affairs through the agency of rangatira. But this agenda required Māori cooperation, which in turn required extensive consultation and persuasion.[515] During his northern tour early in 1861, Gore Browne also proposed to trial his system at Mangonui.[516] In the event, he did not hold office long enough to see his proposals through. In July 1861, a few months after his northern tour, he learned that he would not be reappointed and that George

511. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), pp 155–156; see also Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 143–147. According to the *Daily Southern Cross*, Gore Browne told the rangatira at Waitangi: 'In affording you all, as a people, the advantages of English protection, I reasonably expect submission to English law and authority.' We do not know how this was translated into Māori: 'Bay of Islands', *Daily Southern Cross*, 1 March 1861, p 4.

512. Ngāti Hine, brief of evidence, August 2014 (doc M24(b)),), p 49.

513. Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 126–128.

514. Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 120–121, 127; Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 148–151; Native Secretary to Governor, 31 January 1861, AJHR, 1862, E-1, sec 1, pp 12–13.

515. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 152.

516. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), pp 156–158. Bishop Selwyn and FitzGerald advocated for the establishment of Māori provinces: Loveridge, 'Institutions of Governance for Maori', summary (doc E38(b)), p 30.

Grey would succeed him.[517] Grey arrived in September 1861, with instructions to resolve matters in Waikato and establish a system for the peaceful administration of Māori affairs. Whereas Gore Browne had proposed to test his system and then consult rangatira at the next rūnanga, Grey resolved to move quickly and unilaterally.[518]

He adopted and modified the system that Gore Browne and other officials had already been discussing, under which the Crown would work with the informal rūnanga that already operated in most Māori communities, integrating them into the colony's legal system and granting them substantial powers to administer local and district affairs, resolve disputes, and determine ownership of land. By this means, Grey hoped to soothe Māori grievances, bring Māori into the colony's system of law and authority, and isolate the Kīngitanga, pressuring it to submit to the Crown.[519]

Whereas Grey supported some degree of Māori decision-making as a means of indirect rule at a local level, he opposed establishing national institutions under the circumstances the colony was then facing and therefore decided not to go ahead with the 1861 national rūnanga. In a memorandum to the Secretary of State, Grey gave several reasons. On a pragmatic level, given the divided state of the colony, he believed it would be impossible to persuade all tribes to send representatives. In particular, the Kīngitanga and its sympathisers would stay away – partly because they had been offended by some of the comments made at the previous rūnanga, but mainly because they regarded the rūnanga as an instrument of the Governor and thus incompatible with their ongoing independence. Under those circumstances, Grey reasoned, 'any measures for the introduction of law and order which had been devised by such a Conference' would have been rejected by many Māori 'simply because they had proceeded from such a Conference'.[520]

But Grey also rejected a second rūnanga for what he described as 'policy' reasons, asking 'whether it would be wise to call a number of semi-barbarous Natives together to frame a Constitution for themselves'. In his view:

> before so many tribes with diverse interests could agree upon such a subject, even if the Governor had proposed a form of Constitution to them, it would, in order to suit the prejudices of many ignorant persons, become so altered before it was adopted as to be comparatively useless.[521]

It was therefore 'better for the Governor to frame the measure himself, and then, if he can, get them to adopt it as a boon conferred upon them'. Grey instead resolved to establish a system in which Māori would be governed through local

517. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), pp 158–160.
518. Grey to Duke of Newcastle, 30 November 1861, AJHR, 1862, E-1, sec 2, p 34.
519. Grey to Duke of Newcastle, 30 November 1861, AJHR, 1862, E-1, sec 2, p 34.
520. Grey to Duke of Newcastle, 30 November 1861, AJHR, 1862, E-1, sec 2, p 34.
521. Grey to Duke of Newcastle, 30 November 1861, AJHR, 1862, E-1, sec 2, p 34.

and district rūnanga, as we will discuss in section 7.5. As he explained, his preference was to

> break the native population up into small portions, instead of teaching them to look to one powerful Native Parliament as a means of legislating for the whole Native population of this island – a proceeding and machinery which might hereafter produce most embarrassing results.[522]

In the view of Dr Loveridge, who gave historical evidence for the Crown, Grey was 'rejecting the idea of consulting with the Maori leadership, as any kind of corporate entity, as to the development of policy in Maori affairs'. The absence of any plan to provide for Māori representation in the General Assembly or provincial councils was 'conspicuous'. Grey 'obviously thought that the short-term benefits' of his approach 'outweighed the long-term consequences of depriving the chiefs of a peaceful and public mechanism for influencing government actions and policies'. In Dr Loveridge's assessment, it was 'difficult to agree' with the Governor, and the costs of consultation would have been far less than the costs of the wars and confiscations that followed.[523]

Armstrong and Subasic noted that Native Secretary McLean had viewed national conferences as an important means of keeping 'loyal' rangatira on side and was disappointed with Grey's decision. Many years later, McLean told the House of Representatives that the Kohimarama Rūnanga had allayed Māori concerns and maintained peace in the North Island, 'and he was only sorry that the country did not continue for a number of years that system which permitted the chiefs to meet together and debate their affairs in a chamber of their own'. Had the rūnanga continued, he asserted, the colony would not have found itself at war throughout much of the 1860s.[524]

7.4.3 Conclusion and treaty findings

What, then, was the precise nature of the 'kawenata' that arose from the Kohimarama Rūnanga? Because Gore Browne and McLean were genuinely seeking rangatira input into questions of policy, because the treaty was discussed, and because the final resolution referred to unity between Māori and the Crown, the rūnanga has come to be seen as a 'fuller ratification' of te Tiriti, and as providing the basis for a treaty-compliant partnership between Māori and the Crown. In support of this view, Dr Orange has observed that 'the covenant of Kohimarama' later became a point of reference for Māori political movements such as Te Kotahitanga, whose leaders saw Kohimarama as part of a continuum of Crown–Māori agreements that also included he Whakaputanga and te Tiriti.[525]

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522. Grey to Duke of Newcastle, 30 November 1861, AJHR, 1862, E-1, sec 2, p 34.
523. Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 159–160.
524. McLean, 7 October 1875, NZPD, vol 19, pp 319–320; Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 165.
525. Orange, 'The Covenant of Kohimarama', pp 76–77.

Historian Dr Lachy Paterson (now Professor) has cautioned against interpreting the rūnanga's significance 'purely through a Treaty lens', noting that te Tiriti was specifically mentioned in only 26 of 371 speeches by rangatira, and none of the resolutions.[526] The Crown was mainly concerned with gaining support for its war against Taranaki and its campaign against the Kīngitanga, and initiated discussions about the treaty in order to offer Māori a choice between protection and war. According to Paterson, the purpose of any 'affirmation' of the treaty by the Crown was to secure Māori submission to the Crown's authority. The Crown was not offering genuine power-sharing or partnership, under which Māori would be incorporated into 'the top tier of government'; rather, he commented, 'as the government's own rhetoric and subsequent events make clear, any kind of autonomy that might devolve to Māori would be restricted and under Crown control'.[527] Furthermore, in Paterson's view, the Crown saw the substance of the rūnanga as less important than the impression it created. As the extensive coverage in *Te Karere Maori* demonstrated, it was at heart 'an immense propaganda exercise' aimed at calming settlers and showing Taranaki and Kīngitanga Māori that they were isolated.[528]

In this inquiry, all parties argued that Kohimarama was a valuable step forward.[529] Yet their interpretations diverged more or less along the lines that Paterson identified, under which Māori saw the rūnanga (in Paterson's words) 'as a proto-Treaty-compliant partnership', and the Crown viewed it as 'evidence of Māori submission to Crown sovereignty', a position that, in his view, 'privilege[d] fragments of the bare textual record' over 'a fuller and more contextualized reading of the event'.[530]

In submissions to our inquiry, the claimants presented the Kohimaramara Rūnanga as 'a reaffirmation of te Tiriti/the treaty relationship' in which the Crown promised that Māori would be involved in their own governance through the annual rūnanga, and Māori saw this 'as a means of establishing political equality, which te Tiriti/the Treaty had promised'.[531] Crown counsel submitted that the rūnanga left 'absolutely no doubt' about the views of Te Raki rangatira: they 'expressed their contentment with residing under the Queen's mana, their desire to be united with settlers and that English law should continued to be extended to them', all in a manner that 'sat squarely within the wider sovereignty of the Crown and its administration of the country'.[532]

This did not mean that Māori were surrendering their rangatiratanga, Crown counsel submitted: 'Rather . . . the Kohimarama Conference was an unprecedented and significant event whereby the Crown, in the exercise of its kāwanatanga, engaged directly with rangatira (including Northland rangatira), in the exercise of

526. Paterson, 'The Kohimārama Conference', p 41; see also pp 30–32.
527. Paterson, 'The Kohimārama Conference', pp 30–31.
528. Paterson, 'The Kohimārama Conference', pp 31–32.
529. Claimant closing submissions (#3.3.228), pp 166–167, 217–218; Crown closing submissions (#3.3.402), pp 89–92.
530. Paterson, 'The Kohimārama Conference', p 41.
531. Claimant closing submissions (#3.3.228), pp 166–167, 237; see also pp 217–218.
532. Crown closing submissions (#3.3.402), p 90.

their rangatiratanga.' Crown counsel accepted that Māori were not subordinating themselves and wanted to be involved in the process of shaping laws and institutions of government. But, in Crown counsel's submission, Northland Māori 'reaffirmed their relationship with the Queen and the Governor' and accepted that 'the Queen and her Governor had authority [which] related to them'.[533]

We do not accept the Crown's argument that Te Raki Māori were accepting of the Crown's sovereignty. We agree with Paterson that the Crown's position depends on English language translations of the rūnanga proceedings – translations that were made by Crown officials and that purported to show rangatira accepting the Crown's sovereignty when they were in fact acknowledging their long-standing alliance with the Queen and her empire.[534] When rangatira acknowledged the Queen's mana, this was a sign of respect for her status and considerable power – a power with which Te Raki rangatira had consciously chosen to align, in preference to other foreign powers, since 1820. When rangatira acknowledged the Queen's maru, they were acknowledging that she (and her forebears) had made commitments to protect Māori from the threats posed by foreigners and settlers. When they used terms such as 'piri' (cling to) and 'tomo' (marry), they were not expressing submission or pledging allegiance, but acknowledging their partnership with the Queen.

It is also clear that they were anxious to profess their commitment to the Queen and their willingness to work with the Governor. This was consistent with their view of the treaty as providing for a protective alliance and with their ongoing desire to secure a closer relationship with the Crown, under which the promised benefits of settlement would at last come to fruition. It was also consistent with their desire to maintain peaceful relations with the Governor and settlers at a time of considerable volatility in the colony.

The Governor had presented rangatira with a stark choice: either align with the Queen and retain her protection, or align with the King and lose that protection. Te Raki leaders took that threat seriously, and some subsequently feared a Crown invasion of their district. Under those circumstances, they chose to align with the Queen's protection, as Te Raki leaders now had for 40 years. This does not mean that Te Raki rangatira had submitted to the colony's laws or were expressing their willingness to do so. The practical limits of the Crown's authority are clear from the Governor's proposals, in which he sought to find some means of drawing Māori into systems of law, governance, and land tenure that they had not already adopted. Rangatira undertook to discuss these matters with their hapū.

While rangatira were seeking progress in the treaty relationship, the Crown was also courting rangatira. Having started a war in Taranaki, and with conflict looming in Waikato, Gore Browne could scarcely afford to open new fronts against Ngāpuhi, Ngāti Toa, or other iwi represented at the rūnanga. In order to secure future peaceful relationships with Māori, Gore Browne was prepared to make significant concessions in the direction of Māori self-government and Māori

533. Crown closing submissions (#3.3.402), pp 89–92.
534. Paterson, 'The Kohimārama Conference', p 41.

involvement in the colony's system of government. For that reason also, Gore Browne and McLean carefully downplayed the Crown's claim to possess sovereignty over Māori, presenting the treaty not as a cession but as an instrument of protection, repeating the concealment of intentions that had characterised the original Tiriti debates in 1840 in so doing.

If the rangatira at Kohimarama did not affirm the Crown's sovereignty, did the rūnanga conversely affirm a treaty partnership under which the Crown and Māori were equals; and did it provide a forum where they could meet to negotiate matters in which the rangatiratanga and kāwanatanga spheres of influence intersected? On this, the evidence is perhaps more ambiguous. Certainly, the rūnanga provided a means by which rangatira could express their wishes and grievances to the Crown, and thereby influence government policy.

Gore Browne promised that this vehicle would be available every year or two, providing Māori with opportunities for input into the colony's laws. Gore Browne and McLean cultivated the impression that the rūnanga would evolve into a formal advisory body and pave the way for direct Māori representation in the General Assembly. They also made other significant promises: they affirmed the Crown's commitment to protecting Māori from foreign threats and lawless settlers; they promised a considerable degree of Māori control over matters such as local self-government, land titling, and dispute resolution; and they promised further discussion at a national level to determine paths forward on these matters.

But, regardless of the sincerity of these offers, they must be seen in historical context as attempts by the Crown to begin the process of extending its authority into new territories and areas of Māori life. Had these offers been accepted and adopted, and genuine negotiations subsequently occurred to determine the appropriate institutional arrangements for Māori self-government, something approximating a functioning treaty partnership might have emerged.

Such a partnership could not have fully accorded with the original treaty guarantees unless the Crown was prepared to fully recognise and respect the rangatiratanga sphere of authority, which it was not. A new, national advisory body would have been a very important step in the treaty relationship: it would have brought the kāwanatanga and rangatiratanga spheres together in regular dialogue, and would have offered significant opportunities for Māori input into the colony's laws at a time when settler influence was growing, and the Crown was increasingly determined to extend its sovereign authority into territories still dominated by Māori. Gore Browne suggested that the rūnanga might become a permanent institution as part of the colony's machinery of government, and might ultimately play some formal role in the colony's law-making. But it nonetheless was to be an advisory body. While Gore Browne and other officials recognised the practical limitations of the Crown's authority in 1860 in this district and elsewhere, they always saw final authority as resting with the Crown.

From a Te Raki Māori perspective, the rūnanga provided a rare opportunity to engage with the Crown, to affirm their commitment to a treaty relationship in which the Queen would offer protection, and to engage in dialogue about a treaty partnership in which authority might be shared, and peace and prosperity finally

secured. But it is notable that Te Raki leaders did not express great enthusiasm for the Crown's various proposals for land, criminal law, and administration of Māori communities. Nor did Te Raki Māori leaders return from the rūnanga feeling entirely secure about the Crown's intentions; on the contrary, as we have seen, very soon afterwards rumours were spreading in the north that the Crown intended a general war against Māori. Gore Browne was concerned about Ngāpuhi resistance and visited to ease these concerns.

We agree with the many scholars who have seen Kohimarama as an unprecedented opportunity for dialogue between the treaty partners and therefore as a potential step towards meaningful treaty partnership.[535] But it was no more than a step. It took on greater significance to Māori in subsequent decades because it was not repeated, and because the Crown subsequently abandoned any pretence that it was willing to accept that rangatira could participate in government at a national level on anything approaching equal terms. The initial promise of Kohimarama remained unfulfilled.

Grey's unilateral decision to abandon all future national rūnanga reflected his ideas of British racial and cultural superiority, his determination to discourage Māori nationalism, and his unwillingness to share power. By making this decision, the Governor forestalled any opportunity for further negotiation between Māori and the Crown over matters such as land and local government. As the Tribunal found in the *He Maunga Rongo* report, this was a critical lost opportunity to build a forum for Crown–Māori dialogue and consensus building. At Kohimarama, the Crown came closer to recognising a Māori 'parliament' than at any other time, and then deliberately rejected this opportunity 'on very inadequate grounds'.[536]

As we will see in section 7.5, after this the Crown made its own decisions about the governance of Māori, with (for the most part) little input from Māori communities.

Accordingly, we find that:

- By calling the Kohimarama Rūnanga only after war had already broken out, the Crown ensured the rūnanga focused primarily on its own agenda, that is on seeking Māori approval for the war and on its own proposals for administration of Māori affairs rather than responding to the priorities of Māori leaders. This was inconsistent with the Crown's duty of good faith, in breach of te mātāpono o te houruatanga/the principle of partnership.
- Governor Grey's decision to cancel the planned 1861 national rūnanga and all future national rūnanga was inconsistent with the Crown's obligation of good faith. The decision was a critical missed opportunity to build a forum for regular dialogue between the rangatiratanga and kāwanatanga spheres. It denied Māori (including Te Raki Māori) opportunities for ongoing input into government policy on matters of fundamental importance to them, including questions of land titling and administration, local government,

535. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 151; Kawharu, 'Te Tiriti and its Northern Context' (doc A20), pp 244–246; Orange, 'The Covenant of Kohimarama', pp 76–77, 80.
536. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, p 232.

and justice. By denying this opportunity, the Crown was in breach of te mātāpono o te houruatanga/the principle of partnership.

7.5 To What Extent Did Governor Grey's 'New Institutions' Adequately Provide for the Exercise of Tino Rangatiratanga by Te Raki Māori?

7.5.1 Introduction

After his return to New Zealand in 1861, Governor Grey acted swiftly to establish new institutions for governing Māori communities. Whereas Gore Browne had intended to consult further on these 'new institutions' and then trial them before implementing them across the country, Grey forged ahead with his own plans. The model he adopted recognised local and district rūnanga, granting them significant powers of local self-government, including rights to propose regulations, manage public works, oversee health and education, determine land ownership and boundaries, and oversee settlement. The existing resident magistrate system would continue with an enhanced role for Māori assessors.[537] Grey's system, developed with input from Ministers in the colonial Government, provided no formal means by which Māori could influence law or policy at a national level – there would be no national rūnanga or advisory council, and nor did Grey give any priority to Māori representation in the General Assembly. As Dr O'Malley concluded, Grey's 'preferred method of indirect rule' was through local influence.[538]

New Zealand's first district rūnanga were established in January 1862, in the Bay of Islands and Mangonui.[539] Other rūnanga were progressively adopted elsewhere in the country (though not in Mahurangi or Kaipara).[540] Grey had promised Te Raki Māori that the system would be permanent and would allow them to achieve their ambitions for settlement and economic development, including the establishment of a long-awaited township.[541] But the district and local rūnanga operated for fewer than four years before a change of Government led to the withdrawal of funding and official support—a policy change that coincided with increased em-

537. Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 152–153.

538. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 152. Also see Orange, *The Treaty of Waitangi*, pp 161–162.

539. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), pp 167–168. Loveridge said that new institutions were trialled in the Bay of Islands and Mangonui from 1859. A native district was declared in 1858 for Mongonui (north of Herekino and Whangaroa Harbours) in 1859, under the Native Circuit Courts Act 1858 and the Native Districts Regulation Act 1858, but we have seen no evidence of it operating prior to 1862: Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 79–80; 'Orders in Council issued under the Native Districts Regulation Act, 1858, and the Native Circuit Courts Act, 1858', AJHR, 1862, E-6, pp 3–4.

540. O'Malley, 'Runanga and the Komiti' (doc E31), pp 47–48; Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 188. The districts established were Bay of Islands, Mangonui, Upper Waikato, Waiuku, Tokomaru, Waiapu, Lower Waikato, Waihou, Manawatu, Ahuriri, Bay of Plenty, and Taupo: 'Orders in Council issued under the Native Districts Regulation Act, 1858, and the Native Circuit Courts Act, 1858', AJHR, 1862, E-6.

541. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 174–175.

phasis on individualisation of Māori land titles through the Native Land Court, as discussed in chapter 9.[542]

Claimants told us that rūnanga had existed throughout the north since pre-treaty times, and that Grey's ambition was to co-opt this pre-existing system of government while introducing 'a heavy overlay of Crown control'. Nonetheless, claimants said, the system provided for Māori to exercise 'a significant role in the administration of their district'. The Crown withdrew support because, in the wake of the Waikato War, it decided 'to reduce or disestablish any manifestation of Māori political autonomy or "special treatment"'.[543] By withdrawing funds and effectively disestablishing the rūnanga, claimants said, the Crown broke its promises and committed a serious breach of te Tiriti.[544]

The Crown submitted that, through the rūnanga, it had 'actively supported Northland Māori in self-government' in a manner consistent with treaty guarantees. The 'breadth of jurisdiction that runanga enjoyed was broadly similar to that held by provincial government at the time, though runanga had a criminal jurisdiction that provincial governments lacked'. The Crown denied that it had abolished rūnanga. Crown counsel submitted that rūnanga were affected by government-wide funding cuts but nonetheless continued to operate beyond 1865. The Crown did not say when or why rūnanga ultimately ceased to operate.[545]

7.5.2 The Tribunal's analysis

7.5.2.1 *Prior to Grey's 'new institutions', how had Governors attempted to govern Māori communities?*

Grey's decision to establish the 'new institutions' must be seen in the context of previous attempts to introduce English law into Māori districts. This was an issue that had exercised Crown officials since the time of the treaty: Governor Hobson had been instructed to tolerate Māori customary law while gradually leading Māori towards accepting the British legal system; successive Governors had since tried several legal and institutional models involving varying degrees of acknowledgement of existing chiefly authority and Māori law.

As discussed in chapter 4, the Native Exemption Act 1844 provided some recognition of the principle of utu in cases of 'theft,'[546] and provided that, outside of townships, Māori could be arrested only by rangatira. This was replaced by Governor Grey's Resident Magistrates Courts Act 1846, which established a district

542. . O'Malley asserted that the rūnanga were 'formally abolished'. But this does not appear to have been the case. They were *effectively* abolished (their funding was cut, most assessors were sacked, and they no longer met after 1865) but the Orders in Council remained in force, apparently to provide legitimacy for the resident magistrate system: O'Malley, 'Runanga and the Komiti' (doc E31) p 56; Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 297–298; Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 233–235, 236–264.

543. Claimant closing submissions: (#3.3.228), p 171.

544. Claimant closing submissions: (#3.3.228), pp 172–173.

545. Crown closing submissions (#3.3.402), p 92.

546. Colonial officials routinely used the term 'theft' to describe the Māori law enforcement practice taua muru.

court system for minor civil and criminal matters and provided for the appointment of Māori assessors. Usually rangatira of senior rank, they were empowered to determine civil cases involving only Māori. Magistrates could issue arrest warrants for Māori, but the payment of utu for theft and assault was retained.[547]

In our view, both these ordinances were intended to assimilate Māori into the colony's legal system, and recognised Māori customary law and authority solely because colonial officials knew they could only achieve their objectives with cooperation from rangatira. According to Professor Robert Joseph, the resident magistrate system achieved some degree of acceptance from Māori communities for this reason, and because, in effect, it allowed them to determine which laws would apply to them.[548]

After its introduction, the resident magistrate and assessor system provided 'the basis of official administration and law enforcement in Maori districts for the next fifty years'.[549] The system did not draw Māori into the colony's legal system as rapidly as Grey had hoped but did provide Māori communities with an alternative and sometimes useful method of dispute resolution. In this district, resident magistrates were appointed from 1846, but Māori continued for the most part to enforce law among themselves, typically rejecting Crown attempts to interfere in their affairs or acquiescing only after magistrates appealed to senior rangatira.[550]

Subsequent nineteenth-century efforts to extend English law into Māori districts all retained and built on this basic magistrate-and-assessor model. The Native Circuit Courts Act 1858 expanded the influence of assessors and enabled them to hear some civil cases alone. Magistrates and assessors were also charged with enforcing local regulations on matters such as public health, animal control, and the suppression of 'injurious' Māori customs.[551] The Native Districts Regulation Act

547. Alan Ward, 'Law and Law-enforcement on the New Zealand Frontier, 1840–1893', NZJH, vol 5, no 2 (1971), pp 132–134. According to Professor Shaunnagh Dorsett, the Resident Magistrate Courts Ordinance was an amalgam of the Native Exemption Ordinance 1844 with South Australia's Resident Magistrates Court Ordinance 1846. Grey had been Governor of South Australia from 1841 to 1846: Shaunnagh Dorsett, 'How do Things get Started? Legal Transplants and Domestication: An Example from Colonial New Zealand', *New Zealand Journal of Public and International Law*, vol 12 (2014), p 108.

548. Robert Joseph, 'Re-Creating Legal Space for the First Law of Aotearoa-New Zealand', *Waikato Law Review*, vol 17, 2009, p 78; O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 49.

549. Ward, 'Law and Law-enforcement on the New Zealand Frontier', p 134; see also Loveridge, 'Institutions of Governance for Maori' (doc E38), p 155.

550. Phillipson, 'Bay of Islands Maori and the Crown, 1793–1853' (doc A1), pp 90–93, 373; O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), pp 93–98; Ward, 'Law and Law-enforcement on the New Zealand Frontier', p 135; Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 142. As one example, Tāmati Waka Nene in the late 1840s refused to allow magistrates to investigate killings arising from adultery and mākutu: Ward, 'Law and Law-enforcement on the New Zealand Frontier', p 131. James Clendon appears to have become resident magistrate in March 1847. William White was appointed Mangonui resident magistrate in 1848. Others were appointed including Major James Patience in Kororāreka and Robert St Aubyn in Hokianga. Clendon and St Aubyn had served as police magistrates.

551. Loveridge, 'Institutions of Governance for Maori' (doc E38), p 62; Ward, 'Law and Law Enforcement on the New Zealand Frontier', pp 137–138.

1858 empowered the Governor to make these regulations and apply them to territories that remained in customary ownership.[552]

Māori were not consulted on either of these Acts, although section 6 of the Native Districts Regulation Act provided that any regulations must 'as far as possible be made with the general assent of the Native population affected thereby'. At the time, local rūnanga were expected to play that role.[553] The objective, according to Native Minister Richmond, was to introduce to Māori communities 'Institutions, English in their spirit, if not absolutely in their form'.[554] Early in 1859, the Mangonui district was proclaimed under both Acts but not brought into practical effect. William Bertram White had arrived in the district in 1848, and a few years later was appointed resident magistrate. He continued in the role under the new system, and we have seen no evidence of new assessors being appointed or rūnanga being established.[555] (In chapter 6, we referred to another William White, an early Wesleyan missionary who made several claims for pre-1840 land purchases.)

By 1860, with the colony at war in Taranaki, Crown officials sought options that undermined the Kīngitanga and more generally deterred the spread of Māori nationalist sentiment. To this end, they sought to recognise some form of Māori self-government while still supporting longer-term assimilation. Ultimately, they turned to a model first suggested by the official Francis Dart Fenton, under which local rūnanga would regulate their own affairs. This system was tried in Waikato from 1857, with mixed success.[556]

Nonetheless, in 1860 McLean proposed the establishment of a national system of tribal rūnanga, along with the appointment of 'head chiefs' on the Crown payroll, who would manage affairs in their territories. By drawing existing Māori leaders into the rubric of the colonial state, McLean hoped to secure their loyalty and assert the Crown's authority by indirect means.[557]

Richmond then proposed to use the Native Districts Regulation Act to make this system operational by dividing the country into native districts and appointing a single rangatira from each to assist the resident magistrate and propose

552. Loveridge, 'Institutions of Governance for Maori' (doc E38), p 62; Ward, 'Law and Law Enforcement on the New Zealand Frontier', pp 137–138.

553. Loveridge, 'Institutions of Governance for Maori' (doc E38), p 62; Ward, 'Law and Law Enforcement on the New Zealand Frontier', pp 137–138.

554. Richmond,29 September 1858, AJHR, 1860, E-1, p 6; Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 253.

555. 'Orders in Council', AJHR, 1862, E-6, p 3; Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 79–80. Regarding White, see 'Mangonui: Farewell to Mr White, R. M.', *New Zealand Herald*, 5 April 1878, p 3.

556. Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 73–74, 119.

557. McLean, MS-papers-0032–43, ATL (cited in '('Northern Land and Politics: 1860–1910' (doc A12), p 127; Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 126–127; Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 98–99.

bylaws for managing his people.[558] This is essentially the system that Gore Browne adopted in September 1860, though (as discussed in section 7.3.2) he also intended to continue with regular national rūnanga.[559]

7.5.2.2 *Why did Governor Grey establish the 'new institutions'?*

As we have noted, Grey arrived in September 1861 during a highly volatile period for the colony.[560] The first Taranaki War had only recently ended, and the Crown was preparing for war in Waikato. The first Stafford ministry had fallen in July, replaced by a new Government under William Fox.[561]

The Colonial Office tasked Grey with achieving four related objectives: first, to secure peace in the colony in a manner that would demonstrate the Crown's strength and discourage any further outbreaks of resistance; secondly, if it was safe to do so and 'acceptable to the colonists', to transfer responsibility for Māori affairs to the Executive Council; thirdly, to establish 'some institutions of Civil Government, and some rudiments of law and order' in native districts that had 'hitherto been subjects of the Queen in little more than in name'; and lastly, to create a tribunal to resolve disputes and determine title to Māori land.[562]

The Secretary of State (Newcastle) encouraged Grey to consider the establishment of native districts under section 71 of the New Zealand Constitution Act 1852, and to pay salaries to rangatira who could be 'attached to the Government' and assist resident magistrates to administer their districts. He encouraged Grey to use diplomacy as far as possible with the Kīngitanga, rather than treating the movement as a threat merely because it used the term 'King'. Nonetheless, Newcastle also promised to assist Grey with troops if needed, providing that, so long as the troops remained in New Zealand, the Governor would retain power of veto over any policies affecting Māori.[563]

Newcastle also encouraged Grey to establish a court or tribunal to determine Māori land title, with a view to allowing direct land dealings between Māori and settlers.[564] Newcastle acknowledged that this policy would be a departure from the treaty, a document that the instructions otherwise did not mention, but he saw the new approach as prudent given that the Taranaki War had arisen from a disputed

558. Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 98–99. McLean, William White, and others argued that appointing one rangatira from an entire district would only inspire conflict: Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 119–120.

559. Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 126–128.

560. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), pp 158–160.

561. Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 140, 146–147.

562. Newcastle to Grey, 5 June 1861, AJHR, 1862, E-1, pp 3–4; Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 140, 146–147.

563. Newcastle to Grey, 5 June 1861, AJHR, 1862, E-1, pp 3–4, 5–6; Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 140, 146–147.

564. Newcastle to Grey, 5 June 1861, AJHR, 1862, E-1, pp [95]–[96]; Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 146–147.

Government purchase at Waitara. This policy led to the introduction of the Native Land Court, which we discuss in chapter 9.[565]

Grey's arrival was a significant step in the colony's transition to responsible government, and Ministers certainly influenced Grey's plans. At the time of Grey's appointment, the views of colonial Ministers were in any case broadly in line with those of the Governor and the Colonial Office. Premier Fox and his colleagues advised the Governor that tensions between Māori and the Crown could be resolved only through a 'large and liberal policy' that would 'go to the root of the disease' (that is, the reality of Māori autonomy) instead of seeking merely to repress it. This, in Fox's view, could be achieved through 'the creation of permanent civil institutions which may include the Native race and bring both races under one uniform system of government'. Fox advised that the colonial Parliament had already legislated (through the Native Districts Regulation Act 1858) to introduce such a system, but no progress had been made.[566]

In October 1861, just weeks after his arrival, Grey had outlined a 'Plan of Native Government', setting out the framework for his new institutions. Under the plan, the 'native portions' of the North Island would be divided into 20 districts, each divided into five or six 'hundreds'. Each hundred would be administered by a local rūnanga. Two members of each rūnanga would be appointed as assessors or 'native magistrates'. For law enforcement, each hundred would have a Pākehā police officer and five Māori constables, who would be nominated by the rūnanga. The assessors, police officer, and constables would all be on the Crown payroll. All appointments would be subject to the Governor's approval.[567]

The plan also provided for the establishment of district rūnanga, comprising the assessors from the hundreds under the oversight of a Pākehā civil commissioner. District rūnanga were tasked with building and maintaining public works, overseeing schools and hospitals, hearing land disputes, and making recommendations to the civil commissioner for Crown grants to iwi, hapū, and individuals. Rūnanga would also have a say over settlement within their districts by vetting any prospective buyers and proposing conditions of any sale or lease. Each district would have the services of three Māori clergymen and schoolmasters. Whereas Gore Browne had proposed to trial local institutions in Mangonui, at a cost of £140 per year, Grey's scheme proposed some 60 Pākehā and 1,040 Māori on the colony's payroll, at an annual cost of £49,000 plus another £6,000 for buildings. All decisions made by district rūnanga would be subject to confirmation by the Governor in Council.[568]

Grey explained that his objective in proposing this system was to enable all subjects to 'participate in the benefits of law and order, be maintained in the

565. Newcastle to Grey, 5 June 1861, AJHR, 1862, E-1, pp [95]–[96]; Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 146–147.

566. Fox, 8 October 1861, AJHR, 1862, E-1, p 4; Grey, October 1861, AJHR, 1862, E-2, pp 10–12; Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 149–150.

567. Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 150–151.

568. Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 150–152, 156; O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 159.

undisturbed possession of their lands, and enjoy a perfect security for life and property'. To achieve these ends, it was desirable that '[Māori] should, in as far as practicable, themselves frame and enforce regulations suited to their various requirements, and take an active share in the administration of the government of their own country'.[569]

Although the plan was presented under the Governor's name, it was heavily influenced by executive councillors William Fox and Henry Sewell, and also by Fenton. Certainly, the existing Native Circuit Courts Act and Native Districts Regulation Act provided sufficient legislative authority.[570] Grey's biographer, James Rutherford, saw the plan as a merger of Grey's resident magistrate scheme and Fenton's 1857 rūnanga scheme, which was briefly trialled in Waikato.[571] When responding formally to the plan on Ministers' behalf, Fox particularly objected to Grey's 'rigid' restrictions on the acquisition of Māori land. Grey had proposed, among other things, that district rūnanga control the selling and leasing of Māori land once title to it had been ascertained. But Fox countered that Māori should be free to lease or sell their lands as they chose.[572] Grey conceded on this point, and it was reflected in the finalised plan.[573] Grey reassured Ministers that all he sought was the rūnanga's agreement to intended sales, and that 'no one should be allowed to grasp more land than he can use'.[574]

Grey's new institutions must be seen in the context of his rejection of a second Kohimarama Conference or any other means by which Māori could have input into colonial policy at a national level. As discussed in section 7.4, Grey preferred to 'break the Native population up into small portions' instead of creating a national focus for Māori influence. In other words, Māori could be more effectively controlled and governed (to use McLean's phrasing) if their influence was confined to local districts. Some newspaper commentators saw in the scheme a revival of Grey's earlier 'flour and sugar' policy.[575]

Professor Ward considered the new institutions as part of a tradition of attempts by colonial officials to 'outbid the King movement' by granting the day-to-day authority of Māori leaders, while incorporating them into the colony's legal framework. An 'ulterior' purpose was to encourage Māori leaders to subdivide

569. Grey, October 1861, AJHR, 1862, E-2, p 10.

570. Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 152–155; see also Orange, *The Treaty of Waitangi*, pp 161–162. The Ministers later claimed that Grey provided a bare outline and they filled in the details; Grey made the same claim in reverse: Grey to Duke of Newcastle, AJHR, 1862, E-1, sec 2, pp 15–16.

571. Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 155–156. Loveridge was citing James Rutherford, *Sir George Grey*, pp 457, 461.

572. Fox, 31 October 1861, AJHR, 1862, E-2, p 15; Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 169.

573. Fox, 31 October 1861, AJHR, 1862, E-2, pp 15–16; Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 169.

574. Fox, 31 October 1861, AJHR, 1862, E-2, p 16.

575. Loveridge, 'Institutions of Governance for Maori' (doc E38), p 164. Nene had been receiving a £100 annuity since 1847 as a reward for his role in the Northern War: O'Malley, supporting documents (doc A6(a)), vol 17, p 5648.

their lands and individualise title. While there was 'much talk of encouraging the Maoris in self-government', the ultimate purposes were to 'undermine the King movement and . . . encourage alienation of land'.[576] The reality, as colonial officials acknowledged, was that rūnanga were already operating throughout much of the North Island and exercised far greater everyday control over Māori communities than the Crown could hope to. Harnessing their energy was the only realistic means by which the Crown could hope to extend its systems of law, government, and land tenure into districts where Māori remained the majority.[577]

Dr O'Malley's view was that the new institutions 'appeared to offer self-government' even as they 'aimed at the extension of English law'.[578] The rūnanga were a 'carrot' Grey intended to use to secure allegiance from Ngāpuhi and other tribes, 'before dealing with the looming Waikato crisis head on'.[579] Dr Orange expressed a similar view. Grey's clear objective, she said, was 'to bring Maori within the compass of British authority' in order to secure 'undisputed control over the whole country'. Grey therefore established rūnanga in some territories – promising autonomy while intending the institutions as a 'training ground' for eventual Māori amalgamation into the colony's system of law and government. While he pursued peace in some districts, he prepared for war in others. 'By persuasion or by force,' Dr Orange concluded, 'Maori were to be brought to submission. It was to be a war of sovereignty on two fronts – political and military.'[580]

We agree with these historians about Grey's underlying motives. The Colonial Office, Ministers, and the Governor were all in agreement during the early 1860s that Māori – who remained practically autonomous in many parts of the North Island – must be guided towards adoption of the colony's laws, and that this could most effectively be achieved by establishing institutions that promised some degree of self-government within a framework of Crown oversight. This was an assimilationist policy, but also one that aimed to prevent or at least contain war – and one, as we will see, that Māori were capable of adapting to meet their own objectives in a manner that created potential for partnership between the rangatiratanga and kāwanatanga spheres at a local level.

7.5.2.3 *What did Grey promise Te Raki Māori in return for their adoption of the 'new institutions'?*

Grey did not consult Māori leaders while he was developing his plans for the new institutions. As Dr Kawharu observed, the plan was 'proposed not by Maori but by the Crown for Maori'.[581] Grey did, however, recognise that the new institutions could succeed only if Māori embraced them. To that end, he visited Northland in November 1861 to explain his proposals and advocate for their adoption. William

576. Ward, 'Law and Law-enforcement on the New Zealand Frontier', pp 137–139.
577. O'Malley, 'English Law and the Māori Response', p 7; O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 160.
578. O'Malley, 'English Law and the Māori Response', p 7.
579. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 159.
580. Orange, *The Treaty of Waitangi*, p 161.
581. Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 250.

B White and James Clendon, resident magistrates of Mangonui and the Bay of Islands respectively, had advised him that northern Māori generally opposed the King movement and were amenable to a new system of local government. Māori in these districts,[582] who continued to outnumber settlers by a considerable margin (5,000 Māori to 600 settlers in the Bay of Islands in 1861), were favourably disposed towards settlers and had shown some willingness to experiment with Pākehā customs when they saw benefits to doing so.[583] Furthermore, from Grey's point of view, Ngāpuhi support or at least neutrality was essential in the event that war did break out in Waikato.[584]

7.5.2.3.1 Grey's visit to the north

Grey attended a series of hui in the Bay of Islands and Hokianga, presenting his proposed system of government as the means by which Māori might make laws, share in government, and secure the economic prosperity that had been withheld from them since the Northern War.[585] At Kororāreka, he told rangatira that 'a change must take place in their government and customs'. He said the north had many rūnanga 'set up in this place and in that place, all making various laws', and the time had come to 'make use of all these existing institutions but to put them into a new and better condition.'[586]

He proposed a two-tier system under which each settlement would have its own rūnanga and would also be represented on a district rūnanga. The district rūnanga would make laws 'for many things', including 'all questions about the boundaries and ownership of lands', as well as other matters such as fencing and cattle trespass. The Government would assent to these laws, which would then be enforced by Māori constables.[587] With respect to legal disputes or breaches of peace, Māori assessors would hear minor cases, and judges would visit from time to time to hear serious cases.[588]

Grey added that all Māori officials and constables would be well paid,[589] and that as well as making laws, the distict rūnanga would make decisions about public works and development; for example, the rūnanga would decide where to build roads, hospitals, jails, and other works, and it would also decide what medical and other services were needed. In short, it would be his 'eyes and ears' in the district, since he could not make decisions about the north while he was based in Auckland.[590]

582. J R Clendon to Native Secretary, 2 October 1861, AJHR, 1862, E-7, pp 17–20.
583. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 162–163; 'Reports on the State of the Natives, AJHR, 1862, E-7, pp 14–20, 22–24.
584. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 159.
585. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), pp 160–165.
586. Grey, 6 November 1861 (cited in O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), pp 160–161).
587. Grey, 6 November 1861 (cited in O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), pp 160–161).
588. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 171.
589. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 171.
590. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), ppp 172, 174.

Grey informed those present that George Clarke senior, whom he intended to appoint as civil commissioner, would visit all kāinga to explain further details and determine 'who were to be the people to carry these plans into effect'.[591] This raised questions about whether rūnanga would be truly autonomous, and led rangatira to insist that they would make their own appointments; Grey advised them to speak with Clarke about the matter.[592]

Some rangatira expressed concerns about how workable the system might be, questioning, for example, whether 'it would be found possible to execute the law in case a great chief were the offending party'. Grey's response was that any constable who failed to carry out his duty would lose his salary. Someone asked: 'Suppose a chief should kill a policeman?' Grey responded that 'all his brother-policemen would come to his assistance, the men from constantly acting together would become a hapū and would help each other fast enough. All the police in the country would be sent to help them.'[593]

Many rangatira asked questions about the provisions for paying native officers, and some observed that 'Maori assessors were not so well paid as European magistrates'. Grey responded that 'they had not had so much work to do, but that for the future they would have more work and be better paid'.[594] While Grey sought agreement from Te Raki leaders to implement his scheme, they were more concerned with reviving Māori economic fortunes, and they therefore asked about the Crown's failure to establish a township at Kerikeri as Governor Gore Browne had promised in 1858 (see chapter 4).[595] Tāmati Pukututu told the Governor:

> Ka tono atu ahau ki a koe ko nga tono o mua. Homai he Pakeha ki au kia tini me etahi Apiha ano hoki. I tukua atu ai e ahau te Kawakawa, he mea kia nohoia e te Pakeha. Tukua mai etahi Pakeha hei hoa moku. Ka mea atu nei ahau ki a koe; ko to aroha tenei ki au, ko etahi Pakeha, tukua mai e koe ki au: hohorotia mai kei wha mate ahau, kia kite ai ahau i o Pakeha. E hoa, e Kawana Kerei, homai e koe he Pakeha maku.
>
> I will ask you for the things which I have asked you for before. Give me plenty of Pakehas, and also some officers. I gave the Kawakawa in order that it should be occupied by Europeans. Send me some Pakehas to be my friends. I now say to you, shew your love for me by giving me Pakehas, and do so quickly before I die, that I may see your Pakehas. Friend, Governor Grey, give me Pakehas.[596]

591. Grey, 6 November 1861 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 172).

592. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 173.

593. Grey, 6 November 1861 (cited in O'Malley, supporting papers, doc A6(a), vol 6, p 1888). As Armstrong and Subasic note, this was not a particularly satisfactory answer given that 'the "police hapū" might well find itself engaged in a civil war with the hapū of the offending chief': 'Northern Land and Politics: 1860–1910' (doc A12), p 173.

594. Grey, 6 November 1861 (cited in O'Malley, supporting documents, doc A6(a), vol 6, p 1886).

595. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), pp 162–165.

596. 'Speeches of the Ngapuhi Chiefs to Governor Grey at the Meeting at Kororareka', *Maori Messenger/Te Karere Maori*, 15 January 1862, p 11; O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), pp 162–163.

This, then, became the lever that Grey would use to persuade Māori to accept his scheme. In response to requests for settlement, a township, and increased commerce, Grey promised to make arrangements for their introduction. He insisted that land titles must be determined first – but had promised that district rūnanga could take care of that.[597] At Kerikeri the following day, rangatira presented Grey with two letters concerning the promise to establish a township. The first, from 'Nga rangatira o Ngapuhi', read:

> Manaakitia e koe nga kupu a tou hoa a Kawana Paraone; mau e whakamana aianei pu ano. Kaua, e pa e Kawana, e waiho kia roa, kia whakanohoia e koe he Taone ki konei. Kua oti te ruri nga pihi whenua e takoto nei; heoi, he tatari kau atu ta matou ki te kupu. Homai he Pakeha, homai he taonga, homai he mahi; ara, ma te Ture atawhai o te Kuini e whakakotahi nga Iwi e rua.

> Respect the word of your friend Governor Browne, and carry it out now at once. Do not delay O Governor to establish a town here: the land has been surveyed, and we are only waiting for the word. Give us Pakehas; give us wealth; give us employment, and let the kind law of the Queen unite the two races.[598]

Another letter from Te Hikuwai and other rangatira also asked Grey to keep his predecessor's promise, and Wiremu Hau told the Governor directly: 'Kua he pea, no te mea, ko ta matou kua oti, ko tana kihai i te oti.' *Te Karere Maori* translated this as: 'there is perhaps some error, for we have performed our promise, whereas his [Gore Browne's] is not yet performed.'[599]

Grey did not respond directly. Instead, he turned the discussion back to his proposals, insisting that economic development had been retarded in the north because there was no authority to make and enforce laws. Grey continued, 'We Europeans are richer than you, because we have laws or regulations made and enforced by ourselves. We set apart one class of men to make the laws, and another to enforce them.'[600]

The rūnanga, he said, would provide for towns, roads, schools, hospitals, and 'Europeans to live with you'.[601] In short, whatever Māori were seeking, 'The

597. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), pp162–163; Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p172.

598. 'Speeches of the Ngapuhi Chiefs to Governor Grey at the Meeting at Kerikeri', *Maori Messenger/Te Karere Maori*, 15 January 1862, p16; O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p163.

599. 'Speeches of the Ngapuhi Chiefs to Governor Grey at the Meeting at Kerikeri', *Maori Messenger/Te Karere Maori*, 15 January 1862, p18; O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), pp163–164.

600. Sir George Grey, 6 November 1861 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p174).

601. Sir George Grey, 6 November 1861 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p174).

runanga would provide for all these wants.'[602] As Dr O'Malley observed, this was Grey's way of 'dodging responsibility' for the Crown's failure to keep its earlier promise of a Kerikeri township:

> Essentially, Grey placed the onus back onto northern Māori to subscribe to and actively support his proposals for indirect rule through state-sanctioned rūnanga as the cost of gaining the townships so desperately desired by the tribes. Yet as Wi Hau had noted, Māori had already fulfilled their part of the bargain by agreeing to provide lands for the proposed settlements. Grey, at his slippery best, had shifted the goalposts significantly.[603]

Grey furthermore insisted that rūnanga would become a permanent safeguard for Māori rights, as they could not be set aside at the whim of the Governor or Government. According to the official record,

> Sir George Grey said that he would be putting up for them a shelter and refuge for all times. It was far better that they should make laws for themselves, than that he should do it for them by his own will. If Europeans came to settle in their country then they would be in their runangas too and they would consult together. Laws would be made with the consent of both Governor and runanga. Thus a strange Governor could by no possibility make laws in his ignorance that would injure them, for a law once made could only be altered by the consent of both. A new Governor could not break down their laws, but they would remain a safeguard for them and for their children forever.[604]

As Armstrong and Subasic noted, Grey's comments held out the prospect 'that the Runanga would, as settlement developed, administer the affairs of both races working together in some kind of social and political partnership with the settlers'. This 'highly desired process of settlement would, as Grey had confirmed at Kororareka on the previous day, not only be encouraged by the establishment of the Runanga but would be directly facilitated by the Crown.'[605] Again, rangatira expressed concern about how the rūnanga would be appointed. Grey left his answer for another hui, the following day at Waimate. There, he said that hapū would be 'consulted' on the appointment of assessors, and that only 'good and deserving men' would be appointed.[606]

602. 'Memorandum of a conversation between Sir George Grey and the Maori chiefs assembled at Kerikeri', 7 November 1861 (cited in O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 174).

603. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 165.

604. 'Memorandum of a conversation between Sir George Grey and the Maori chiefs assembled at Kerikeri', 7 November 1861 (cited in O'Malley, supporting documents (doc A6(a)), vol 6, pp 1890–1891); Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 174–175.

605. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 175.

606. Grey, 8 November 1861 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 176).

At his final hui at Herd's Point (Rawene), Grey went into more detail about the role of district rūnanga in resolving land disputes. He asserted that the rūnanga would have the final say on all disputes, including those between Māori and settlers, and between Māori and the Crown:

> If any dispute about land should hereafter arise between the Government and the natives, the Governor would put himself into the same position as a Maori chief, and would leave the matter to be decided by the runanga and consider himself bound by that decision whether favourable or not. Thus there would be one law for all persons whether native or European.[607]

Grey also revealed that the district rūnanga would be appointed from among the assessors and would have a European (the civil commissioner) as president; these details had not been explained in the Bay of Islands hui. Once rūnanga were operating, he said, there would no longer be 'any fear of wrongs and disputes between natives and Europeans', and the Government would 'therefore no longer keep Europeans out of the Hokianga district but would encourage settlement . . . [a]s soon as the boundaries were fixed'. Grey also assured those present that 'a town would necessarily spring up in the Hokianga district' once the new institutions were established. Every member of the rūnanga would have a house in the Hokianga, and there would also be a doctor and a schoolmaster, all creating demand that would attract European merchants to the district. The tensions in Waikato would not in any way delay the establishment of a town, Grey said.[608]

Māori at the hui were reportedly supportive of his proposed institutions, but even more pleased with his promise that towns would be created.[609] As Dr O'Malley observed,

> By effectively linking support for the rūnanga scheme with the establishment of townships the governor thus managed to secure the agreement he sought for his proposals. He had done so, however, only at the cost of greatly heightening expectations among northern Māori as to the benefits the scheme might be expected to bring them.[610]

The promises Grey made to northern rangatira were in our view highly significant. The Governor proposed a new system of local government in partnership with the Crown, which explicitly built on the district's existing network of local rūnanga. If Māori adopted his proposals, he said, they would benefit from settlement (including a township), as well as schools, hospitals, and medical services.

607. Grey, 12 November 1861 cited in (Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 177).

608. Grey, 12 November 1861 (cited in O'Malley, supporting documents (doc A6(a)), vol 6, pp 1896–1897); Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 165–166; Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 177–178.

609. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 178.

610. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 166.

The business of making and enforcing laws, governing the district, and guiding public works and economic development would be delegated to them. Pākehā, including the Governor himself, would be subject to district rūnanga and their laws. Furthermore, the proposed new system would be established permanently. For Te Raki Māori, the Governor seemed to be promising the partnership they had been seeking for many years. The test would be in what the Crown delivered.

7.5.2.3.2 Grey's circular letter to northern rangatira

In December, Grey reported to the Secretary of State for the Colonies that his visit had been successful and that he hoped to establish the new institutions for all territories north of Auckland within two months. He hoped also that the example set by the north would influence other Māori to adopt the new institutions.[611]

Grey took some initial steps to keep his promises, transferring large tracts of Crown land in the north to the Auckland Provincial Council so it could be opened for settlement, and preparing a plan for the establishment of townships on Crown lands, with schools, hospitals, administrative centres, and allotments for the principal rangatira. He also considered the possibility of assisting immigrants on condition that they settle in these townships. Although Grey's plans were ambitious and potentially costly, he regarded this as a temporary issue: as economic development occurred, he believed, Māori and settlers alike could pay land and income taxes to defray the costs of local government and public works.[612]

To help explain his scheme, Grey issued a circular, printed in Māori and English, to be distributed in the north and elsewhere (see the sidebar on page 1059). We have a copy of the English text only, from which we draw the quotation following. In this circular, Grey explained his intention that all subjects, Māori and non-Māori, 'should have the benefits of law and order', including protection from harm, and secure enjoyment of lands and possessions. Again, Grey drew an explicit link between English law and prosperity:

> The Europeans in New Zealand, with the help of the Governor, make laws for themselves, and have their own Magistrates; and, because they obey those laws, they are rich, they have large houses, great ships, horses, sheep, cattle, corn, and all other good things for the body. They have also Ministers of Religion, Teachers of Schools, Lawyers, to teach the law; Surveyors, to measure every man's land; Doctors, to heal the sick; Carpenters, Blacksmiths, and all those other persons who make good things for the body, and teach good things for the souls and minds of the Europeans. It is because they have made wise and good laws, and because they look up to the Queen as the one head over all the Magistrates, and over all the several bodies of which the English people consists.[613]

611. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 167.
612. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 181.
613. 'Native Policy', *Daily Southern Cross*, 13 December 1861, p 3.

Grey's desire was that Māori 'should do for themselves as the Europeans do'. He had therefore determined to assist Māori in establishing a system of law within their districts, which the Crown would fund 'till such time as the Maories shall have become rich, and be able to pay all the expenses themselves'. We have already set out the structure of Grey's new institutions, including the functions of district and local rūnanga, and the roles of civil commissioners, assessors, and other officers. Grey's circular provided some elaboration. It clarified that the Governor would have final say over the appointment of assessors and over any bylaws passed by district rūnanga.[614]

In fact, the Governor already had oversight of all regulations being produced by rūnanga or otherwise. The Native Districts Regulation Act 1858 did not provide for rūnanga to make regulations for native districts but provided for the Governor in Council (that is, the Governor acting as part of the colony's Executive Council) to make those regulations, so long as the Governor was satisfied that the regulations had the 'general assent' of the affected Māori.[615] Grey's circular observed that the Governor also approved all laws passed by the General Assembly. For provincial councils, the power of assent was delegated to the provincial superintendent, although the Governor could disallow the Bill within three months of it passing.[616]

Regarding land, the circular said that rūnanga would 'decide all disputes' and should establish a register of ownership. Grey had promised that the Crown would be subject to rūnanga decisions on land, but this was not made explicit.[617] The *Daily Southern Cross* noted some ambiguities in the plan. In particular, in the newspaper's view, it was not clear whether the proposed land register would record individual or collective interests; nor was it clear what role the rūnanga would play in administering land transactions between Māori and settlers. The newspaper also expressed concern that there was no national assembly to ensure consistency across the country in terms of rulings about land.[618]

Grey's circular presented the establishment and development of this new system of government as a long-term project. It would be 'a work of time, like the growing of a large tree', beginning with seeds, then trunk, then branches, then leaves and fruit. The growth of a tree was slow, 'and so will it be with the good laws of the Runanga'. The Governor was planting a seed by recognising the rūnanga and appointing commissioners and assessors, and Māori must then tend and cultivate it. By this work, he promised, peace would be brought to the country, and 'the children of the Maori . . . will grow to be a rich, wise and prosperous people, like

614. 'Native Policy', *Daily Southern Cross*, 13 December 1861, p 3; see also Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 183–185.
615. Native Districts Regulation Act 1858, ss 2, 6.
616. New Zealand Constitution Act 1852, ss 28–30.
617. 'Native Policy', *Daily Southern Cross*, 13 December 1861, p 3; see also Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 183–185.
618. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 187.

The Structure and Functions of Grey's New Institutions

This is the English language text of Governor Grey's circulater letter to Māori leaders explaining his 'new institutions':

1. The parts of the Island inhabited by Maories will be marked off into several districts, according to tribes or divisions of tribes, and the convenience of the natural features of the country. To every one of these districts the Governor will send a learned and good European to assist the Maories in the work of making laws and enforcing them; he will be called the Civil Commissioner. There will be a Runanga for that district, which will consist of a certain number of men who will be chosen from the Assessors. The Civil Commissioner will be the President of that Runanga to guide its deliberations, and if the votes are equal on any matter, he will have a casting vote to decide. This Runanga will propose the laws for that district, about the trespass of cattle, about cattle pounds, about fences, about branding cattle, about thistles and weeds, about dogs, about spirits and drunkenness, about putting down bad customs of the old Maori law, like the *Taua*, and about the various things which specially concern the people living in that district. They will also make regulations about schools, about roads, if they wish for them, and about other matters which may promote the public good of that district. And all these laws which the district Runangas may propose will be laid before the Governor, and he will say if they are good or not. If he says they are good, they will become law for all men in that district to which they relate. If he says they are not good, then the Runanga must make some other law which will be better. This is the way with the laws which the Europeans make in their Runangas, both in New Zealand and in the great Runanga of the Queen in England.

2. Every district will be subdivided into Hundreds, and in each of these there will be Assessors appointed. The men of that district will choose who shall be Assessors, only the Governor will have the word to decide whether the choice is good or not. The Magistrate, with these Assessors, will hold Courts for disputes about debts of money, about cattle trespass, about all breaches of the law in that district. They will decide in all these cases.

3. In every Hundred there will be Policemen, and one Chief Policeman, who will be under the Assessors. These Policemen shall summon all persons against whom there are complaints before the Court of the Assessors, and when the Assessors shall have decided, the Policeman will see that the orders of the Assessors are carried out. All fines which shall be paid shall be applied to some public uses. The Commissioner or Magistrate will keep this money till it is required.

4. The Runangas will also be assisted in establishing and maintaining Schools and Teachers; sometimes Europeans, sometimes Maories, will be appointed. The Maories ought to pay part of the salary of the School Teacher, the Governor will pay the rest.

5. Where the Runangas wish to have [a] European Doctor to live among them, the Governor will endeavour to procure one to reside there, and will pay him so much salary as may make him willing to go to that work. The Doctor will give medicine to the Maories when they are sick, and will teach them what things are good for the rearing of their children, to make them strong and healthy, and how to prolong the lives of all the Maories by eating good food, by keeping their houses clean, by having proper clothes and other things relating to their health. This will be the business of the Doctor. But all those who require the services of the Doctor will pay for them, except such as the Runanga may decide to be too poor to do so.

6. About the lands of the Maories. It will be for the Runangas to decide all disputes about the lands. It will be good that each Runanga should make a Register, in which should be written a statement of all the lands within the district of that Runanga, so that everybody may know, and that there may be no more disputings about land.

This, then, is what the Governor intends to do, to assist the Maori in the good work of establishing law and order. These are the first things: – the Runangas, the Assessors, the Policeman, the Schools, the Doctors, the Civil Commissioners to assist the Maories to govern themselves, to make good laws, and to protect the weak against the strong. There will be many more things to be planned and to be decided, but about such things the Runangas and the Commissioners will consult.[1]

1. Governor Grey, 'These are some of the thoughts of the Governor, of Sir George Grey, towards the Maories at this time', circular, December 1861, printed by W C Chisholm; English text extract reproduced in 'Native Policy', *Daily Southern Cross*, 13 December 1861, p 3.

the English and those other Nations which long ago began the work of making good laws, and obeying them.'[619]

The success of the new institutions and, by extension, Te Raki Māori faith in their partnership with the Crown would depend to a significant degree on whether these promised benefits came to fruition.[620]

619. 'Native Policy', *Daily Southern Cross*, 13 December 1861, p 3; see also Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 183–185.

620. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 179–180.

7.5.2.4 *How did the new institutions operate in practice?*

7.5.2.4.1 Establishment of the districts, 1861–62

Following his tour of the north, Grey acted swiftly to bring his scheme into operation. On 7 December 1861, he issued a proclamation establishing the Bay of Islands native district under the Native Circuit Courts Act 1858 and the Native Districts Regulation Act 1858. George Clarke senior was confirmed as civil commissioner.[621]

In February 1862, after some protest from the resident magistrate, William B White, the Governor established a separate Mangonui district with him as civil commissioner. White had argued that, due to his long experience and personal influence in the district, it would be in the best interests of Māori and the Government if he retained independent management of Mangonui rather than serving under Clarke, who was unknown in the area.[622]

Hence, the Mangonui district comprised all territories north of a line from Herekino to Maungataniwha to the southern heads of Whangaroa Harbour. The Bay of Islands district comprised all territories from there south to a line between Maunganui Bluff and Tutukaka (near Ngunguru, just north of Whāngārei). In turn, the Bay of Islands district was divided into three 'hundreds': Kororāreka, with Robert Barstow as resident magistrate, encompassed the east coast from Tutukaka to Okiato; Hokianga, with James Clendon as resident magistrate, encompassed territories from Maunganui Bluff to Herekino and inland to Maungataniwha and the head of the Waimā River; Waimate encompassed the remaining territories, and Edward Williams was the resident magistrate.[623] Although Te Hemara Tauhia had already selected his rūnanga, Mahurangi was not established as a native district, presumably on the basis that much of its land had already been sold to the Crown.[624]

Dissatisfaction with the district boundaries was expressed by some Hokianga and Bay of Islands rangatira, including Wī Tana Pāpāhia on behalf of Te Rarawa at Hokianga, among whom he was the principal rangatira, not least because members of Te Rarawa were included in the Bay of Islands district, and some Whangaroa Ngāpuhi were included in Mangonui.[625]

7.5.2.4.2 The first Bay of Islands rūnanga meeting, 1862

During December, while boundaries were being finalised, Clarke visited settlements throughout the Bay of Islands district, and White visited those in Mangonui. Williams also travelled throughout the Waimate hundred, and Barstow visited coastal territories at Te Rāwhiti and Waikare. All reported that they encouraged Māori to select the rangatira of greatest authority and influence for the district rūnanga, and that the rangatira they approached insisted on consulting

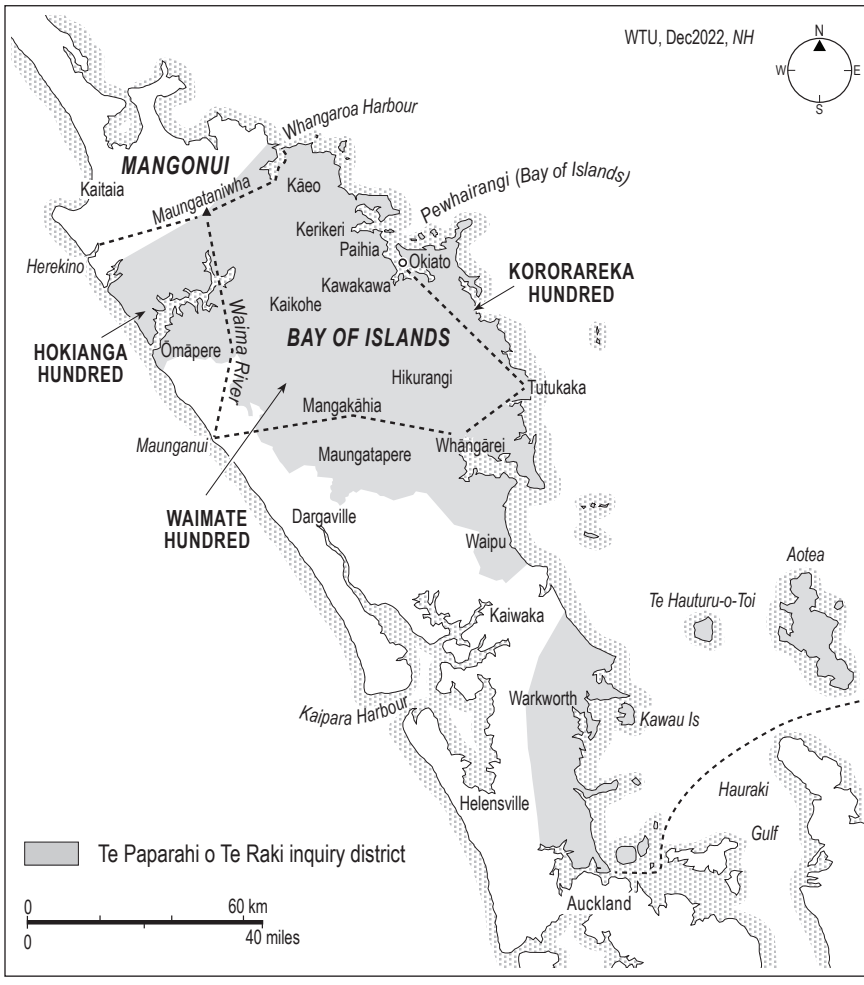
621. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 188–190; Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 165–166.

622. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 188–190.

623. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 188, 190; 'Orders in Council', AJHR, 1862, E-6, orders 19–23.

624. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 188.

625. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 168.



Map 7.1: the Mangonui and Bay of Islands native districts.

their people before accepting nomination.[626] But the officials also sought to shape membership to suit the Crown's purposes and therefore wanted leaders they considered 'useful'.[627] Barstow claimed that no chief in the Te Rāwhiti or Waikare hapū possessed 'sufficient authority to exercise any effectual control', so 'broken' were these hapū; they therefore put forward no names.[628]

626. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 193, 197, 199–200.

627. 'The First Maori Parliament or District Runanga', *Maori Messenger/Te Karere Maori*, 23 May 1862, p 14.

628. Barstow to Attorney-General, 15 March 1862, AJHR, 1862, E-4, p 3; Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 193, 194, 200.

The Bay of Islands rūnanga held its first meeting at Waimate from 25 to 28 March 1862, with about 500 Māori in attendance. *Te Karere Maori* acknowledged this as the country's first rūnanga and described it as a 'Maori Parliament'.[629] Clarke and Williams went to considerable lengths to ensure the hui would be conducted in the manner of an English council. They held the meeting inside, despite the large number in attendance, and schooled the rangatira in formal English meeting procedures – in writing out, moving, and seconding motions; printing meeting papers; recording minutes; and following standing orders. Clarke reported that the meeting had been held indoors because 'the Chiefs . . . had been given to understand that their assembly was to be after the model of English councils'; and

> moreover, had the meeting been held outside, we could have had no control over the Chiefs, who would (whether members or not) have made their speeches as they pleased; and would have been as disorderly as they usually are at their own meetings; as it was, we had order and regularity, and a precedent for future Runangas.[630]

Another important feature was the exclusion of women from the proceedings. Hanson Turton, then resident magistrate, noted of rūnanga that 'members of the Runanga are chosen . . . by a few leading men, very similar to the selection of our own Committees; and thus has risen up in every village a kind of little oligarchy'.[631] Certainly, the exclusion of women from rūnanga had been part of the vision of the Governor and Ministers for the new institutions from the start. Responding to Grey's proposed plan on behalf of Ministers, Fox noted: '[t]he Runanga as at present constituted appears to be little else than a gathering of the people of a particular village or hapu. Let it continue so, with the limitation only imposed that none but adult males take part in its deliberations.'[632]

This suggestion, Grey affirmed, was 'quite in accordance with my views'.[633] Dr O'Malley suggested that, subsequently, Māori women would be excluded from the rūnanga on an ongoing basis as Māori observed 'the Pakeha practice of the time whereby women were not eligible to vote for or sit on local bodies or the General Assembly'.[634]

In February 1862, Clarke opened the Bay of Islands rūnanga with a long speech, in essence repeating Grey's previous promises that peace, prosperity, and unity between Māori and settlers would be natural consequences of Māori adopting this new system of law. He also determined the agenda, which for this first meeting mainly concerned administrative matters such as the membership, salaries,

629. 'The First Maori Parliament or District Runanga', *Maori Messenger/Te Karere Maori*, 23 May 1862, p 13; Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 196.
630. 'The First Maori Parliament or District Runanga', *Maori Messenger/Te Karere Maori*, 23 May 1862, p 14; Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 197.
631. Turton to Native Secretary, 14 October 1861, AJHR, 1862, E-7, p 9.
632. Fox, 31 October 1861, AJHR, 1862, E-2, p 13.
633. Fox, 31 October 1861, AJHR, 1862, E-2, p 16.
634. O'Malley, 'Runanga and Komiti' (doc E31), p 294.

selection of wardens and constables, and construction of a whare rūnanga.[635] Members of the rūnanga appear to have been willing to experiment with the new system, in the hope that it would bring the promised benefits. With Williams' assistance, they drafted and approved a series of motions proposing to resolve any future disputes through assessors and magistrates in accordance with the 'English law' that they were now charged with framing.[636]

While this general principle was easily disposed of, representation was a major topic of discussion. Prior to the meeting, the Governor had approved 10 members: Nene (Ngāti Hao), Arama Karaka Pī (Te Māhurehure), Āperahama Taonui (Te Pōpoto), Rangatira Moetara (Ngāti Korokoro), Wiremu Hau (Ngāi Te Whiu), Hēmi Marupō (Ngāti Kawa), Hira Te Awa (Ngāti Tautahi), Kingi Wiremu Tāreha (Ngāti Rēhia), Maihi Parāone Kawiti (Ngāti Hine), and Hāre Hongi Hika (Ngāti Uru of Whangaroa). While these were undoubtedly rangatira of considerable mana, most of them were from territories around Kaikohe, inner Hokianga, and the Bay of Islands.[637]

Conspicuous by their absence were representatives from northern Hokianga and eastern coastal territories. Members considered the rūnanga 'far too small' to be representative and asked that their number be doubled. In particular, Maihi Parāone raised concerns that Kororāreka was entirely unrepresented. Clarke had power to appoint only two more members, but the rūnanga nominated three and asked for several more. Clarke regarded only one of the nominees, Wī Tana Pāpāhia of Te Rarawa, as worthy of inclusion, and he brought some northern Hokianga representation to the table.[638]

Clarke did not regard the others, Ruhe of Pukenui and Piripi Korongohi of Tautoro, as sufficiently 'useful and influential' to warrant inclusion – but after some initial reluctance, he approved these two as well, because they had been nominated by Nene and Maihi Parāone respectively, and the Crown could not afford to upset either (Nene had threatened to resign if Ruhe was not accepted).[639] Clarke's official report acknowledged that representation would continue to be a source of 'great difficulty and dissatisfaction' if not resolved. He therefore recommended that the Governor increase the size of the rūnanga to at least 15 and allow rangatira to make further 'honorary' appointments at their own cost.[640]

His concerns proved prescient, as other complaints soon emerged and continued throughout 1862 and 1863. Whāngāpē Māori had no assessors, so resolved

635. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 197–198, 201.
636. 'The First Maori Parliament or District Runanga', *Maori Messenger/Te Karere Maori*, 23 May 1862, pp 18–19; Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 201.
637. 'The First Maori Parliament or District Runanga', *Maori Messenger/Te Karere Maori*, 23 May 1862, pp 13, 18; Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 197.
638. 'The First Maori Parliament or District Runanga', *Maori Messenger/Te Karere Maori*, 23 May 1862, pp 14–15.
639. 'The First Maori Parliament or District Runanga', *Maori Messenger/Te Karere Maori*, 23 May 1862, pp 14–15; Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 197–198.
640. 'The First Maori Parliament or District Runanga', *Maori Messenger/Te Karere Maori*, 23 May 1862, pp 14–15.

to exercise their collective authority without reference to the rūnanga. Clendon raised concerns about other Hokianga communities that lacked representation, but his superiors made no concessions.[641] Maihi Parāone continued to raise concerns about Kororāreka throughout 1862, writing to Fox on 22 July:

> Friend, you supposed probably that the Ngapuhi was one tribe and therefore should have but one Runanga. It is true that the Ngapuhi are united in favour of the Queen's law, but the laws of our fathers still remain, hence the saying of the Ngapuhi 'Ngapuhi kowhao rua'[.] Ngapuhi of [one] hundred taniwhas one chief lowers and another rises. The letters that I sent to the Governor and you were on this subject. I proposed that the Ngapuhi (District) should be divided into two, the Kawakawa, Kororareka, Waiomio, Te Karetu, Waikare and Whangaruru forming one division, thence on to the Whananaki, Tutukata [*sic*], Ngunguru, Pataua, Taiharuru. [W]hat I said was that I should stand among my own people. If the Governor and you say there is to be but one, well and good . . .[642]

He ultimately held his own hui to address the issue, nominating six rangatira; Barstow approved none and instead drew up his own nominations, threatening to resign if the Government did not accept his authority over Maihi Parāone's. One of the rangatira he recommended, Mangonui Kerei, was appointed and then quickly dismissed due to alleged Kīngitanga sympathies (his sister Matire Toha was married to Kati, brother of the first Māori King Te Wherowhero).[643]

Another difficulty that quickly arose was inequality in the salaries offered to members of the rūnanga. Nene, mistakenly assumed by the Crown to have authority throughout Ngāpuhi territories, was offered £22 10s a year, more than double that of any other member. Members agreed that all salaries should be set at £20, with some flexibility for those who worked particularly hard.[644]

After four days, much of it concerned with administrative matters, the rūnanga ended. Clarke reported that he had considerably more business planned, but the rangatira 'began to show symptoms of uneasiness, and I found it would be impossible to keep them in good humour for business much longer'. Clarke hoped that this initial meeting had at least introduced the rangatira to the duties they would be carrying out, though it was 'only a beginning'.[645]

In Dr O'Malley's view, this was 'not a good start' for the new system. While it 'purported to offer northern Māori extensive powers in the management of their

641. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 168; Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 202–203.

642. Maihi Parāone Kawiti to Fox, 22 July 1862 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 203).

643. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 203–204.

644. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 197, 200; 'The First Maori Parliament or District Runanga', *Maori Messenger/Te Karere Maori*, 23 May 1862, p 19.

645. 'The First Maori Parliament or District Runanga', *Maori Messenger/Te Karere Maori*, 23 May 1862, pp 14–15.

own affairs', Crown officials retained the final say.[646] Dr Kawharu also noted the extent of Crown control over matters such as membership and meeting procedures.[647] Many elements of the latter were 'not sourced in tikanga or traditional leadership principles', including the Crown's role in selecting and approving members of the rūnanga, the payment of salaries, fixed-term appointments, and the processes for conducting meetings and approving regulations. Most importantly, she noted, the rūnanga created a level of decision-making that was outside the direct control of hapū.[648] In her view, the rūnanga were established 'essentially to be tools of the Crown', not of Māori.[649] Nonetheless, just as the Crown sought to mould the rūnanga to its own purposes, so too did rangatira, who 'saw runanga holistically, supporting the operation of customary authority in several areas – education, health, justice and land'.[650]

Some Māori groups observed the rūnanga as chiefly an instrument of the Crown, intended to impose British law, and took it upon themselves to set up mirror institutions. At Kororāreka, an alternative rūnanga was established in 1863 by Turau, one of Nene's relatives. According to Barstow, this new rūnanga 'entirely repudiates the Government runanga at Waimate'.[651] He dismissed this as the work of a disaffected chief of poor character. A similar alternative rūnanga was set up in Mangonui, which we discuss later. In the view of Armstrong and Subasic, these alternative rūnanga were 'manifestations of a desire of some sections of Maori in those places to maintain a degree of control over their affairs, and resist any trammelling or substitution of their own authority by that of the Magistrates'.[652]

7.5.2.4.3 The roles of resident magistrates

Questions of membership and salaries were not the only issues to beset the fledgling system. Magistrates found that Māori were not as amenable to British legal values as they had hoped. Clarke therefore urged the magistrates to oversee the assessors' courts; to use advice, influence, and training to 'secure the objects of the Government Policy' and 'prevent incorrect or unjust decisions of your Native Assessors who from ignorance and partiality, are continually erring and presuming upon powers quite beyond their Jurisdictions'. He also encouraged the magistrates wherever possible to avoid court hearings on matters that did not conform to British ideas of justice, such as mākutu and breaches of tapu, and instead act as neutral peacemakers and meditators outside of court. If such cases came to court

646. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 169; Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 202.
647. Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 254.
648. Kawharu, 'Te Tiriti and its Northern Context' (doc A20), pp 257–259.
649. Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 254.
650. Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 253.
651. Barstow to Civil Ccivil ommissioner, 5 January 1863 (cited in Armstrong and Subasic (doc A12), p 232).
652. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 233.

and it refused to rule, he warned, magistrates would lose all influence, and Māori would take matters into their own hands.[653]

In October 1862, Barstow acknowledged that he had held very few formal court hearings in the Kororāreka hundred, in essence because Māori were not interested. He had visited communities and on occasion been able to advise or mediate in disputes, but any attempt to impose his own decision would be futile since he had no means of enforcing it and would 'render it a mockery and myself ridiculous'.[654] As Armstrong and Subasic observed, the magistrates 'understood the limits of their authority and influence, and their need to work through existing tribal structures'.[655]

Clarke also understood that treaty obligations were involved, advising that 'any Native custom not immoral or excessive in its demands should be entertained by the Bench as being in accordance with the Treaty of Waitangi, which guarantees to the Natives such customs'.[656] Clarke's hope was that the magistrates' influence would gradually increase, leading to eventual Māori adoption of the colony's legal system.[657] His admission that the treaty protected the exercise of customary law is significant in our view. It demonstrates that at least one senior Crown official was aware that article 2 rights extended well beyond mere possession of land and was advocating for those rights to be acknowledged in the colony's common law.

Clarke was less tolerant of informal rūnanga, which had existed before the new institutions were adopted but now, he believed, threatened the Crown's scheme. Informal rūnanga, he said, should be controlled or suppressed, lest they become 'a complete nuisance' operating in opposition to the assessors' and magistrates' courts. He therefore instructed magistrates to remind Māori communities '[t]hat self constituted Runangas claiming any Judicial or executive functions are illegal', and '[t]hat there can be no legal Runanga such as is constituted by the Government'. If they could not be suppressed altogether, he continued, they should be co-opted into the official system and so 'brought under regulations which will render them useful as well as harmless'.[658]

Clarke sent another letter to magistrates in December, instructing them that assessors' courts should be established at Waimate and in the other hundreds, in the same locations as village rūnanga. These were aimed at putting an end to all 'irregular and inconvenient' methods of settling disputes among Māori and 'giving the Native a respect for Law and order'. This object could be achieved only through the agency of rangatira: 'theirs must be the working, yours the guiding

653. Clarke to Williams, 1 August 1862 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 204–207).

654. Barstow to Attorney-General, 13 October 1862 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 193).

655. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 193–194.

656. Clarke to Williams, 1 August 1862 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 207).

657. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 206–207.

658. Clarke to Williams, 1 August 1862 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 207–208).

and directing hand'.[659] The same month, Williams wrote to the Waimate rūnanga, saying it was their duty to keep peace, 'teach the people to respect the law . . . induce them to send their children to school, teach them habits of industry, and endeavour to find out a road by which the property of the people may be advanced according to Pakeha custom'. Rūnanga could play a key role by encouraging Māori to adopt Pākehā habits; for example, fencing their properties, building houses in the Pākehā style, and furnishing those houses with 'tables, chairs, tea cups, plates, knives and forks'.[660] As Armstrong and Subasic observed, this left little doubt that Crown officials saw the rūnanga as agents of assimilation.[661]

7.5.2.4.4 The first and second Mangonui meetings, 1862–63

The Mangonui district rūnanga held its first meeting in late July and early August 1862, with about 400 to 500 Māori present. The rūnanga had seven members, including Pāora Ururoa of Whangaroa. As with the Bay of Islands rūnanga, this inaugural meeting was mainly concerned with administrative matters, though it did address several questions of substance. It resolved to discourage taua muru and encourage the new legal system to be adopted. Under White's influence, the rūnanga also resolved to encourage people to settle in villages, where services could more easily be delivered. Other resolutions concerned cattle trespass and fencing, a triennial census, schools, and health.[662]

The Mangonui rūnanga also considered two land disputes: one over a boundary, and the other concerning the allocation of payment from a northern Whangaroa block sold to the Government. The latter resulted in considerable debate about the relative interests of Ngāpuhi and Te Rarawa hapū, but was nonetheless resolved amicably.[663] White reported that he had sought to involve all rangatira in the decision-making process, not only those who had been formally appointed. This ensured that the decision had broad support, while the senior rangatira had 'little real power' when acting separately from their people.[664] Settler newspapers were less sanguine: reporting on the fencing issue, the *Aucklander* newspaper 'declared with dread' that 'it only wants the Governor's approval to subject Europeans settled in that district to Maori law administered by Maoris'.[665]

These comments highlight the essential tensions at the heart of the rūnanga system. Whereas the Crown intended it to lead Māori towards adopting English law, Māori understood it as providing for the exercise of Māori law under the sanction

659. Clarke to Magistrates, December 1862 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 209–210).

660. Edward Williams to Waimate rūnanga, 1 August 1862, 'Letters', *Maori Messenger/Te Karere Maori*, 16 December 1862, p 16; Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 210–211.

661. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 210.

662. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 211–214.

663. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 211–214.

664. White to Native Minister, 12 August 1862 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 215).

665. *Aucklander*, 7 October 1862 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 214).

of the Crown. The system was workable so long as Crown officials limited their roles to guidance and mediation, but began to crack whenever the Crown became more assertive.[666]

These tensions were evident in several land disputes resolved by Hokianga assessors during 1862 and 1863. One such dispute, in May 1862, threatened to erupt in armed conflict until the conflicting parties agreed to place their dispute before the Hokianga rūnanga. A successful outcome ensued, largely because the magistrate (Clendon) left it to the assessors to resolve themselves.[667]

However, another dispute, concerning lands between Māwhe and Kaikohe, was harder to resolve owing to the influence of Crown agents. The essence of this dispute was that Wiremu Hau attempted to sell lands that were contested by Ngāti Rangi, in breach of an agreement brokered by the assessors. The Bay of Islands rūnanga considered the case and achieved a temporary resolution, but tensions erupted again soon afterwards. Ngāti Rangi blamed the Crown's land purchase agent, Henry Tacy Kemp, who in their view was encouraging Hau to persist with the sale. Clarke, recognising that Māori confidence in the Crown was at stake, instructed Kemp to desist until the matter had been resolved in the Native Land Court, which was soon to be established in the district under the Native Lands Act 1862. Thus, the Crown's own officials undermined rulings already made by assessors and rūnanga. Armstrong and Subasic identified other occasions in which Kemp's activities usurped assessors' authority.[668]

The second Mangonui district rūnanga was held at Ōruru in January 1863. This resolved several land disputes and considered a range of other matters, including the provision of schools and roads. Rangatira expressed concern that the Crown had made no attempt to build roads in the district and offered to point out possible routes and make lands available. The *Daily Southern Cross* observed that this would become a major complaint if not addressed.[669]

7.5.2.4.5 The second Bay of Islands meeting, 1863

The second Bay of Islands district rūnanga was held soon afterwards, in March 1863. It settled on fines to be imposed against Māori taking part in taua muru, and prohibited polygamous marriages, payment for marriage to widows, and marriage without the full consent of both partners. The rūnanga also resolved that all debts owed by Māori to Pākehā should be paid promptly, and decided upon rules for the fencing of property and branding of cattle. Additionally, it determined to hold a district census, prohibited sales of liquor, and agreed to seek more Crown funding for the completion of a whare rūnanga.[670]

666. O'Malley, 'English Law and the Māori Response', pp 7–8.
667. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 216.
668. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 217–219. The Native Land Court Act 1862 had provided for the establishment of the Court. The Court was established in December 1864, as the rūnanga scheme was being wound down.
669. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 220–221.
670. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 221–222.

The Waimate resident magistrate Edward Williams chaired the meeting, and his hand can be seen in some of these resolutions. Williams had been pushing for a census for some time, whereas Bay of Islands Māori were far from enthusiastic. Williams was also an ardent opponent of liquor consumption.[671] The rūnanga once again debated the question of representation, resolving that more appointments were needed so that all hapū could be fully represented, and also resolving to admit eight settlers to their number – four selected by the Government and four by the rūnanga itself: the missionaries Henry Williams, Richard Davis, and John King, and the Kohukohu trader John (J J) Webster.[672]

The Government, by then embroiled in its preparations for invading Waikato, did not respond to Williams' report on the rūnanga until August. As might be expected, Te Raki leaders were 'considerably annoyed' that events elsewhere had taken precedence over their affairs.[673] Of the several resolutions passed, the Native Secretary subsequently advised that just one – the prohibition on liquor – had been brought into effect by Order in Council. According to Armstrong and Subasic, this was the only resolution by either of the northern rūnanga that the Crown ever adopted. Without the Governor's approval, none of the rūnanga resolutions had any legal force.[674]

Some Māori had begun to fence their lands in anticipation of the resolutions about fencing and stock control being instituted.[675] But the Government rejected those resolutions on grounds that they did not apply to settlers and were therefore unworkable. Whereas Grey had told Te Raki Māori that the rūnanga would make regulations for all who lived in their territories, the Native Districts Regulation Act 1858 applied only to Māori customary lands. The Crown had since enacted the Native Districts Regulation Amendment Act 1862, providing that the Native Districts Regulation Act could be applied to settlers if a majority gave their consent at a public meeting, and though the Native Secretary advised Clarke to call such a meeting, there is no record of him doing so.[676]

The Native Secretary also rejected the resolution to appoint more Māori to the rūnanga, while supporting the resolution to appoint settlers. According to Armstrong and Subasic, there is no evidence that Clarke or other Crown officials ever took steps to bring this to fruition:

671. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 221–222.
672. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 222–223.
673. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 224.
674. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 214, 224; Loveridge, 'Institutions of Government for Maori' (doc E18), p 173. The Native Districts Regulation Act 1858 empowered the Governor to make regulations for Māori districts, while an Order in Council on 7 March 1862 provided for the establishment of district and village rūnanga and set out a process by which they might consent to resolutions and a process by which the Governor could refer resolutions back for amendment, but neither instrument specifically empowered district rūnanga to make bylaws.
675. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 228.
676. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 224–225.

> Nevertheless, that the proposal was made by the Runanga provides strong evidence, as noted above, of an ongoing desire among Maori to embark on a form of partnership with local settler communities, and in a manner which reflected their views expressed at the Kohimarama Conference in 1860.[677]

The resolutions at the March rūnanga indicate that Māori were prepared to modify or abandon some of their customs, especially when advised that this would smooth their relationships with settlers and the Crown. But, according to Armstrong and Subasic, reports from magistrates 'confirm that . . . Maori had certainly not abandoned their tikanga or customary practices wholesale'. Instead, they 'appear to have attempted to incorporate the new judicial structures into their own system of values and customary law'.[678] We see this as another missed opportunity for the Crown: it could have recognised the compromises Te Raki Māori were willing to make through the rūnanga system by shoring up that system further and affording rūnanga the space to conduct matters as was appropriate. Rūnanga could have exercised real leadership in and for local communities, using tikanga and English law alike.

Having said this, officials of the time noted a somewhat mixed response to rūnanga among those Māori who participated in their processes. Williams reported in February 1863 that Māori who brought disputes to his court generally accepted his decisions, though very often this was because he left the matter to assessors. He 'would not venture to assert that the Natives have been led to acknowledge the supremacy of the law', especially as the system had not been tested by any case that required imprisonment or other significant enforcement action.[679] Some Māori openly defied the rūnanga and assessors, reasoning that they had their own means of law enforcement; others took actions that were contrary to the colony's system of property rights – for example, Armstrong and Subasic noted, many Māori 'believed . . . that they were at liberty to dig gum on any unenclosed land, Government or European-owned', and did not necessarily stop when magistrates warned them.[680]

By mid-1863, Bay of Islands and Hokianga Māori were also expressing frustration that the Crown had not yet taken action to build schools and roads in the district, as Grey had promised in 1861. Ongoing hostilities in Taranaki continued to cast a shadow over the relationship between the Crown and Te Raki Māori as well. Some Māori expressed a willingness to fight on the side of the Crown, apparently in the hope that expressions of support would encourage the Crown to keep its promises, or at least prevent it from invading this district. After hostilities had broken out in Waikato, Grey responded by assuring northern leaders that he had 'no intention of interfering with the Ngapuhi or Rarawa tribes either by taking

677. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 225.
678. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 225.
679. Williams to Civil Ccivil ommissioner, 17 February 1863 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 226).
680. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 227–228.

their land or their arms so long as they remain in peace and quietness.'[681] It is not clear whether this was meant as reassurance or a threat.

7.5.2.4.6 The final rūnanga meetings, 1864–65

A third Mangonui district rūnanga was held at the newly built courthouse in Ōruru in early February 1864, with a large number of Māori in attendance. The rūnanga passed a resolution calling for the establishment of law and order; other resolutions expressed 'sympathy' for the Governor over the Waikato conflict and undertook to send 10 rangatira to satisfy themselves that the Crown was winning the war.[682] The outbreak of war in Waikato had hardened settler attitudes towards any form of differential treatment for Māori, and White increasingly shared these views. In 1864, his assessors granted utu of four horses in a pūremu (adultery) dispute. Reversing his previous, more flexible approach, White overruled the assessors and prevented the payment from going ahead. He further insisted that any fine should be paid directly to the Crown and could only be released if the aggrieved party could demonstrate good character.

This assertion of British legal values over those of Māori angered the Mangonui rangatira. One member was sacked from the district rūnanga after saying he would no longer uphold English law. One of the assessors involved in the pūremu case was also sacked and the other suspended, and White admonished other assessors for failing to administer British justice in the district.[683] Some Māori responded by operating alternative 'Runanga Kei Waho' (outside rūnanga), in essence returning to something similar to the system of decision-making that had existed before the 'new institutions'. White reported that this rūnanga 'means a desire to return to the old Maori Law'. Māori, he added, with undisguised racism, were 'habitual breakers of the law' and so 'do not like the restraints of the European Law'.[684]

By 1865, for reasons which we discuss in the next section, the Government was withdrawing support from the new institutions and was instead pursuing policies aimed at encouraging Māori acceptance of the colony's system of law and government. The Bay of Islands District Runanga held its third and last meeting in March 1865. The *New Zealand Herald* reported that it was 'numerously attended' and Māori remained 'loyal and peaceable', but the newspaper gave no details about the agenda or business conducted.[685] The Mangonui District Runanga also held its last official meeting in March 1865; again, there are few surviving details of the business conducted. White reported that he was discouraging Māori from passing

681. Native Secretary to Resident Magistrate, 19 August 1863 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 229–231). When Clarke was first appointed, he had recommended that steps be taken to establish an education system in the district, without any apparent result: Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 194–195.

682. 'Waimate', *Daily Southern Cross*, 8 April 1864, p 3 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 231).

683. O'Malley, 'Runanga and Komiti' (doc E31), pp 55–56.

684. White to Native Secretary, 2 May 1864 (cited in O'Malley, 'Runanga and Komiti' (doc E31), p 55); see also Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 231–232.

685. 'Russell', *New Zealand Herald*, 15 March 1865, p 6.

their own laws and encouraging them to adopt English laws instead. Therefore, he 'did not consider it necessary to invite the Runanga to pass resolutions as to the government of the district'. White also reported that he had admonished some assessors for 'irregularities' in their decisions, and for lack of energy in enforcing decisions from the magistrates' courts.[686]

7.5.2.5 *How and why did the Crown withdraw support from the rūnanga from 1865?*

By early 1863, rūnanga had been established in almost all North Island territories except Taranaki. They operated 'more or less as intended' in most regions except Waikato, where their operation was hampered by the outbreak of war in mid-1863.[687] Their establishment led to significant growth in government spending on 'native purposes' – from a little over £17,000 in the 1860-to-1861 fiscal year to over £60,000 in the period 1864 to 1865.[688] A significant portion of this expense arose from paying salaries to the various officials (settlers and Māori) employed by the new institutions, though some costs were also associated with the establishment of the Native Land Courts from 1864, as we discuss in this section and again in chapter 9.[689] While settlers and colonial politicians certainly regarded these costs as significant, we note that the colony's total budget in the 1864-to-1865 fiscal year exceeded £936,000.[690]

From the beginning of the new institutions, some settlers had opposed the provision of separate institutions for Māori or had expressed unhappiness over the payments to rangatira, arguing that the Crown was in essence paying Māori for their loyalty.[691] Successive colonial Governments had nonetheless supported the new institutions and had voted in the General Assembly to meet the necessary costs.[692] But political sentiment was changing by 1864 for several reasons, including the renewal of Crown–Māori warfare, the transition to responsible government (see section 7.3), changes in the colony's political leadership, settler demand for land, and the settler backlash against Māori institutions.[693]

686. White to Native Minister, 5 May 1865 (cited in O'Malley, 'Runanga and Komiti' (doc E31),) p 56).

687. Loveridge, 'Institutions of Governance for Maori' (doc E38), p 217.

688. The spending in the 1860 to 1861 period comprised £7,909 3s 4d (Civil List); £6,254 15s 7d (Native Schools); and £2,934 19s 10d (Appropriations). The spending in 1864 to 1865 was allocated as £7,000 (Civil List); £2,508 5s (Native Schools); and £51,044 2s (Appropriations): J Woodward, assistant treasurer, 6 July 1868, 'Expenditure on Native Purposes', AJHR, 1868, A-1, p 85.

689. Stafford to Governor, 4 July 1868, AJHR, 1868, A-1, p 85; Loveridge, 'Institutions of Governance for Maori' (doc E38), p 172. The figures did not include native schools or the civil list. Otherwise, spending on 'Native affairs' was not itemised.

690. This comprised £810,553 in ordinary expenditure and a further £126,157 in unauthorised expenditure: 'Financial Statement by the Hon. The Colonial Treasurer', AJHR, 18651866, B-1A, p 13.

691. Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 172, 218.

692. Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 150–151; O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), pp 159–160.

693. Orange, The Treaty of Waitangi, pp 171–172, 175–176; Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 235, 264.

From the end of 1864, the colonial Government began to move away from the provision of separate institutions for Māori towards a course that was aimed at encouraging or pressuring Māori to accept the colony's laws and institutions of government – including the Native Land Court, which we discuss in chapter 9. Accordingly, from 1865, the Government withdrew funding and support from the new institutions.

7.5.2.5.1 Changes in the government's general policy towards Māori

When the Weld Government took office in November 1864, it committed not only to assume responsibility for the colony's defences under its 'self-reliant' policy but also to pursue new means of bringing Māori into the colony's system of law and government. Weld announced, soon after taking office, that 'attempts to force political institutions upon the Natives have been, and will be, a failure'. Furthermore, he was opposed to 'any system which may be called bribery to induce them to accept those institutions'.[694] According to Dr Loveridge, Weld's Government briefly considered the establishment of self-governing Māori districts under section 71 of the New Zealand Constitution Act 1852 (discussed in section 7.3), but ultimately it pursued a different and much more determinedly assimilationist course.[695]

The Weld Government's first step was to accelerate the process of individualising Māori land titles. To this end, it passed the Native Lands Act 1865 and established the Native Land Court as a national court of record. It also increased the number of judges and assessors, and began to prepare for the introduction of free trade in Māori land. We discuss these events in detail in chapter 9, but mention them here because of their relevance to the Government's withdrawal of support for the new institutions.[696] Two courts had already been established in Kaipara in 1864, operating (according to Armstrong and Subasic) in an informal manner that was 'largely driven by iwi and hapū themselves'.[697]

Whereas local Māori assessors played key decision-making roles in the court at Kaipara, the system brought into operation from January 1865 effectively placed legal power in the hands of Pākehā judges;[698] and whereas the Native Land Act 1862 provided for the court to respond to applications from, and award title to Māori communities, the 1865 Act provided for title to be awarded to named individuals. Weld and his colleagues saw these changes as means of breaking down tribal 'communism', instead turning Māori into individual landowners with title

694. Weld, 28 November 1864, NZPD, vol E, p16; Loveridge, 'Institutions of Governance for Maori' (doc E38), p219.

695. Loveridge, 'Institutions of Governance for Maori' (doc E38), p219.

696. Loveridge, 'Institutions of Governance for Maori' (doc E38), pp223–224, 227.

697. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p19.

698. Ward, *A Show of Justice*, pp180–181. Under the original plan, the Court would have operated as an extension of the existing rūnanga and resident magistrate system, and to that end George Clarke (Bay of Islands), William White (Mangonui), and John Rogan (Kaipara) were all appointed judges in December 1864. A month later, a new system was introduced under which judges were part of a national court and could not simultaneously hold government appointments. Accordingly, Clarke and White resigned as judges so they could continue with their work as civil commissioners, and Rogan resigned as Kaipara resident magistrate.

that could easily be sold or leased.[699] As we will see in chapters 9 and 10, the Native Land Court was to have a huge impact on Te Raki Māori, opening the way for alienation of nearly 300,000 acres during the mid-1870s alone.[700]

The Weld Government also introduced three other reforms of significance to Māori during 1865. As discussed in section 7.3, the Native Commission Act 1865 provided for the establishment of a temporary commission to advise on the best means of providing for Māori representation in Parliament;[701] the Native Rights Act 1865 deemed that the law would treat all Māori as British subjects, and that the courts would therefore have the same jurisdiction over Māori as other subjects;[702] and the Outlying Districts Police Act empowered the Crown to confiscate lands from Māori communities in some circumstances, using the proceeds to fund the district's police force.[703] Unlike the Native Land Act, these Acts had limited effect: the commission was never set up,[704] and the Outlying Districts Police Act 1865 was little used nationally and not at all in this inquiry district.[705]

Nonetheless, the policy direction was clear, and would remain so for the rest of the century and beyond. In essence, these reforms marked a transition away from limited Māori self-government towards government of Māori by the colonial bureaucracy. The ultimate aim, in Dr Claudia Orange's words, was 'to subjugate the Maori'.[706]

7.5.2.5.2 The Government's withdrawal of funding and support from the rūnanga

There was little room, in this new policy environment, for self-governing Māori institutions or for employment of Māori to administer local affairs. Accordingly, from 1865, the colonial Government began to rapidly withdraw funding and support for the rūnanga, while their responsibilities were transferred to other institutions under Pākehā control: land titling responsibilities to the Native Land Court, and dispute resolution to resident magistrates and constables.[707]

During August and September 1865, the Government instructed civil commissioners and resident magistrates to minimise spending on Māori affairs, and told them it would not be making any new appointments of Māori officials or filling

699. Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 223–224.

700. Dr Barry Rigby, 'Validation review of the Crown's tabulated data on land titling and alienation for the Te paparahi o te Raki inquiry region: Crown purchases 1866–1900' (doc A56), p 4.

701. The commission could also advise on other matters affecting Māori welfare, if the Governor requested. The Act provided that the commission would cease to exist on 31 December 1866 at the latest: Native Commission Act 1865, ss 5, 9. Also see Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 256–259.

702. Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 259–260.

703. Outlying Districts Police Act 1865, ss 2–4, 6.

704. John Wilson, 'The Origins of the Māori Seats', pp 7–8, New Zealand Parliament, https://www.parliament.nz/mi/pb/research-papers/document/00PLLawRP03141/origins-of-the-m%C4%81ori-seats, last modified 31 May 2009.

705. Hazel Riseborough, 'Background Papers for the Taranaki Raupatu Claim', 1989 (Wai 143 ROI, doc A2), p 39.

706. Orange, The Treaty of Waitangi, p 175.

707. Armstrong and Subasic describe these events in 'Northern Land and Politics: 1860–1910' (doc A12), pp 236–264; see also pp 14, 17.

any vacancies. Then in late September, Native Minister FitzGerald told the House of Representatives that he planned to reduce spending on Māori officials, who in his view were of 'little or no use' in the enforcement of English law, and were principally paid for their loyalty and usefulness in 'maintaining British influence.'[708]

The following month, FitzGerald asked the Native Department to gather information about the performance of all Māori assessors, wardens, and police officers, as well as reports on the utility of the district rūnanga and on how spending could be reduced. Very soon afterwards, the Government told civil commissioners and magistrates to cease all spending unless required to keep peace and enforce the law. Commissioners were told that assessors provided no real service – a statement that was certainly false in our inquiry district – and that the number of paid assessors would be reduced to about two per district, though some unpaid assessors might also be retained.[709]

Fitzgerald told officials that a major reorganisation of Māori policy was pending and that he hoped to eventually persuade Māori to fund the future administration of native districts by gifting land to the Government.[710] For territories with little or no Pākehā settlement (particularly Te Rohe Pōtae, the East Coast, and parts of the Bay of Plenty), FitzGerald wanted to explore the establishment of self-funding native provinces. But this proposal was roundly condemned by other parliamentarians, and his proposed enabling legislation (the Native Provinces Bill 1865) was heavily defeated.[711]

The Government's plans for cost reduction aroused considerable opposition among both Te Raki Māori and the Crown's officials in the north. In November 1865, Penetana Papahurihia wrote to George Clarke pointing out that Māori had not asked for the new institutions or for paid positions, but had nonetheless willingly taken part when invited by the Governor. Although rangatira had kept the peace in their districts for the preceding four years, the Government was now planning to withdraw from the scheme. If that occurred, Papahurihia indicated, northern Māori would return to their 'former condition', resolving disputes among themselves in accordance with tikanga.[712]

White, Barstow, and Williams all confirmed that they were hearing similar views from other Māori in the district. All emphasised the important roles that rūnanga and Māori assessors had played in keeping peace in the north during a time of considerable turbulence for the colony, and all warned that Māori would see any retrenchment as a significant breach of faith on the part of the Crown, especially in light of Grey's promises that the system was established with the

708. Fitzgerald, 21 September 1865, NZPD, vol E, pp 576–581; Loveridge, 'Institutions of Governance for Maori' (doc E38), p 267.

709. Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 268–269.

710. Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 268–269; see also Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 239–242.

711. Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 274–276.

712. Penehane Papahurahura [*sic*] to Clarke, 11 November 1865 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 249).

intention of giving Māori permanent authority over their territories.[713] White wrote to the Native Minister:

> I cannot think it would be just or wise, when the whole Native expenditure [in Mangonui] is confined to the paltry sum of fourteen hundred pounds per annum, inclusive of European officers, to advise any reduction, which would most certainly create great feeling of ill will towards the Government amongst the governing class of Natives, who would have some right to think themselves ill treated, and might perhaps allow some of the worst disposed characters to commit them to direct opposition to the Government.[714]

Williams, similarly, warned that Māori were likely to lose faith in the Crown and become suspicious of its motives. The magistrates also pointed out that Māori paid significant sums in customs duties, and as taxpayers were entitled to receive some of that back in the form of expenditure in their local districts.[715]

In October 1865, the Weld Government resigned, and a new ministry was sworn in under Premier Edward Stafford.[716] This spelled the end of the district rūnanga system. The newly appointed Native Minister, Colonel Andrew Russell, announced that his Government's Māori policy would be carried out 'in accordance, as strictly as possible, with English law'.[717] In practice, according to Dr Loveridge, this meant the Government 'did not require the involvement of runanga at any level of government, in any capacity'. Nor would it require the payment of significant numbers of Māori officials.[718]

Accordingly, the Government instructed local officials to further reduce the number of Māori on the Crown payroll. In Hokianga, the number of assessors was reduced from 12 to eight, and the number of wardens from nine to four. The office of Bay of Islands civil commissioner was abolished in December 1865, and the salaries of the resident magistrates were also reduced.[719] While cutting the number of Māori law enforcement officials, Russell was determined to abolish Māori lawmaking altogether. According to the Native Department Under-Secretary William Rolleston:

> Colonel Russell's opinion [is] that as a rule it has utterly failed and that what the Natives appear to desire and respect is a calm but determined enforcement of English

713. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 242–246.
714. White to Native Minister, 30 October 1865 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 243–244).
715. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 246.
716. Loveridge, 'Institutions of Governance for Maori' (doc E38), p 279.
717. Russell, 19 October 1865, NZPD, vol E, p 682; Loveridge, 'Institutions of Governance for Maori' (doc E38), p 279.
718. Loveridge, 'Institutions of Governance for Maori' (doc E38), p 279.
719. Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 280–281; Ward, *A Show of Justice*, pp 196–197.

> law, this they can understand and believe in, but they could not understand and did not believe in the decisions of their own Runangas.[720]

Russell furthermore considered the object of the law was therefore 'to identify the Natives with ourselves, to become one people, and to realise their expressed desire for, one law, one Queen, and one Gospel'.[721]

Russell's view of rūnanga was coloured by his own experiences: during a term as Hawke's Bay civil commissioner, he had struggled to establish the rūnanga system among a Māori population that was indifferent to the colonial Government.[722] Accordingly, the course of government policy turned decisively towards the assimilation and subjection of Māori to the colony's system of law. In December 1865, the Native Secretary told Mangonui civil commissioner William B White that 'all exceptional law should gradually cease and the Natives be encouraged to conform to that of the European'.[723] We note, here, the significant contrast between this instruction and George Clarke senior's August 1862 instruction that resident magistrates should accept Māori customs as they were protected under the treaty.[724]

During 1866, in most districts throughout New Zealand, the role of civil commissioner was disestablished, leaving resident magistrates to resolve disputes in accordance with the colony's laws and to oversee law enforcement. The number of resident magistrates was also reduced.[725] Of the 450 Māori officials (assessors, kārere, constables) employed throughout the country, according to Professor Alan Ward, some 300 'had their salaries stopped or heavily cut'.[726] In the north, the Government cancelled all road works.[727] Colonel Russell told the House of Representatives in July 1866 that he hoped to trim expenditure on Māori by about £25,000, or nearly 50 per cent.[728] According to Dr Loveridge,

> The overall effect . . . was to turn the clock back to 1856 (or even to 1846) as far as the provision of law and government to Maori communities was concerned. In Russell's wake the system was reduced to a network of Resident Magistrates, who often acted as the principal representative of the Crown in their districts, assisted by a

720. Rolleston to Civil Commissioner, 19 February 1866 (cited in Loveridge, 'Institutions of Governance for Maori' (doc E38), p 281).

721. Rolleston to Civil Commissioner, Auckland, 19 February 1866 (cited in Loveridge, 'Institutions of Governance for Maori' (doc E38), p 281).

722. Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 280–281.

723. Native Secretary to White, 8 December 1865 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 235).

724. Clarke to Williams, 1 August 1862 (cited in Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 207).

725. Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 281–282.

726. Ward, *A Show of Justice*, p 198; O'Malley, 'Runanga and Komiti', doc E31, p 56.

727. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 237.

728. Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 281–282. As noted earlier, the native purposes budget was £51,044 in the 1864–1865 fiscal year : enclosure to Stafford to Governor, 4 July 1868, AJHR, 1868, A-1, p 85. According to Alan Ward, the Native Department budget [estimates] was reduced from £53,000 to £33,000 over two years: Ward, *A Show of Justice*, pp 195–196.

limited number of Assessors, policemen and Kareres, with provision also being made for medical care and education.[729]

This 'basic structure remained in place for another quarter-century', subject to periodic expansion or contraction depending on the views of the Native Minister at the time.[730]

In this inquiry, the Crown submitted that it had not abolished rūnanga in 1865, merely subjected them to funding cuts that were also affecting all areas of the public service. It submitted that there was 'evidence of Runanga in Northland operating during 1866–67', and that it was 'unclear then quite when the Runanga ceased to operate'.[731] Yet none of the expert witnesses provided evidence of any meetings of 'official' rūnanga (supported and funded by the Crown) meeting after March 1865.[732]

Armstrong and Subasic wrote that the rūnanga were 'starved of funds', 'strangled', and 'finally terminated in 1865'.[733] Dr Loveridge's view was that the new institutions were 'virtually eradicated', and that the Government's policy was 'one which did not require the involvement of runanga at any level of government, in any capacity'.[734] Vincent O'Malley, in a doctoral thesis about Māori self-government, wrote that the 'last vestiges of the official rūnanga system . . . were formally abolished [in 1865]', though some positions were incorporated into the resident magistrate system.[735]

Indeed, between 1865 and 1867 the total number of Māori assessors in the Bay of Islands and Mangonui was reduced from 52 to five, and everyone else was dismissed.[736] In July 1866, White informed his superiors that he intended to keep the Mangonui District Rūnanga going on an informal basis, but there is no evidence that this occurred.[737] It appears that the Orders in Council establishing the Bay of Islands and Mangonui native districts remained in force, but this was presumably because they were necessary to support the continued operation of the resident magistrate system. Under cross-examination by Crown counsel, David Armstrong noted that while rūnanga were 'officially terminated' in 1865, elements of the system operated after this period: there were assessors still employed in Mangonui and Hokianga up to 1867 under the Native Districts Regulation Act 1862. However,

729. Loveridge, 'Institutions of Governance for Maori' (doc E38), p 282.

730. Loveridge, 'Institutions of Governance for Maori' (doc E38), p 282.

731. Crown closing submissions: political engagement (#3.3.402), pp 110–111.

732. O'Malley, 'English Law and the Māori Response', pp 29–30; Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 235.

733. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 14, 19. Armstrong and Subasic gave evidence that the March 1865 meetings were the last in the district. Other technical witnesses did not specify that those were the final meetings but did give evidence of rūnanga being abandoned after that date.

734. Loveridge, 'Institutions of Governance for Maori', summary (doc E38(b)), p 34; Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 279, 297.

735. O'Malley, 'Northland Crown Purchases – 1840–1865 (doc A6), p 177.

736. Armstrong, transcript 4.1.8, Kerikeri pp 722–723.

737. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 235.

the rūnanga themselves received no funding after 1865, and (Armstrong said) it was not clear what role these few remaining assessors had in this inquiry district after the rūnanga system was disestablished.[738]

In any event, Māori no longer had any formal role in recommending local laws, and their role in law enforcement was also much reduced. The Liberal Government formally abolished the system in 1891 by repealing the Native Districts Regulation Act and the Native Circuit Courts Act.[739] In submitting that rūnanga operated beyond 1865, the Crown appears to have conflated the official rūnanga established under the Native Districts Regulation Act with unofficial rūnanga that operated in the north before, during, and after the 'new institutions'.[740] The Crown also appears to have conflated the employment of assessors, which continued beyond 1865, with the operation of official rūnanga, which ended in 1865.[741]

7.5.2.5.3 Why did the Government withdraw funding and support?

The Crown submitted that spending on the rūnanga was reduced as part of an overall reduction in Government spending, due to recession and the high costs of pursuing North Island wars.[742] Cost-cutting was certainly a factor, but as Dr Loveridge observed, this 'economy drive' was also specifically aimed at Māori institutions and officials.[743] Even as the rūnanga ceased operations and the number of Māori assessors was significantly reduced, the Native Land Court 'grew into a major institution'. This, according to Dr Loveridge, 'was one of the few areas where Maori expenditures remained the same, or increased' under the Stafford Government.[744] Soon after taking office, Colonel Russell determined that appointing more judges to the Court was his highest priority, and that 'no unnecessary delay should take place in bringing the Courts into operation' in any district where Māori could be persuaded to take part.[745] The Court operated in Kaipara from 1864 and the Bay of Islands from 1866.[746]

All technical witnesses in this inquiry agreed that the Crown disestablished the rūnanga system for essentially political reasons. The rūnanga had served their purpose by pacifying most North Island Māori while the Crown fought its wars in Taranaki, Waikato, and other districts. With the wars at a close, the rūnanga

738. Armstrong, Transcript 4.1.8, Kerikeri, p 713.
739. Loveridge, 'Institutions of Governance for Maori' (doc E38), p 282.
740. For O'Malley's description of the operation of these 'unofficial' (that is, indigenous) rūnanga, see O'Malley, 'English Law and the Māori Response', pp 7, 15–19, 25–29.
741. As evidence that rūnanga continued to operate in 1865 and 1866, the Crown referred to an 1866 Kaipara hui in which leaders of that district threatened to resign their positions as assessors: Crown closing submissions (#3.3.402), pp 110–111; Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 251–252.
742. Crown closing submissions (#3.3.402), p 92.
743. Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 267–268, 282–283.
744. Loveridge, 'Institutions of Governance for Maori' (doc E38), p 282.
745. Russell, quoted in Rolleston to Fenton, 18 November 1865 (Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 282–283).
746. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 298, 341.

were no longer necessary for the colonial Government's broader goal, which was to assert its authority over Māori communities. According to Dr Loveridge,

> Pleading economy, but pursuing an ideological agenda at the same time, the new Native Minister more or less returned the country to the Resident Magistrate system set up by Grey twenty years earlier. Local government for and by Maori, under the authority and with the sanction of the Crown, was all but eliminated in the name of 'one law for all'.[747]

In the view of Armstrong and Subasic, the withdrawal of funding from the rūnanga could not fairly be attributed to 'a lack of funds, or the need to pay for the Waikato war',[748] but rather a change in government priorities:

> It is difficult to escape the conclusion that once the immediate military crisis in the Waikato had passed the Government was content to simply dispense with the 'new institutions' experiment, and quickly moved to reduce or eliminate autonomous Maori agencies such as the northern Runanga. In short, it was no longer necessary to shore up a northern front, or provide a counterpoint or alternative to the Kingitanga.[749]

From this point, successive governments turned their back on institutions of Māori self-government, in favour of rapidly assimilating Māori into the colony's system of government. To this end, as well as dismantling the rūnanga system and slashing the number of assessors, the Stafford Government abandoned the proposal for a Māori commission, supported legislation to grant Māori a limited place in the House of Representatives, and pressed ahead at pace with the establishment of the Native Land Court. Ministers justified these policies on the basis that Māori and settlers deserved equal treatment. But, as Dr Loveridge observed, equal treatment in practice meant 'one set of laws made by the General Assembly, which after 1865 gave short shrift to the idea of separate forms of government for Maori, at any level'. Without effective local self-government, Māori communities had little prospect of 'exercising any significant control' over matters such as title determination and the administration of their lands.[750] Armstrong and Subasic expressed similar views, observing that 'equal treatment' was in fact 'a shorthand way of saying that the Crown's authority would be fully established and maintained':

> 'Equality in all respects', as interpreted by Pakeha politicians and officials, left no room for Maori autonomy or the exercise of tribal rangatiratanga.
>
> This 'equality' was achieved first by strangling the Runanga and other forms of local Maori administration, and a cessation of public works, medical and other services

747. Loveridge, 'Institutions of Governance for Maori' (doc E38), p 297.
748. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 258.
749. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 235.
750. Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 284–285.

through 'retrenchment', and then by introducing new measures aimed at the destruction of tribal authority and more rapid assimilation. We refer here to the Native Land Court as it was later constituted.[751]

Ward saw assimilationist policies as a reaction by settlers 'against the control of Maori affairs by the Governor, against the provision of special machinery for Maori affairs in the form of an elaborate Native Department, and against such centres of residual Maori authority as the Runanga'.[752] In his view, Colonel Russell and other Crown decision makers 'weight[ed] the evidence to suit their case' and made decisions with no consideration for 'the promising efforts of the chiefs and magistrates in Northland and the Chatham Islands who were co-operating in local self-government through the official Runanga'.[753]

Orange's view was that the Government essentially replaced the rūnanga with the Native Land Court. From a settler perspective, the main purpose of the rūnanga was to grant title to Māori and open lands for settlement. When this did not occur – because title was awarded to communities which, in general, did not want to alienate their lands – settlers denounced tribal 'communism' and demanded a new system.[754] Settler pressure led to the changes of government and policy (as discussed earlier in this section), culminating in land confiscations in Waikato and Taranaki, and in the Native Land Act 1865 which 'effectively severed the threads of Crown protection and nullified the treaty's second article'.[755]

In O'Malley's view, the Crown withdrew support because the rūnanga had not brought Māori under the control of the colonial Government as rapidly as settler politicians wanted; nor had the rūnanga opened up Māori lands for sale as rapidly as settlers desired. The Crown had never intended the rūnanga to operate as 'a state-sanctioned instrument of genuine self-government'; rather, its objective throughout had been to use rangatira as instruments of indirect rule and assimilation. In many parts of the country, O'Malley said, Māori were unwilling or reluctant to engage. In this district, rangatira were willing 'to work through the runanga system in partnership with Crown officials to maintain order within their communities and as an interface between themselves and the Pakeha state'. As a result, the system was implemented more fully here than anywhere else. Yet Te Raki rangatira were not willing to be 'duped into enforcing English laws against themselves'. On the contrary, they co-opted and subverted the system to their own ends, thereby frustrating the Crown's objectives.[756]

751. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 236.
752. Ward, *A Show of Justice*, p 183; Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 235–236.
753. Ward, *A Show of Justice*, p 196; Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 237.
754. Orange, *The Treaty of Waitangi*, p 161.
755. Orange, *The Treaty of Waitangi*, p 179.
756. O'Malley, 'Runanga and Komiti' (doc E31), pp 56–57; see also O'Malley, 'English Law and the Māori Response', pp 7–8, 25, 26–27.

7.5.2.6 *How did Te Raki Māori respond to the Crown's withdrawal of support for the rūnanga?*

Settler responses to the demise of rūnanga were more or less uniformly positive, reflecting the fact that the power of the Crown was by this time in settlers' hands. The *Daily Southern Cross* opined that the Crown's quarter-century experience of pursuing the 'idea of a model colonization, a model civilization, and a model Christianity, implanted among a race of model savages' was now at an end. The imperial government 'should know that in handing over the colony to the entire control of the colonists she hands it over entirely untrammelled by the rules and precedents she had set up for her own guidance'. The colonial Government would not pursue the 'pampering spoilt-child policy' in which the Crown had previously indulged, and would instead place their own interests first. As British troops withdrew, the 'reign of philanthropy' would be over, and that of 'stern justice' would begin. Māori who were peaceable would find the colonists also peaceable; as for Māori who did not keep the peace, 'then they will find out the distinction'.[757]

Te Raki Māori expressed considerable dissatisfaction with the Crown's decision to withdraw support from the rūnanga and cut funding to assessors. Coverage in the *Daily Southern Cross* indicated that the loss of salaries was not their principal concern; rather, they were concerned with questions of rangatiratanga, land, and the treaty partnership. Whereas contact with missionaries and other settlers had tended to undermine the authority of rangatira, appointment to rūnanga had tended to 'support their authority in the tribes', since that authority for the most part was exercised for good:

> By the threatened deprivation of their salaries, the chiefs see the last sign of their rank passing away, and their connection with the Government, which has been of service in past times of trouble, completely destroyed. Thus it is, that throughout the north, from Kaipara to Mongonui, the chiefs are the most discontented . . .[758]

The newspaper also reported that Ngāpuhi leaders had written to Governor Grey 'inform[ing] him . . . that if he withheld their pay they would not have his laws'.[759] Mahurangi and Kaipara leaders held a series of hui where they likewise objected to the Crown's actions. In the view of Te Hemara Tauhia, the dismissal of rangatira caused 'a spot' on their mana and made them objects of ridicule. He could scarcely believe that the Governor had taken such an action – and what was more, that Grey had not been transparent about his reasons. Te Hemara said he did not care about the salary 'and would sooner lose it than the respect of my tribe'. Arama Karaka Haututu of Ngāti Whātua said the Governor had 'made me kiss the book, and take an oath that I would remain faithful to him'. Then, 'after having

757. Editorial, *Daily Southern Cross*, 18 October 1865, p 4; Loveridge, 'Institutions of Governance for Maori' (doc E38), p 284.

758. 'The Agitation Amongst the Natives in the North', *Daily Southern Cross*, 20 October 1866, p 5; see also Loveridge, 'Institutions of Governance for Maori' (doc E38), p 284.

759. 'The Kaipara Natives', *Daily Southern Cross*, 18 October 1866, p 4; Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 251.

me thus bound by a sacred tie, he says, "you are of no use to me, return to your ignorance"'.[760]

The demise of the district rūnanga left with it a legacy of broken promises to Te Raki Māori. In 1860, Governor Gore Browne had promised another national conference where institutions for local self-government would be discussed, but Grey had cancelled that.[761] As we set out earlier, during Grey's 1861 northern tour, he had promised that the rūnanga would have extensive powers of self-government, including powers to determine boundaries and land ownership, without interference from the Crown. In any dispute between the Crown and Māori over land, the rūnanga would have the final say.[762] Rūnanga would also have extensive powers to make local regulations and to administer local affairs. While any local regulations would require the Governor's consent, Grey gave no indication that consent would routinely be withheld; rather, he told rangatira that laws would be made by rūnanga, assented by the Governor, and enforced by Māori officials.[763] Māori assessors would be empowered to adjudicate in minor cases, without a magistrate being present.[764] The rūnanga would furthermore provide for the development of towns, roads, schools, and hospitals, all of which would attract settlers to live in the north, in accordance with the wishes of Māori communities.[765] Māori officials would be well paid.[766] Finally, the system would become a permanent safeguard for Māori rights, a 'shelter and refuge for all times'. Future Governors would not be able to amend the laws of rūnanga without its consent.[767]

By 1866, all these promises had been broken. Decisions about land ownership and boundaries were in the hands of a settler-controlled court. The extensive powers of self-government had proved to be a mirage, initially because the Governor in Council declined most of the recommended Mangonui and Bay of Islands bylaws, and then because the rūnanga were disestablished. Assessors were unable to make decisions in the absence of a magistrate. The promised towns, schools, hospitals, roads, and settlers had not come to fruition. And Māori officials had either been sacked or had their pay slashed. Māori responded by turning

760. 'Native Meeting at Kaipara', *New Zealand Herald*, 20 October 1866 (Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 253).

761. Regarding specific proposals, see *Maori Messenger/Te Karere Maori*, 31 July 1860, pp 3–8; *Maori Messenger/Te Karere Maori*, 1 September 1860, p 4. Regarding Browne's promise to reconvene the conference, see *Maori Messenger/Te Karere Maori*, 15 August 1860, pp 12–13. Regarding Grey's decision to cancel the 1861 conference, see Grey to Duke of Newcastle, 30 November 1861, AJHR, 1862, E-1, sec 2, p 34.

762. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), pp 160–161; Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), pp 176, 183–185.

763. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), pp 160–161.

764. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 171; Loveridge, 'Institutions of Governance for Maori' (doc E38), p 62.

765. 'Memorandum of a conversation between Sir George Grey and the Maori chiefs assembled at Kerikeri', 7 November 1861 (Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 164–165).

766. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 171.

767. 'Memorandum of a conversation between Sir George Grey and the Maori chiefs assembled at Kerikeri', 7 November 1861 (Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 175).

back to their own institutions, and by developing new ones including hapū and tribal rūnanga, and eventually regional and national parliaments.[768] We will discuss those in chapter 11.

7.5.3 Conclusion and treaty findings

The guarantee in te Tiriri of tino rangatiratanga encompasses the right of Māori to exercise collective authority over their own affairs at hapū, iwi, and national levels in accordance with tikanga. Rangatiratanga encompassed leadership in many areas of life, including the control, management, and use of lands and resources; economic leadership, which in early colonial times included the management of trade and commerce; political leadership, including the coordination of hapū decision-making; the resolution of disputes within hapū; and the representation of hapū in relationships with others (including peacemaking, alliance-building, diplomacy, and warfare). This leadership was not the exclusive preserve of men: rangatira status was conferred through whakapapa and could be possessed by men and women alike. As colonial instutitions and structures took hold, Māori had a right to develop institutions of their choosing, at local, regional, and national levels in accordance with their traditional customs.

Governor Grey's 'new institutions' did not so much establish new political and judicial structures as add a layer of British legal authority to existing structures. Local rūnanga already made decisions about matters affecting hapū, and rangatira already mediated in disputes. In recognising these structures, the Crown was not aiming to provide for the exercise of tino rangatiratanga but rather pursuing its own ends. It sought to divert Māori communities from following the independent course pursued by the Kīngitanga, and instead draw them into a system that was under the Crown's control.

Under the relevant statutes and policies, the new institutions were to exercise authority over a broad range of local activities, including the determination of land ownership and boundaries, and the regulation of public health, animal control, and dispute resolution. But in reality, they operated under a heavy layer of Crown control and met very infrequently – only when the resident magistrates called meetings. The Governor in Council determined who could be appointed to the rūnanga and which regulations could be adopted, and the Crown's local officials exercised formal authority over administrative and judicial matters. The structure and procedures of the rūnanga themselves separated rangatira from their hapū and excluded women. Furthermore, the institutions had authority over only Māori customary lands (barely, for the most part), and over only Māori.

Despite these limitations, rangatira in this inquiry district embraced the rūnanga scheme. We think they saw it less as a system of self-government, which they already possessed, and more as a means of advancing their partnership with the Crown and so attracting settlers. In order to achieve these benefits, they were willing to experiment with new decision-making structures and legal norms. But they were not willing to give up their own autonomy or abandon Māori law

768. Orange, *The Treaty of Waitangi*, p 190.

in cases that were internal to Māori communities. Because Te Raki rangatira responded as they did, and because local officials initially took a flexible approach to influencing rūnanga and assessor decisions, these institutions had the potential to operate as effective institutions for self-government.

In practice, this potential was not realised. The rūnanga, as established, were not representative of all hapū and territories. On occasions, the rūnanga and assessors were able to successfully resolve issues, including land disputes, in a manner that was consistent with Māori values. But on other occasions local officials interfered with or (in the case of land purchasing) undermined the decisions of Māori officials. The rūnanga were not empowered under the Government's system to make and enforce local laws, because the Governor in Council did not recognise their decisions; in the north, only one resolution, made by the Bay of Islands District Rūnanga was ever brought into force. In practice, Māori therefore could not exercise the powers of local self-government that Grey had promised them. We are not convinced by the Crown's argument that rūnanga exercised considerable decision-making power, akin to that of provincial governments. We note also that Dr Loveridge pointed out that Grey's institutions were not really new, in that the administrative model had been laid down in 1858 by C W Richmond – which in his view raised an important question: '[W]hy did he not also adopt the companion idea of a national conference of chiefs, or some comparable mechanism for consultation?' This, he said, was Grey's 'principal departure from Fox's plans, and might well be considered the principal flaw in his own'.[769]

Further, the scheme operated for only four years before the Crown unilaterally decided to withdraw funding and close the rūnanga. This was an act of serious bad faith. Crown counsel submitted that the rūnanga were victims of nationwide budget cuts, but the evidence does not support this: it suggests that rūnanga were abandoned because the Crown took an ideological decision to withdraw support from Māori institutions and instead accelerate the process of Māori submission to the colony's systems of law and authority. This was reflected in the rapid establishment of the Native Land Court under the Native Lands Act 1865 after the closure of the rūnanga (we discuss and make findings on the Native Land Court system in chapter 9).

Grey had promised that the rūnanga would endure forever and would protect Māori from capricious government decisions. This promise was broken. Grey had promised that district rūnanga would make decisions about boundaries and ownership, and that the Crown itself would be subject to rūnanga decisions about land. This promise was broken. Grey had promoted the idea that rūnanga would be key decision-making bodies for the social good, and an important force in the revitalisation of the North and its economic and social development. With the creation of rūnanga, he had promised, townships, roads, schools, and hospitals would be established in the north. That promise was broken, too.

Accordingly, we find that:

769. Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 294–295.

- By promising Māori that rūnanga would exercise substantial powers to make and enforce local regulations, determine land ownership, and guide development in their districts, and then failing to give effect to rūnanga decisions, the Crown acted inconsistently with its obligation of good faith, and breached te mātāpono o te houruatanga me te mātāpono o te whakaaronui tētahi ki tētahi/the principles of partnership and of mutual recognition and respect.
- By first reducing the powers that rūnanga could exercise and then unilaterally withdrawing support for them after promising Māori that the scheme would endure forever, allow Māori to make law for their districts, determine land ownership and boundaries, control the pace of settlement, and bring benefits, including the development of services and infrastructure leading to greater prosperity, the Crown acted inconsistently with its obligation of good faith, and therefore breached te mātāpono o te houruatanga/the principle of partnership.
- By failing to deliver on its 1858 promise that a township would be established at Kerikeri, and its 1861 promise that a township would naturally follow the establishment of district rūnanga, the Crown acted inconsistently with its obligation of good faith conduct, and therefore breached te mātāpono o te houruatanga/the principle of partnership.

7.6 Whakarāpopototanga o ngā Whakataunga / Summary of Findings

In respect of the Crown's transfer of responsibility for Māori affairs to settler authorities, we find that:

- The Crown failed to recognise, respect, and give effect to Māori political rights when it enacted a constitution that provided for provincial and national representative assemblies in 1852 without negotiating with Te Raki Māori, without ensuring that Te Raki Māori were able to exercise a right to vote alongside settlers, and without providing safeguards that would secure ongoing Te Raki Māori autonomy and tino rangatiratanga. These Crown actions and omissions, which came at a crucial juncture in New Zealand history, breached te mātāpono o te tino rangatiratanga. These actions also breached te mātāpono o te houruatanga me te mātāpono o te whakaaronui tētahi ki tētahi/the principles of partnership and of mutual recognition and respect.
- By providing for responsible government by colonial ministries from 1856, and ultimately allowing those ministries to assume responsibility for the Crown–Māori relationship, the Crown fundamentally undermined the treaty relationship. The Crown did not negotiate with Te Raki Māori, or provide safeguards to ensure that Māori could continue to exercise autonomy and tino rangatiratanga. This breached te mātāpono o te tino rangatiratanga. It also breached te mātāpono o te houruatanga me te mātāpono o

te whakaaronui tētahi ki tētahi/the principles of partnership and of mutual recognition and respect.

- By failing to declare self-governing Māori districts under section 71 of the Constitution Act 1852, and thus to ensure provision was made for Māori autonomy within its own kāwanatanga framework, the Crown breached te mātāpono o te houruatanga/the principle of partnership.
- By effectively denying the great majority of Māori representation in the General Assembly prior to 1867, the Crown breached te mātāpono o te mana taurite/the principle of equity. The Crown also breached this principle by failing to ensure that Māori were represented in the Legislative Council and in provincial assemblies (the Auckland Provincial Council in the case of Te Raki Māori).

In respect of the significance of the Kohimarama Rūnanga, we find that:

- By calling the Kohimarama Rūnanga only after war had already broken out, the Crown ensured the rūnanga focused primarily on its own agenda, that is on seeking Māori approval for the war and on its own proposals for administration of Māori affairs rather than responding to the priorities of Māori leaders. This was inconsistent with the Crown's duty of good faith, in breach of te mātāpono o te houruatanga/the principle of partnership.
- Governor Grey's decision to cancel the planned 1861 national rūnanga and all future national rūnanga was inconsistent with the Crown's obligation of good faith. The decision was a critical missed opportunity to build a forum for regular dialogue between the rangatiratanga and kāwanatanga spheres. It denied Māori (including Te Raki Māori) opportunities for ongoing input into government policy on matters of fundamental importance to them, including questions of land titling and administration, local government, and justice. By denying this opportunity, the Crown was in breach of te mātāpono o te houruatanga/the principle of partnership.

In respect of Grey's 'new institutions', we find that:

- By promising Māori that rūnanga would exercise substantial powers to make and enforce local regulations, determine land ownership, and guide development in their districts, and then failing to give effect to rūnanga decisions, the Crown acted inconsistently with its obligation of good faith, and breached te mātāpono o te houruatanga me te mātāpono o te whakaaronui tētahi ki tētahi/the principles of partnership and of mutual recognition and respect.
- By first reducing the powers that rūnanga could exercise and then unilaterally withdrawing support for them after promising Māori that the scheme would endure forever, allow Māori to make law for their districts, determine land ownership and boundaries, control the pace of settlement, and bring benefits, including the development of services and infrastructure leading to greater prosperity, the Crown acted inconsistently with its obligation of good faith, and therefore breached te mātāpono o te houruatanga/the principle of partnership.

- By failing to deliver on its 1858 promise that a township would be established at Kerikeri, and its 1861 promise that a township would naturally follow the establishment of district rūnanga, the Crown acted inconsistently with its obligation of good faith conduct, and therefore breached te mātāpono o te houruatanga/the principle of partnership.

7.7 Kōrero Whakatepe / Concluding Remarks

When Te Raki rangatira signed te Tiriti in February 1840, they granted kāwanantanga to the Queen of England ('ka tuku rawa atu ki te Kuini o Ingarangi ake tonu atu – te Kawanatanga katoa'). In turn, it was the Queen who guaranteed their tino rangatiratanga, offered to protect them, and granted them all the rights of British subjects.

Before 1840, and again during the treaty debates, British representatives deliberately cultivated the impression that Māori had a personal relationship with the monarch. In 1834, James Busby arrived as British Resident with a personal message from King William IV, and he later emphasized the King's personal interest in Māori wellbeing and his personal commitment to protecting Māori. Likewise, Hobson and other British representatives emphasised this personal relationship in the texts of the treaty and in their treaty explanations.[770]

The first few years after the signing of te Tiriti had, for a number of Ngāpuhi rangatira, raised questions about the role of governors who spoke and acted in the name of the Queen. During the period after the Northern War northern leaders engaged with the Crown in the hope that their relationship might be restored, but by the mid-1860s had become disenchanted. Their expectations of the Kerikeri township had been disappointed; and they had participated with enthusiasm in the Kohimarama Rūnanga of 1860 as a rare opportunity to engage with the Crown and affirm their commitment to the treaty relationship, only to find that Governor Gore Browne's promise to reconvene the meeting annually, and his vision of its becoming a permanent body, part of the machinery of government, were overturned by his successor. In the meantime, they had adopted Governor Grey's scheme for district runanga, which he pledged would be lasting institutions through which Māori could run the affairs of their district and manage their lands, only to find that the Government cut funding for the Runanga and withdrew its support within just a few years.

Above all, major changes in the arrangements for governing New Zealand were taking place. At first Te Raki leaders, and Māori generally, were probably unaware of the significance of the new Constitution of 1852. We have seen no evidence that the Crown informed Te Raki Māori or Māori generally about this important constitutional development, let alone sought Māori agreement. In 1840 the Crown

770. Regarding the period prior to 1840, see Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, vol 1, pp 129–130; see also Kawharu, 'Te Tiriti and its Northern Context' (doc A20), pp 36–38, 43. Regarding the treaty debates, see Orange, *The Treaty of Waitangi*, p 56; McLean, 'Crown, Empire and Redressing the Historical Wrongs', pp 198–199.

had called meetings in many parts of the country to discuss te Tiriti, but it did not call similar meetings to discuss the New Zealand Constitution Act and its significance. The Act was not translated into Māori, nor was it circulated amongst Māori communities. It is not clear how aware Te Raki Māori were of the establishment of the colonial Parliament and provincial governments. What they did become aware of during the latter part of this period was the growing presence and influence of settler politicians. This followed the grant of responsible government by the British authorities to a generation of settlers who were determined to secure rights of self-government.

In Dr Orange's view, these changes 'confronted Maori with a new authority representing interests that they increasingly perceived to be opposed to their own', and led to a 'growth of Maori unease' in many districts during these years. Their personal relationship with the Queen seemed less important, even though the Queen herself still evidently cherished it. In 1863, she would receive a delegation of Māori and become godmother to Albert Victor Pōmare, the newly born son of Hare Pōmare (the son of Pōmare II, and nephew of Te Hemara Tauhia) and his wife Hariata at his christening. Arapeta Hamilton described the birth of Albert Victor Pōmare and his christening as Queen Victoria's godson as the fulfilment of 'te Kawenata tuatoru' between Ngāti Manu and the Crown.[771]

British constitutional change was to highlight the tensions between its establishment of empire in countries with large indigenous populations, and its encouragement of settlement – in the case of New Zealand, organised British settlement from 1840 which was augmented greatly by the unorganised arrival of great numbers of gold miners in the 1860s. The British government's view that it would be able to accommodate its obligations both to Māori (who it considered had rights to land and to exercise their own customs), and to settlers would soon come under scrutiny.

Governor Gore Browne, who held office when responsible government was granted, decided that the only way of resolving the tension and protecting Māori from the new settler Governments and their constituencies was to reserve Māori matters to the imperial government (practically, to himself). Whether this was the right decision is open to question. The Colonial Office at the time had considerable doubts about whether it was practical to separate the administration of Māori affairs from that of other internal issues; but because they too were worried about a settler Government, and whether it could avoid conflict with Māori, gave the Governor unreserved support. But Gore Browne's move aroused strong resentment within the settler Government, and attempts to undermine his decision began at once. Arguably, he also laid the basis for some years of conflict between the imperial and the colonial Governments, since the Colonial Office regarded responsibility for self defence as a logical corollary to settler self-government. As war spread across the central North Island from 1860, the struggle between London and Wellington for control of Māori affairs became little more than a struggle over

771. Arapeta Hamilton (doc K7(b)), p16; Arapeta Hamilton (doc F23), pp [2]–[3]

who should pay for the British troops engaged in quelling Māori resistance. It was an inauspicious beginning for Māori–settler relations in a new constitutional era.

One voice raised against the policies of the Government by 1864 was that of politician Henry Sewell, regarded as a 'moderate'. In an open letter he criticised the Whitaker–Fox ministry's punitive legislation passed during the Waikato war (the Suppression of Rebellion Act 1863 which permitted trial by court-martial and the suspension of *habeas corpus*) and the New Zealand Settlements Act 1863 (the confiscation legislation). Sewell 'aimed to embarrass the New Zealand government and to prod the English political and moral conscience' in Orange's words. In the crisis of the 1860s, he 'perceived that New Zealand stood at the crossroads.'[772] In his view, the essential question to be resolved was 'what are the respective rights and obligations of two races placed in political relation to each other'. His answer was that certainly the treaty reserved to Māori their 'full territorial rights; and they must also have understood that they would retain the right of self-government over their internal affairs'. The Crown had limited rights of authority over Māori, and might not confiscate their lands. In his view the sovereign power rested with the imperial executive, not the New Zealand Government. Yet when he considered the Crown's treaty duty, he assumed that it lay in gradually extending British law over Māori, and that Māori self government would be temporary. This was, as Orange says, 'the humanitarian, gradualist approach to relations with Māori to whom the Crown stood as guardian'.[773] But the imperial government view of its guardianship role was by now limited. Certainly it was alarmed by the extent of New Zealand Government confiscation, and New Zealand politicians did respond, in Professor Ward's view, by including Māori 'more meaningfully in mainstream institutions and give them rights promised under the Treaty'.[774] But Dalton concluded that by 1868, the imperial government was worn out by the attempts of Grey and his Government to retain the last British troops in New Zealand, and 'no longer had any policy except that of disentangling itself completely from the colony's internal affairs'.[775]

Professor Dalton has suggested that the real question that arose when the imperial government granted the settlers of New Zealand self-government was 'how best could the British Government assist the Māori people under responsible government?' Would maintaining personal control by the Governor really promise Māori 'substantially greater practical benefits than any alternative arrangement?' In fact, he suggested, given 'the undoubted disadvantages of personal control' it did not seem that Māori would on balance be advantaged.[776] Claudia Orange, likewise, pointed to the distrust and antagonism' between the British and colonial

772. Sewell's open letter *The New Zealand Native Rebellion* (1864) was addressed to his patron, Lord Lyttleton. Claudia Orange, *The Treaty of Waitangi*, 2nd ed (Wellington: Bridget Williams Books, 2011), p 159.
773. Orange, *The Treaty of Waitangi*, 2nd ed, p 159.
774. Alan Ward, *An Unsettled History*, p 135.
775. Dalton, *War and Politics in New Zealand*, p 261.
776. Dalton, *War and Politics in New Zealand*, p 43.

Governments that developed during the following years; in her view, 'the losers in the struggle were the Maori'.

She suggested one answer to Dalton's question: the Crown might have made a formal transfer of treaty obligations to the colonial Government. It did not; nor was this even considered.[777] As mentioned earlier, the Wesleyan Missionary Society argued that the colonial Government should be legally required to act in accordance with the treaty, but the imperial authorities took no action on this issue.[778] Neither the New Zealand Constitution Act 1852 nor any subsequent constitutional instrument provided meaningful safeguards for treaty rights. Section 71 of the Constitution Act provided for self-governing Māori districts but contained no requirement that these be established or recognised. Section 7 enfranchised males aged 21 or over, subject to a property test which effectively excluded almost all Māori.

It is true that the Colonial Office in February 1863 instructed Governor Grey to refuse assent for any legislation that harmed Māori or breached the treaty, and this is the closest the imperial government came to providing a safeguard – but it was short-lived. Subsequent instructions did not repeat this requirement. After Grey's departure, the Royal Instructions appointing his successors did not make any specific provision for the protection of Māori treaty rights.[779] Yet this was well within the powers of the Colonial Office.

We add that the injunctions to Governor Grey may be thought to highlight the problems of relying on a Governor as the last line of defence of the treaty. Grey's instructions, for instance, allowed him some latitude in relation to his dealings with the Kingitanga, which the Secretary of State suggested might be recognised; but his own views were very different, and his invasion of the Waikato followed by large scale land confiscations put paid to any negotiation with King Tāwhiao.

As we will see in chapter 11, throughout the nineteenth century (and indeed beyond), Te Raki Māori continued to view the treaty relationship as a personal one between rangatira and the Queen. They drew a clear distinction between the Queen (who they were bound to through the sacred covenant of the treaty) and her colonial Government. As Sir James Henare told the Tribunal in 1987, 'the direct link with the Maori people with the Queen is still very strong. But the link with Governments I don't think is'.[780] Yet, the Queen, as we explain in chapter 11, was in practice represented by an imperial government that no longer regarded itself as being responsible for the treaty.

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777. Orange, *The Treaty of Waitangi*, 2nd ed, p 160.

778. Wesleyan Missionary Committee, *Correspondence between the Wesleyan Missionary Committee and Sir James Pakington* (London: PP Thomas, 1852) (cited in Orange, *The Treaty of Waitangi*, p 138).

779. For example, see Secretary of State for the Colonies to Governor Grey, 27 February 1865, AJHR, 1865, A-6, p 15; Duke of Buckingham (Secretary of State for the Colonies) to Governor Bowen, 1 December 1868, AJHR, 1869, A-1A, p 10.

780. Sir James Henare (cited in Phillipson, 'Bay of Islands Maori and the Crown, 1793–1853' (doc A1), p 207).

7.8 Ngā Whakahāweatanga / Prejudice

The period under consideration in this chapter was one of momentous change in the Māori–Crown and Māori–settler relationships. At the beginning of this period, Māori were a significant majority of New Zealand's population, and the Crown's practical authority was established in only a few coastal towns. At the beginning of the Northern War, Governor FitzRoy and other officials had genuinely feared that the Crown might be forced to abandon New Zealand. Two decades later, Māori in this and several other North Island districts continued to exercise considerable day-to-day autonomy, but the tide of Crown and settler influence was rising rapidly, and the Crown's approach to the treaty relationship had fundamentally changed in significant ways, to the long-term prejudice of Te Raki Māori.

First, the relationship was no longer between rangatira and Queen, or even between rangatira and Governor. The Crown had transferred responsibility for the Crown–Māori relationship to the colonial Government, and had done so without providing any mechanism by which Māori could enforce their treaty rights or have any meaningful influence over the colony's policies and laws. The constitution transferring this responsibility was formulated in London as a purely imperial act, with no input from Māori. It did not build at all upon the relationship Te Raki Māori had established with the Crown barely a decade before. As contact with Crown officials and settlers grew, Māori were increasingly forced to manage relationships in ways that took account of those policies and laws.

The prejudicial effects were significant. Growing settler political influence caused considerable unease among Māori about the Crown's intentions, and it coincided with a marked shift in the Government's policies away from tolerating Māori laws and customs towards a more determinedly assimilationist course. At a political level, as the settler population grew and colonial institutions asserted their authority, Māori were left without any means of exercising effective influence on the colony's laws. Māori would not be given representation in the General Assembly until 1867 (we discuss the Maori Representation Act 1867 in chapter 11), and would be offered few opportunities to influence government policy following Grey's decision to not reconvene the Kohimarama Rūnanga.[781]

From the 1860s onwards, leaders in this district and elsewhere frequently protested against laws that infringed their treaty rights. However, the imperial government had not taken steps to ensure that the colonial Government would uphold the Crown' treaty obligations. When the British Parliament did try to intervene in Māori affairs with the introduction of New Zealand Bill 1860 to the House of Lords, the settler Parliament responded with its own Bill to establish 'Responsible advisers' in the administration of Māori affairs. This sent a clear message to London that such interventions were not welcome.[782] Furthermore, having transferred authority for Māori affairs to the colonial Government, the imperial

781. Loveridge, 'Institutions of Governance for Maori' (doc E38), pp 159–160.

782. Loveridge, 'Institutions for the Governance of Maori' (doc E38), pp 114–116; Native Council Act 1860.

government no longer accepted responsibility for the Crown's treaty obligations (a point we will return to in chapter 11).

The constitutional transition that began in 1852 also had significant demographic effects. The combination of settler self-government and assisted immigration (which was funded by provincial councils and often provided in the form of free land) made New Zealand an increasingly attractive destination for British migrants, whose number exploded from 1852 and surpassed those of Māori by the late 1850s. The rapid growth in the settler population continued, driven by the gold rushes of the 1860s, created pressure for sale of Māori lands and ultimately swamped Māori populations.[783] As the influx of settlers continued during the 1860s, the Crown had reinforced its willingness to assert its authority by using force. Te Raki leaders already had direct experience of this in the Northern War and were determined to avoid any repeat. The Crown's invasions of Taranaki and Waikato reinforced the potential threat, and reduced the options available to Māori as they responded to growing Crown and settler influence.

By 1865, the Crown had largely abandoned any genuine interest in Māori autonomy and self-determination. The Crown had always assumed that Māori would ultimately submit to its authority, but until 1860 it had generally tolerated Māori self-government so long as there was no direct threat to its own presumed sovereignty or to settler interests. Section 71 of the Constitution Act 1852 exemplified this tolerance, providing for the creation of native districts in which Māori could continue, albeit under Crown legislation, to exercise authority according to their own laws and customs. This was a promising provision that could have given effect to Māori autonomy within the treaty framework, by giving legal force to tikanga at the local level. If native districts had been established in Te Raki, this may have led to laws or regulations passed by the district rūnanga being gazetted, thus becoming part of New Zealand law and strengthening the partnership between Te Raki Māori and the Crown. However, section 71 was never used. Instead, Māori–Crown tensions increased as the population balance tilted in the late 1850s, and the newly empowered settlers sought to assert their authority over Māori.

In the early 1860s, the Crown needed Māori on its side and was therefore willing to make some concessions to Te Raki Māori in the form of limited self-government. While the Crown was not prepared to fully recognise and respect the rangatiratanga sphere of authority at the Kohimarama Rūnanga, the promise of a new national advisory body was viewed by Te Raki Māori as a rare opportunity to engage with the Crown in dialogue about a treaty partnership in which authority might be shared, and peace and prosperity finally secured. Though not affording the degree of autonomy envisaged under section 71, Grey's rūnanga, in particular, were institutions that might – with ongoing good will – have secured that

783. Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), pp 479–480; 'British & Irish Immigration, 1840–1914', Ministry for Culture and Heritage, https://nzhistory.govt.nz/culture/immigration/home-away-from-home/summary, last updated 8 December 2014; 'Encouragement of Immigration', Te Ara – The Encyclopedia of New Zealand, http://www.TeAra.govt.nz/en/1966/immigration/page-4, accessed 24 March 2022.

partnership for future generations, had the Crown not quickly terminated them. However, the Crown failed to uphold its promises and continue the policy of consultation and listening to Māori that it had signalled at the Kohimarama Rūnanga. The disappointment of this failure was made worse by the withdrawal of funding for the district rūnanga. As Armstrong and Subasic put it, the Crown's 'sudden and heavy retrenchment represented a schism in their relationship with the Crown and settlers'.[784] This series of disapointments and broken promises, beginning with the failure to implement section 71, significantly undermined Te Raki Māori trust in the Crown and seriously compromised the treaty relationship for at least a generation.

As we have seen throughout this chapter, the Crown's unilateral transfer of authority was to have profound effects on Māori in this inquiry district and elsewhere over many decades. By the time the wars in the central North Island concluded, the balance of power had shifted, through a combination of military victory, land confiscation, and continued population growth, in favour of the Crown. Furthermore, by that time the Government was under the effective control of settlers, who showed no tolerance for Māori self-determination or Māori law. Instead, from 1865, the Crown sought to extend its authority into Māori communities as quickly as possible and to support settler desire for Māori lands and resources. A direct line can be drawn from this transfer of power to the Crown's subsequent abandonment of attempts to provide for Māori self-government through district rūnanga; its establishment of the Native Land Court and individualisation of Māori land title, which together inflicted immense damage on Te Raki Māori communities; its acceleration of land purchasing during the 1870s; and its failure to urge the colonial Parliament to take all its treaty responsibilities more seriously and to ensure that it did. This was an assimilationist course, not one that considered Māori as equals or made any place for the exercise of tino rangatiratanga.

784. Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), p 256.

CHAPTER 8

NGĀ HOKONGA WHENUA A TE KARAUNA, 1840–65/ EARLY CROWN PURCHASING, 1840–65

> We write to you to let you know that we are not willing to have the chain dragged over the living and the dead. For this place belonged to our ancestors, descended to our fathers and has come down even to us who now live upon it.
>
> —Paore Te Āwha, Te Tirarau Kūkupa, Hori Kingi Tahua, and Hamiora Marupiopio to Governor Gore Browne, 4 April 1861[1]

8.1 Hei Tīmatanga Kōrero / Introduction

In chapter 6, we considered pre-treaty land transactions between Māori and settlers in the inquiry district. Here, we turn our attention to the significant programme of land purchasing the Crown undertook in Te Paparahi o Te Raki between 1840 and 1865, when the Native Land Court came fully into operation. Over this period, the Crown exercised the exclusive right of pre-emption it claimed to have secured under article 2 of the treaty, except between March 1844 and June 1846, when the Crown implemented a scheme enabling a restricted form of direct private purchase from Māori (we discussed the Crown's pre-emption waiver system in chapter 6; see section 6.6).[2]

In our stage 1 report, we considered past debates over whether pre-emption in the English text of the Treaty referred to an exclusive right of purchase, or rather a first right of refusal.[3] Certainly, the instruction issued by the Secretary of State for War and the Colonies, Lord Normanby, to soon-to-be Governor William Hobson had been to obtain agreement that Māori would sell land only to the Crown. We stated there that the English text largely fulfilled this requirement.[4] We questioned,

1. Tony Walzl, supporting papers (doc E34(a), vol 1), pp 579–580.

2. Donald Loveridge, '"An Object of the First Importance": Land Rights, Land Claims, and Colonization in New Zealand, 1839–1852' (commissioned research report, Wellington: Crown Law Office, 2004) (Wai 863 R01, doc A81), pp 184–185, 276.

3. Waitangi Tribunal, *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry*, Wai 1040 (Wellington: Legislation Direct, 2014), p 413; Ruth M Ross, 'Te Tiriti o Waitangi: Texts and Translations', NZJH, vol 6, no 2 (1972), pp 143–145; Tony Simpson, *Te Riri Pakeha: The White Man's Anger* (Martinborough: Alister Taylor, 1979), p 51; Michael Belgrave, 'Pre-emption, the Treaty of Waitangi and the Politics of Crown Purchase', NZJH, vol 31, no 1 (April 1997), p 26.

4. However, we also stated that Hobson's use of 'pre-emption' in the treaty remained less clear than the language included in a similar a treaty presented to rangatira (mostly from the South Island)

however, whether the term had been properly explained to Te Raki Māori in 1840 and, if it had been, whether they would have consented. As we noted in previous chapters, rangatira agreed to entering land transactions with the Crown, but not exclusively. In chapter 4 of this (stage 2) report, we found that the Crown misrepresented the terms of the treaty.

Early in this period, the Crown entered into its first major land transaction in Te Raki in Mahurangi and Omaha in 1841. The purported purchase of the Mahurangi and Omaha block occurred before the Crown had developed clear processes and a sufficient organisational structure for its purchasing programme. No further land would be purchased by the Crown in Te Raki during the 1840s. Yet, during this period, as they 'gradually came to grips with the reality that Māori laid claim to all of New Zealand and the attendant complications this involved [for the British]',[5] Crown officials engaged in important debates over the nature of Māori rights in land (see chapter 4).

The policy established in 1848 under the governorship of Sir George Grey (1845 to 1853) attempted to resolve the tension between recognition of Māori ownership and the pressure from colonists to open up land for settlement, and provided the basis for the large-scale purchasing programme that followed. After Grey's departure, his policy was continued by the Native Land Purchase Department (established in 1854) under the direction of Donald McLean. During this period, from 1840 to 1865, the Crown purchased over 482,000 acres, or approximately 23 per cent of the land within the inquiry district.[6] Overall, as shown in table 8.1, the taiwhenua affected most significantly by Crown purchasing in this period were Whāngārei, Mangakāhia, Mahurangi, and the Gulf Islands; only Hokianga was exempt, largely because the Crown had already acquired extensive scrip lands there (see chapter 6).

8.1.1 Purpose of this chapter

The Crown's purchasing of Māori lands between 1840 and 1865 resulted in a large transfer of estate and resources from Te Raki Māori to the new colonial Government. As noted, the conclusion we reached in stage 1 of our inquiry was that Te Raki Māori did not cede their sovereignty, that the treaty agreement guaranteed the settlement of the district would be conducted through their new partnership with the Crown, and that 'some kind of relationship would be established

by New South Wales Governor Gipps on 12 February 1840: that 'the said Native Chiefs do hereby on behalf of themselves and tribes engage, not to sell or otherwise alienate any lands occupied by or belonging to them, to any person whatsoever except to her said Majesty'. That treaty was never signed: Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 389–390, 509.

5. Vincent O'Malley, 'Northland Crown Purchases, 1840–1865' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2006) (doc A6), p 29.

6. The Crown gives a total of 482,115 acres, while technical witness Dr Barry Rigby offered a total of 482,524 acres. Crown counsel accepted that between 1840 and 1865 it purchased aproximately 482,115 to 482,525 acres of land from Northland Māori in the district: Barry Rigby, corrections requested by Crown counsel (doc A48(e)), p 7; Crown closing submissions (#3.3.404), pp 4–6.

Taiwhenua	Total area of taiwhenua (acres)	Crown purchases (acres)	Proportion of taiwhenua purchased by Crown (percentage)
Takutai Moana and Te Waimate Taiāmai	420,053	95,305.05	23
Whangaroa	212,484	32,682	15
Hokianga	283,450	0	0
Whāngārei and Mangakāhia	684,884	205,276	30
Mahurangi and Gulf Islands	522,277	148,852.44	28
Total	2,132,148	482,115.49	23

Table 8.1: The Crown's estimation of purchasing in Te Raki, 1840–65. All figures are approximate.
Source: Crown closing submissions (#3.3.404), pp 5–6.

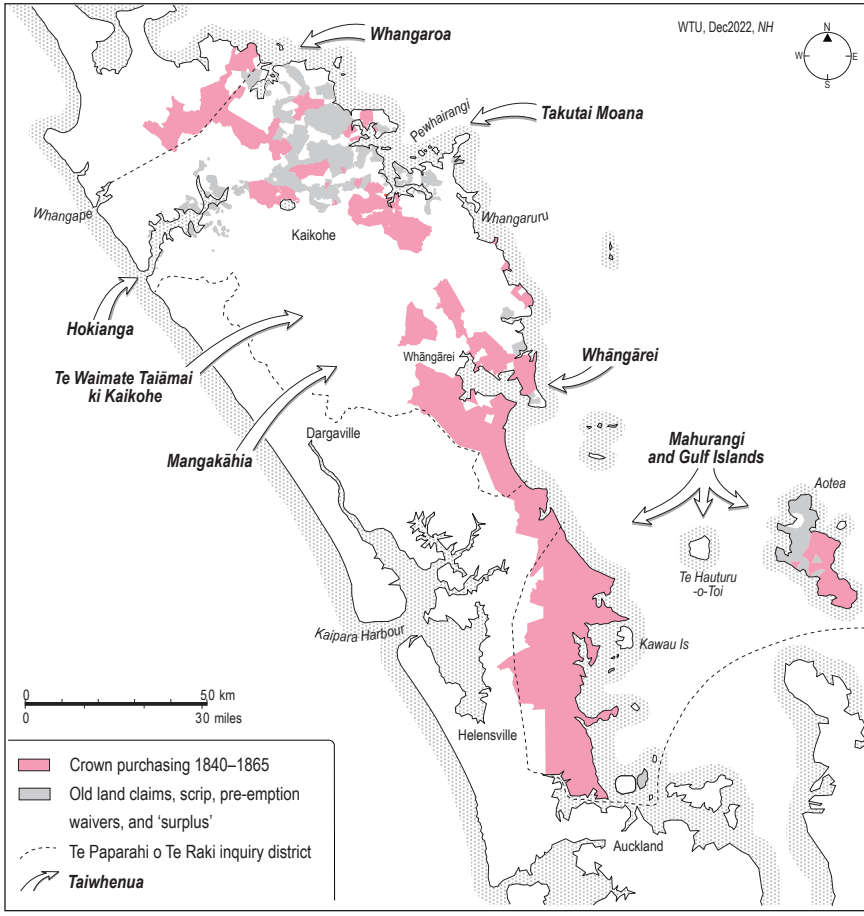
between the British and the rangatira' to negotiate land transactions.[7] In this chapter, we consider how that relationship developed and whether the Crown's efforts to purchase Māori land in the inquiry district complied with its treaty obligations.

As we have discussed in previous chapters, rangatira retained substantial authority in the district over both Māori and settlers in the years after signing the treaty. In chapter 6, we concluded that the tikanga of tuku whenua governed relationships with local settlers, including agreements about land, and that in 1840, Te Raki Māori had no reason to consider that the treaty would do anything but strengthen their ability to enforce their understandings. As Crown purchasing activities increased during the 1850s, these expectations would be challenged, and we discuss whether Māori understandings of the nature of their land transactions changed as a result.

The Crown, for its part, viewed land transactions differently. Its officials considered that permanent alienations and the extinguishment of Māori title over large areas of land was necessary to support the settlement of the colony. However, they were also aware of their obligations to Māori, and at various times throughout this period reiterated their commitment to protect their interests and recognise their rights in land.

This chapter examines the political origins, legislative framework, and the actual mechanics of Crown purchase in the inquiry district following 1840, and the effect of purchasing on iwi and hapū of Te Raki. In doing so, it highlights a range of claims, chosen to illustrate circumstances, dynamics, and methods reflecting the broader system of Crown purchasing and land alienation across the inquiry district.

7. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 519, 526.



Map 8.1: Crown purchasing in Te Raki, 1840–65.

8.1.2 How this chapter is structured

We begin by establishing the issues for determination. To arrive at these questions we have drawn on the parties' submissions in stage two of our inquiry, the evidence before us, and the Tribunal's previous consideration of the Crown's treaty obligations in respect of land purchasing. These obligations are summarised in the section following. The first issue we consider is whether, in developing its purchasing policy during the 1840s, the Crown recognised Te Raki Māori's tino rangatiratanga (section 8.3). We discuss the implementation of that policy during the 1850s, and whether it was treaty compliant (section 8.4). We finally consider the practices of the Crown's purchase agents on the ground, and whether they complied with the Crown's treaty obligations (section 8.5). The chapter concludes with a summary of our findings, including our findings on prejudice (sections 8.6 and 8.7).

8.2 Ngā Kaupapa / Issues

8.2.1 What previous Tribunal reports have said

The Tribunal has considered Crown purchasing of Māori land and its related policies and practices during the period between the signing of te Tiriti and the enactment of the Native Lands Act 1865 over many inquiries, including the Ōrākei, Ngāi Tahu, Muriwhenua Land, Mohaka ki Ahuriri, Te Tau Ihu, Wairarapa ki Tararua, Whanganui, and Te Rohe Pōtae inquiries. In these reports, the Tribunal has reached consistent conclusions on the Crown's obligations when purchasing Māori land. The general requirements the Tribunal has identified for Crown purchases that are consistent with the treaty principles can be summarised as follows:

- all groups of customary owners and their respective interests must be identified;
- all disputes over ownership must be resolved before the start of Crown negotiations for purchase;
- the hapū should be involved in negotiations, not just individuals;
- the area of land being negotiated must be clearly defined;
- the nature of the transaction, whether permanent or not, must be well understood by all the customary owners;
- the price must be fair;
- all customary owners must give their free and informed consent to the purchase, or have the ability to remove their interests; and
- the purchase must leave sufficient community land for the current and future use of the hapū and for their well-being and their economic development.[8]

The Tribunal has broadly concluded that the Crown's assertion of control over land transactions through its pre-emption policy created additional obligations to protect Māori interests when purchasing land. In the *Report of the Waitangi Tribunal on the Orakei Claim* (1987), the Tribunal described pre-emption as a 'valuable monopoly right . . . which enabled the Crown, to the exclusion of all others, to purchase Maori land'.[9] As a result, pre-emption conferred reciprocal obligations on the Crown, including to ensure that Māori wished to sell the lands purchased, and that 'they were left with sufficient land for their maintenance and support or livelihood'.[10]

8. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, Wai 9 (Wellington: Brooker and Friend, 1987), pp 205–206; Waitangi Tribunal, *The Ngai Tahu Report 1991*, Wai 27, 3 vols (Wellington: GP Publications, 1991), vol 3, pp 825–826; Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45 (Wellington: GP Publications, 1997), p 5; Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, Wai 201, 2 vols (Wellington: Legislation Direct, 2004), vol 1, p 120; Waitangi Tribunal, *Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims*, Wai 785, 3 vols (Wellington, Legislation Direct, 2008), vol 1, p 286; Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, 3 vols (Wellington: Legislation Direct, 2010), vol 1, p 104; Waitangi Tribunal, *He Whiritaunoka: The Whanganui Lands Report*, Wai 903, 3 vols (Wellington: Legislation Direct, 2015), vol 1, p 368; Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims – Pre-publication Version*, Wai 898 (Wellington: Legislation Direct, 2018), pts 1–2, pp 1303–1304.

9. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, Wai 9, p 205.

10. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, Wai 9, p 206.

The Tribunal has also observed across a number of reports that the Crown had clear contemporary guidance regarding standards for land purchasing, as set out in Secretary of State Lord Normanby's 1839 instructions to Hobson.[11] In *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims* (2008), the Tribunal considered that throughout the 1840s, various Secretaries of State and Governors acknowledged the importance of dealing with Māori customary rights in accordance with their own law and customs.[12] However, Tribunal reports have also shown that there was a range of opinions among Crown officials on the nature of Māori land rights during this period. Some were influenced by the assumption that indigenous people had no law to recognise and the 'waste land' theory that they only owned the land upon which they lived and cultivated. In the opinion of the Tribunal in *Te Tau Ihu o Te Waka a Maui*, while this 'did not become accepted theory in New Zealand', it was nonetheless influential.[13]

In *The Ngai Tahu Report* (1991), the Tribunal emphasised that a sufficient endowment of lands should have been provided for both the present and future needs of Māori.[14] The Tribunal stated three criteria that the Crown should have met to make certain that it upheld its treaty duty of ensuring that Māori retained sufficient reserve lands:

- that kainga and cultivations were retained;
- that sufficient argicultural quality land was retained to develop alongside the settler economy; and
- that appropriate areas were retained to provide access to traditional resources.[15]

In that inquiry, the Tribunal found that the reserves set aside for Ngāi Tahu provided an average of 12.5 acres per individual, and that this was 'so grossly insufficient as to be no more than nominal in character'.[16] In the *Muriwhenua Land Report* (1997), the Tribunal found that Crown officials did not formulate or implement a clear policy to ensure that Māori retained sufficient lands, or 'where those reserves should be located, or how they should be constituted, managed, or retained in Maori control'.[17] The Tribunal observed that most of the reserves in the district were never formally gazetted, despite this being required by law, and most were either subsequently purchased by the Crown, or titled through the Native Land Court.[18] Both *The Wairarapa ki Tararua Report* (2010) and *He Whiritaunoka: The Whanganui Land Report* (2015) considered that the Crown's purchasing policy

11. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 5; Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, Wai 201, vol 1, pp 120–121; Waitangi Tribunal, *Te Tau Ihu o Te Waka a Maui*, Wai 785, vol 1, pp 286, 441; Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 104; Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pts 1–2, pp 349–350.
12. Waitangi Tribunal, *Te Tau Ihu o Te Waka a Maui*, Wai 785, vol 1, p 286.
13. Waitangi Tribunal, *Te Tau Ihu o Te Waka a Maui*, Wai 785, vol 1, pp 286, 299; see also Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 59.
14. Waitangi Tribunal, *The Ngai Tahu Report 1991*, Wai 27, vol 3, pp 825–826.
15. Waitangi Tribunal, *The Ngai Tahu Report 1991*, Wai 27, vol 2, p 639.
16. Waitangi Tribunal, *The Ngai Tahu Report 1991*, Wai 27, vol 3, p 828.
17. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 279.
18. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 281.

from 1846 under Governor George Grey increasingly sought to confine Māori reserves to the lands they 'occupied', rather than providing for their future needs.[19]

Beyond the protective intent that was supposed to inform Crown pre-emption, previous jurisprudence has also noted the connection between the Crown's exclusive right of purchase and its 'land fund' model for the colonisation of New Zealand. Under this system, the Crown funded immigration and the development of the colony, including infrastructure and the administration of the colonial Government, by using the profits earned from selling land acquired cheaply from Māori to settlers at an increased price.[20] As a result, Crown officials considered it necessary to purchase extensive lands well ahead of demand from settlers before Māori came to appreciate their monetary value, and the Tribunal has often found that the tension between this imperative and the Crown's protective responsibilities resulted in prejudicial outcomes for Māori. The *Muriwhenua Land Report* described the Government's policy in practice under McLean's Native Land Purchase Department was 'to relieve Maori of as much land as possible, as quickly as practicable, and for the least cost'.[21] The Tribunal went on to state that the Crown purchased 'with a distant future in mind, ahead of demand. One result was that market forces did not determine the sale price for Maori [land].'[22] Likewise, in *The Mohaka ki Ahuriri Report* (2004) the Tribunal underlined that Governor Grey employed the Crown's pre-emptive monopoly to acquire Māori land for 'little more than a pittance'.[23] Similarly, *The Hauraki Report* (2006) found that 'the historical record shows that the Crown, as a matter of general policy, did try to obtain Maori land as cheaply as possible'.[24] The Tribunal observed that this policy 'was clearly established by Normanby's 1839 instructions and sustained by Governor Grey'.[25]

In *The Wairarapa ki Tararua Report*, the Tribunal acknowledged that the Crown, if it was to assume an active role in promoting settlement, had to acquire some land for re-sale at a profit. However, that left unanswered questions about how much land the Crown needed to acquire and how much profit it needed to make. The Crown's determination to pay Māori as little as possible left them without the capital they needed to develop their remaining lands.[26] This report also noted the difficulties encountered in establishing the prices paid per acre: among them, overlapping purchases, survey deficiencies, and 'the ambiguous distinction between deeds and receipts that arose from the Crown's practice of retaining por-

19. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 259; Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 368.
20. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, Wai 785, vol 1, p 307.
21. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 206.
22. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 207.
23. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, Wai 201, vol 1, p 67. The Te Tau Ihu Tribunal reiterated this: Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, Wai 785, vol 1, p 307.
24. Waitangi Tribunal, *The Hauraki Report*, Wai 686, 3 vols (Wellington: Legislation Direct, 2006), vol 1, p 173.
25. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 1, p 173.
26. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 190.

tions of the total price to give disputing parties a chance of joining in later with those selling'. The Tribunal did not find any indication that the Crown was at all concerned to offset its monopoly position by ensuring that Māori were paid fair value.[27]

The Wairarapa Tribunal found that from 1853, the Crown's approach to purchasing changed dramatically as the pressure to acquire land intensified; with the rising inflow of migrants, it 'pursued 'more expedient means of securing agreement to its purchases'.[28] From this point, deeds were transacted with fewer rangatira, survey plans were not prepared, purchases overlapped, boundaries were disputed, and, increasingly, lands reserved or excluded from earlier purchases were bought. The Tribunal also discussed Grey's policy of creating a 'five per cents fund', whereby 5 per cent of the on-sale value of specific Crown purchase blocks would be set aside as an endowment for the benefit of the former Māori owners.[29] The Tribunal considered that this policy was based on 'sound principle' to the extent that Grey wanted to ensure that Māori would receive benefits from land sales 'that were not confined to money'. However, it found obvious flaws in policy which created 'an endowment that would decline rather than grow', and the Tribunal questioned 'whether the Crown's intention was principled at all'.[30] Grey's promise of general benefits persuaded Wairarapa Māori to agree to large Crown purchases, and low prices. When the Crown failed to deliver on those promises, the Tribunal concluded, 'the Crown gained Māori consent to the sale of their land under false pretences'.[31] In that inquiry, the Tribunal also found that Māori lodged complaints, in particular about lands that had been purchased without the consent of all those who had customary rights, boundaries that had been inadequately defined, lands that should have been excluded from sale but were purchased, payments that had not been received, reserves that had not been set aside, and promises of 'koha' or 5 per cents that had not been kept.[32]

Previous reports have discussed the importance of 'collateral' benefits that Māori were promised would accompany sales to the Crown through the development of their remaining lands and increased settlement within their rohe. In *The Whanganui River Report* (1999), the Tribunal reached the conclusion that '"[f]uture benefits"' were viewed by Māori as constituting a 'contractual undertaking'.[33] In the subsequent *He Whiritaunoka*, the Tribunal considered that Whanganui Māori were promised collateral benefits and that they accepted and relied on such

27. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 191.
28. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 96.
29. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 367.
30. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 374.
31. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 391.
32. Governor Grey introduced the idea of using a percentage of the on-sale price of land the Crown purchased from Māori to create a fund directly benefitting its former Māori owners. In the Wairarapa, 5 per cent of the on-sale price was to go into the fund. Use of the term 'koha' is found in the early Wairarapa purchase deeds to describe this 5 per cent fund: Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, pp 96, 367.
33. Waitangi Tribunal, *The Whanganui River Report*, Wai 167 (Wellington: GP Publications, 1999), p 140.

assurances. The Tribunal noted that these promises often went unrecorded, but concluded that it was 'very likely that Whanganui Māori were assured that a range of collateral benefits would accompany the sale of the Whanganui block', and that they accepted these assurances as in the nature of a contractual undertaking.[34] *The Wairarapa ki Tararua Report* also discussed the promises that were made about the 'future benefits Māori would enjoy if they agreed to sell their lands to the Crown'. These 'future benefits' included explicit promises from government officials on the provision of health services, roads, schools, and bridges.[35] The *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (2020) recorded that iwi and hapū in that district offered land to the Crown because they sought 'to bring settlers and capital to their areas and so access the benefits of Pākehā settlement'.[36]

Tribunal reports have also identified fundamental differences between Māori expectations and understandings of land transactions, and the full alienations sought by Crown purchasers. Instead of final and permanent sales conferring exclusive rights, Māori broadly expected to continue to use resources on their lands as they had prior to the Crown purchases.[37] *The Ngai Tahu Report* found that at the time of the Crown's early South Island purchases, Ngāi Tahu 'would have had little real understanding of the finality and irrevocability of the sale of their land or of their consequential permanent alienation from it and its resources'. The Tribunal noted that throughout the 1850s 'Ngai Tahu cultrivated or grazed stock beyond the reserves and continued to hunt and forage much as previously'.[38] In the *Muriwhenua Land Report*, the Tribunal found even after 1840 'there was no 'contractual mutuality' between Māori and Crown purchase agents; while Māori entered transactions to ensure 'a continuing social contract', the Crown sought 'an unencumbered property transfer'.[39] In that report, the Tribunal highlighted that Māori broadly did not understand English land law and continued to be unaware of the consequences of the transactions into which they entered.[40]

Subsequent Tribunal inquiries have reached similar conclusions. In *He Whiritaunoka*, the Tribunal concluded that the alienation of the Whanganui block in 1848 was, in the eyes of Māori, neither fully a sale, a cession, or a tuku; rather, 'the transfer of land to Pākehā established a relationship with them through which Māori would benefit materially, and maintain connections with them and with the land'.[41] In the Wairarapa ki Tararua inquiry, the Tribunal found that it was not reasonable to expect that early land purchases during the 1850s would 'instantly

34. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 255.
35. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, pp 327, 100, 327.
36. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pts 1–2, p 244.
37. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, Wai 9, pp 27–28; Waitangi Tribunal, Waitangi Tribunal, *The Ngai Tahu Report 1991*, Wai 27, vol 3, pp 822–823; Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi*, Wai 143 (Wellington: Legislation Direct, 1996), p 35; Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, pp 210, 399.
38. Waitangi Tribunal, *The Ngai Tahu Report 1991*, Wai 27, vol 3, p 823.
39. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, pp 210, 399.
40. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 211.
41. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 246.

transform' the experience and understandings of Wairapapa Māori. The Tribunal concluded that when Wairarapa Māori spoke of land transactions, 'they still spoke of the whole community coming to a decision first', and understood Grey and McLean's statements through the lens of their own cultural context, where a rangatira 'would be expected to act in a way that would be for the betterment of all, and not for his own personal advantage'.[42] Koha and utu provided the lens through which purchase payments would be understood, and this gave rise to an 'expectation that they would be paid as long as Pākehā remained on the land'.[43] In *Te Mana Whatu Ahuru*, the Tribunal observed that the delays in the settlement or development of some of the areas the Crown purchased in Te Rohe Pōtae during this period 'may have further encouraged Māori misunderstandings about the nature of the transactions'.[44]

8.2.2 Crown concessions

The Crown made several concessions in our inquiry relating to its land purchasing policy and practice between 1840 and 1865, which we set out in full:

> The Crown concedes that in purchasing the extensive area called 'Mahurangi and Omaha' in 1841 it breached Te Tiriti o Waitangi/the Treaty of Waitangi and its principles by failing to conduct any investigation of customary rights when it purchased these lands. The Crown acquired these lands without the knowledge and consent of all Māori owners and failed to provide adequate compensation and reserves for the future use of and benefit of all Māori owners when it later learned of their interests in the purchase area. . . .
>
> The Crown concedes that where it failed to carry out an adequate inquiry into the nature and extent of customary rights in lands it purchased in the Te Paparahi o Te Raki district between 1840 and 1865 it breached Te Tiriti o Waitangi/the Treaty of Waitangi.
>
> The Crown concedes that where it did not reserve sufficient land for the present and future needs of the iwi and hapu of Te Paparahi o Te Raki when purchasing land from them before 1865, it failed to uphold its duty under Te Tiriti/the Treaty of Waitangi and its principles to actively protect the interests of the iwi and hapu of Te Paparahi o Te Raki from whom it purchased land.[45]

The Crown had also initally conceded that 'iwi in the Mahurangi and Gulf Islands region were virtually landless by 1865 and the Crown's failure to ensure they retained sufficient land for their present and future needs was a breach of Te Tiriti o Waitangi/the Treaty of Waitangi and its principles'.[46]

42. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 127.
43. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, pp 127–128.
44. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pts 1–2, pp 274, 284, 299.
45. Crown statement of position and concessions (#1.3.2), p 3; Crown closing submissions (#3.3.404), p 2.
46. Crown statement of position and concessions (#1.3.2), p 1.

This concession was based on the Crown's initial estimate that it had acquired 83 per cent of the Mahurangi and Gulf Islands district, 433,852 acres, before 1865.[47] However, the Crown resiled from that position based on revised figures showing that the Crown acquired 148,852 acres by purchase from Māori before 1865, and that 59.8 per cent of Mahurangi and Gulf Islands taiwhenua had not been alienated by that date.[48] In closing submissions, Crown counsel submitted that '[g]iven the revised figures noted above, the facts underpinning that concession appear wrong'.[49] Over 312,511 acres of land remained under Māori ownership in the Mahurangi and Gulf Islands taiwhenua in 1865.[50] The Crown's revised position was that all Te Raki Māori 'did retain a sufficiency of land at 1865 for their then and future needs'.[51] The Crown stated that sufficiency, in this context, means 'at least 50 acres per head'. This definition was based on the requirement in the Native Land Act 1873 that reserves 'be set aside of at least 50 acres of land per Māori individual in a given district'.[52]

We note that the Crown made a more general concession that Mahurangi and Gulf Islands Māori are today virtually landless, and 'the Crown's failure to ensure they retained sufficient lands for their present and future needs was a breach of the treaty'.[53] Similarly, the Crown conceded

> that iwi living in the Whangarei and Whangaroa subregions of the Te Paparahi o Te Raki Tribunal inquiry are now virtually landless and the Crown's failure to ensure that they retained sufficient land for their present and future needs was a breach of Te Tiriti o Waitangi/the Treaty of Waitangi and its principles.[54]

47. Crown statement of position and concessions (#1.3.2), p 29.
48. The Crown first filed particularised figures for Crown purchasing between 1840 and 1865 in 2012. These figures were further clarified in 2015 by Dr Rigby who was commissioned to complete essential Crown purchase information and comment on the source information where appropriate. In his 2015 validation report, Dr Rigby identified blocks that were either wholly or partially outside the inquiry district, and noted that the Crown included certain acreages in its figures that it should not have. This included the Crown having twice accounted for the acres purchased in the Mahurangi and Omaha purchase of 1841, which were the subject of further Crown purchases between 1853 and 1865. In September 2017, Dr Rigby filed further revised figures at the request of Crown counsel that clarified the extent to which Crown purchase blocks overlapped the adjacent Muriwhenua and Kaipara inquiry districts. In its submissions, the Crown noted its appreciation of 'all who have contributed to the inquiry and to a better understanding of the extent of alienation of land from Northland Māori': Crown closing submissions (#3.3.404), pp 4–6; Barry Rigby, 'Pre-1865 Te Raki Crown Purchase Validation Report' (commissioned research report, Wellington: Waitangi Tribunal, 2015) (doc A53), app A, pp 3–7; Rigby, corrections requested by Crown counsel, 2017 (doc A48(e)), p 7.
49. Crown closing submissions (#3.3.404), p 9.
50. Crown closing submissions (#3.3.404), p 10.
51. Crown closing submissions (#3.3.404), p 10.
52. Crown memorandum (#3.2.2677), p 19.
53. Crown closing submissions (#3.3.404), pp 9–10.
54. Crown statement of position and concessions (#1.3.2), p 1.

Crown counsel distinguished between these broader concessions regarding the position of Mahurangi and Gulf Islands, Whāngārei, and Whangaroa hapū today, and the position of those hapū in 1865.

8.2.3 The claimants' submissions

In their generic closing submissions, the claimants argued that through the treaty, the Crown gained the right of pre-emption, and in return acquired something akin to a fiduciary obligation to protect Māori and their interests.[55] The claimants argued that the so-called 'land-fund model' of colonial development was never explained to their tūpuna, nor was their consent to its implementation sought or given.[56] Nevertheless, they argued, once implemented, 'pre-emption had an immediate effect' of imposing a Crown monopoly on purchasing and the attendant obligations that came with it.[57]

Closing submissions for Ngāti Uru and Te Tahawai, Te Uri o Hua and Ngāti Torehina hapū, and Te Hokingamai e te iwi o Mahurangi stressed that by 1840, through both the treaty and other declarations and undertakings made by its officials, the Crown had laid out a number of standards against which its purchasing policies and practices should be judged.[58] They noted that, in his instructions to Hobson, Lord Normanby stated that the Crown should only seek to purchase lands that Māori could afford to alienate 'without distress or serious inconvenience to themselves'.[59] Thus, Māori land rights and the Crown's respect and protection of them were key – and relatively defined – pillars of the Crown–Māori relationship.

Despite these standards, the claimants alleged that the Crown's measures intended to protect Māori 'were ineffective, and did not live up to Māori expectations'.[60] They argued that underlying the lack of protection for Te Raki Māori was the Crown's adherence to the land fund model of colonisation, by which it sought to acquire as much Māori land as cheaply as possible and on-sell it to settlers, using the profit to fund the colony's development.[61] Claimants from Te Taumata o Te Parawhau and from the Mangakāhia and Whangaroa taiwhenua, told us that the Crown's protective duty was incompatible with the land fund model of colonisation it was pursuing.[62] For example, the claimants argued that the role of the Chief Protector of Aborigines (discussed in chapter 4) was 'undermined by [his]

55. Claimant closing submissions (#3.3.208), pp 31–32.
56. Claimant closing submissions (#3.3.208), pp 22–23.
57. Claimant closing submissions (#3.3.208), p 24.
58. Closing submissions for Wai 2394 (#3.3.336), p 44; closing submissions for Wai 2206 (#3.3.400), pp 143–144; closing submissions for Wai 2382 (#3.3.333(b)), pp 45–46.
59. Closing submissions for Wai 2394 (#3.3.336), p 44; closing submissions for Wai 2206 (#3.3.400), pp 143–144; closing submissions for Wai 2382 (#3.3.333(b)), p 45.
60. Claimant closing submissions (#3.3.208), p 5.
61. Claimant closing submissions (#3.3.208), pp 41–42.
62. Closing submissions for Wai 2355 (#3.3.275(a)), p 34; closing statement (#3.3.293), pp 11–12; closing submissions for Whangaroa Taiwhenua (#3.3.385), p 33.

being saddled with the twin role of protector and commissioner for the purchase of lands.'[63]

Many claimant groups, including the descendants of Hone Karahina and members of the hapū of Te Uri o Hua and Ngāti Torehina; Ngāti Uru and Te Tahawai hapū; Ngāti Hineira, Te Uri Taniwha, Te Whānau Whero, and Ngāti Korohue hapū; Whānau Pani, Tahawai, and Kaitangata hapū; Te Patukeha ki Te Rawhiti and Ngāti Kuta ki Te Rawhiti hapū; Ngāti Kawa and Ngāti Manu; and Te Hokingamai e te iwi o Mahurangi, Ngā Wahapu o Mahurangi – Ngapuhi, and Te Tāōū hapū of Makawe, located the Crown's land purchasing programme within a broader strategy of undermining Te Raki Māori tino rangatiratanga 'in preparation for assimilation and the abolition of Māori tribalism'.[64] Claimants acknowledged that the Crown had generally rejected the 'waste lands' theory of indigenous land ownership (that is, that Māori were only considered to have recognisable property rights once land had been occupied, used, and improved by them) and instead recognised Māori proprietary rights to all lands to which they laid claim. Nonetheless, the waste lands theory, requiring Māori to show that they 'exploited' the land in order to prove their ownership, continued to influence Crown policy towards Māori land rights from 1840 into the twentieth century.[65]

Claimants alleged that a failure to carry out adequate inquiries into land ownership was a 'hallmark' of Crown purchases in the inquiry district during this period. Claimant counsel noted: 'it would not have been uncommon for numerous hapu to hold customary rights within the same area of land'.[66] Consequently, an 'adequate inquiry' would have required the Crown to identify all those who held rights in the relevant land and notify them of the proposed purchase. But Crown agents instead followed a policy of negotiating 'with the first individual, or group, that they came across who claimed to be entitled to transact the land', with the intention that any other owners could be dealt with at some later point.[67] Claimants further contended that it is not appropriate for the Crown to now rely on the presence or absence of complaints by Māori as a measure of the adequacy of its past assessments of customary interests. In the claimants' submission, the Crown's argument (see section 8.2.4) would 'place the onus for remedying its own prejudicial process on Māori'.[68]

63. Claimant closing submissions (#3.3.208), pp 33–34; closing submissions for Wai 2394 (#3.3.336), p 67; closing submissions for Whangaroa Taiwhenua (#3.3.385), p 34.

64. Closing submissions for Wai 2394 (#3.3.336), pp 55–56; closing submissions for Wai 2382 (#3.3.339(a)), pp 56–57; closing submissions for Wai 1522 and Wai 1716 (#3.3.341(a)), pp 26–27; closing submissions for Wai 1968 (#3.3.337), pp 60–61; see also closing submissions for Wai 1140 and Wai 1307 (#3.3.354), p 28; closing submissions for Wai 1514 (#3.3.357), p 58; closing submissions for Wai 2206 (#3.3.400), p 153.

65. Closing submissions for Wai 2394 (#3.3.336), pp 71–75; closing submissions for Wai 1968 (#3.3.337), pp 77–82; closing submissions for Wai 2382 (#3.3.339(a)), pp 75–79; closing submissions for Wai 1522 and Wai 1716 (#3.3.341(a)), pp 43–48; closing submissions for Wai 2206 (#3.3.400), pp 170–175.

66. Claimant closing submissions (#3.3.208), pp 5–6.

67. Claimant closing submissions (#3.3.208), p 53.

68. Claimant submissions in reply (#3.3.423), p 22.

With regard to other Crown purchasing practices in this period, claimant counsel alleged that transactions in the north followed a pattern of 'unclear boundaries and the absence of any survey or plan'.[69] Claimant counsel noted the Crown did not require surveys prior to the completion of its purchases before 1856.[70] While the claimants recognised that the Crown did make some efforts to improve surveys, they stated that its purchase officers could make their own unilateral decisions regarding survey, and there was a gap between policy and practice.[71] They argued that without adequate surveys, purchasers relied on guesswork, and 'Māori, and even purchasers, could not be clear of the area that was being transacted'.[72] In addition, the prices the Crown paid Māori in pre-1865 transactions were inadequate, even allowing 'for reduced payments in lieu of future benefits' that largely failed to materialise. But the Crown's imposition of a pre-emptive right left Māori with no other option for sale or lease.[73] These flaws in Crown practice, claimants said, were compounded by the Crown's 'grossly inadequate' efforts to properly document the land transactions in which it engaged. Deficient or absent legal documentation, the claimants alleged, prejudiced Māori by presenting opportunities for fraud in land transactions, as well as leaving Māori unable to prove fraud where it may have occurred.[74]

The claimants further argued that the Crown failed to set aside sufficient reserves for Te Raki Māori during its purchasing in this period.[75] Only 2.49 per cent of Te Raki land purchased before 1865 was reserved for Maōri, which the claimants submitted was grossly insufficient. The claimants challenged the Crown's contention that 'sufficiency' equated to 50 acres per head,[76] arguing that such a figure is arbitrary, is unduly focused on the individual at the expense of Māori collectives, refers only to the quantity rather than quality of retained lands, and deals strictly with economic sufficiency while ignoring the cultural sense of the term.[77] Claimants also contended that the fact that nearly 80 per cent of Northland Crown purchase deeds contained no provision for reserves demonstrates that the Crown 'was not interested' in ensuring Māori retained an adequate land base. Even where reserves were set aside, they usually had no official status and were open to future purchasing efforts.[78] Furthermore, claimants said, while the Crown may have instructed its purchase agents to ensure Māori retained sufficient land, it failed to ensure these directions were acted upon.[79]

69. Claimant closing submissions (#3.3.208), p 58.
70. Claimant closing submissions (#3.3.208), p 58; Rigby, 'Pre-1865 Te Raki Crown purchase validation report' (doc A53), p 11.
71. Claimant closing submissions (#3.3.208), pp 58–59.
72. Claimant closing submissions (#3.3.208), p 59.
73. Claimant closing submissions (#3.3.208), pp 60–61.
74. Claimant closing submissions (#3.3.208), pp 63–66.
75. Claimant closing submissions (#3.3.208), p 6.
76. See Crown memorandum (#3.2.2677), p 19.
77. Claimant submissions in reply (#3.3.423), pp 8–12.
78. Claimant closing submissions (#3.3.208), pp 55–57.
79. Claimant submissions in reply (#3.3.423), pp 13–14.

In reply submissions, the claimants 'strongly disputed' the Crown's revised position on the status of Te Raki Māori landholding by 1865 and the landlessness of Mahurangi hapū. The claimants submitted that '[i]n taking back the concession the Crown fails to take into account the quality of the land in assessing whether the land is enough for present and future needs'.[80] They further submitted that by 1865, the ability for Māori to live individually or collectively 'was undermined'.[81] Ngāti Maraeariki, Ngāti Manu, Ngāti Rongo, Te Uri Karaka, Te Uri o Raewera, Ngāpuhi ki Taumarere, and Te Hokingamai e te iwi o Mahurangi claimants maintained that they had been left virtually landless as a result of the Crown's purchasing practices and policies.[82]

In relation to Māori understandings of what transactions entailed, claimants submitted that '[t]he custom surrounding land was that of tuku whenua, and permanent alienations were not possible.' In their view, this was the case in the period of the old land claims, and there is no evidence to suggest this had changed between 1840 and 1865.[83] Claimant counsel argued that the Crown was aware that Māori conceived of land sales in this manner but 'pushed on in the hope that in the future their purchases could be confirmed by way of force'. As such, counsel concluded, these transactions cannot be considered legitimate.[84] Counsel maintained that Māori believed that even following 'sales', they still retained ongoing rights to access and occupy their lands because they had 'entered into reciprocal transactions on the basis of an ongoing relationship'. In some cases, settlers did not move onto the land or clear the bush for decades after it was purchased. The claimants cited historian Dr Vincent O'Malley who stated that before 1865, 'nominal purchases had no real meaning or discernible consequences on the ground . . . local Māori continued to utilise such lands for gum digging, mahinga kai and other purposes'.[85]

In terms of Te Raki Māori expectations relating to the advantages of land transactions, claimants contended that Māori anticipated 'immediate financial gain' as well as ancillary benefits like public works and development; however, these promised benefits did not appear.[86] They also expected higher payments from the Crown than they generally received, yet had no avenue to complain because '[p]reemption ensured that the Crown's show was the only one in town'.[87] Moreover, Māori may have accepted low prices on the assumption that they would gain the benefits in the future that the Crown had promised them.[88] However, the claim-

80. Claimant submissions in reply (#3.3.423), pp 12–13.
81. Claimant submissions in reply (#3.3.423), p 11.
82. Closing submissions for Wai 2181 (#3.3.242), pp 19–21; closing submissions for Wai 354 (#3.3.392), p 44; closing submissions for Wai 2206 (#3.3.400), p 212.
83. Claimant closing submissions (#3.3.208), pp 9–10.
84. Claimant closing submissions (#3.3.208), p 12.
85. Claimant closing submissions (#3.3.208), pp 12–13; O'Malley, 'Northland Crown Purchases' (doc A6), pp 19–20, 490.
86. Claimant closing submissions (#3.3.208), pp 13, 20–22.
87. Claimant closing submissions (#3.3.208), p 14.
88. Claimant submissions in reply (#3.3.423), p 24.

ants submitted that in order to receive any benefit from future settlement and development, they had to retain sufficient lands. They contended the Crown failed to ensure that Te Raki Māori received those benefits.[89]

8.2.4 The Crown's submissions

Crown counsel stated that of the 88 blocks the Crown acquired in Te Raki between 1840 and 1865, the 'vast majority' were purchased after 1854.[90] The Crown submitted that it entered into at least 27 purchase agreements in the Bay of Islands between 1855 and 1865, with only one occurring before 1855, for a total gain of 95,306 acres. Hapū and iwi involved in transacting land there included Ngāti Kahu, Ngāti Wai, Ngāti Rangi, Ngāpuhi, Te Waiariki, Ngāti Hine, Ngāti Rēhia, Te Uri o Ngongo, Ngāi Te Wake, Ngāti Maru, Te Urikapana, Te Hikutū, and Ngāi Te Whiu.[91] Finally, the Crown submitted that it was unaware of any Crown purchasing occurring in Hokianga between 1840 and 1865, yet recognised that the Crown acquired land during this period under the scrip and surplus land policies relating to pre-treaty transactions.[92]

Crown counsel agreed with the claimants' assertion that Crown purchasing in the inquiry district between 1840 and 1865 was carried out under the land fund model. They agreed the Crown had bought land from Māori and on-sold it to settlers, putting the profit towards the development of the colony; as a consequence, it sought to buy land for low prices. The Crown submitted that '[u]nder this model a contribution to the future development of the colony was built in to every purchase of land by the Crown and every sale of Crown land'.[93] The Crown contended that Māori were expected to 'benefit from the associated infrastructure and economic development' that accompanied European settlement so long as they retained enough land to do so.[94] It further submitted that there is insufficient evidence to quantify 'the real or perceived benefits there may or may not have been' for Te Raki Māori in this inquiry.[95]

The Crown also argued that from 1846, Governor Grey 'pursued a policy whereby the Crown would purchase land not actually occupied or needed by Māori'.[96] Counsel referred to *The Kaipara Report* (2006) which recorded that in 1848, Grey set out the Crown's approach to purchasing, and thus adopted the following principles:

- The interests Māori had in all of their lands (even the so-called 'waste lands' which they were not occupying or cultivating) would be recognised.

89. Claimant closing submissions (#3.3.208), p 20.
90. Crown closing submissions (#3.3.404), p 5.
91. Crown closing submissions (#3.3.404), p 6.
92. Crown closing submissions (#3.3.404), p 7.
93. Crown closing submissions (#3.3.404), p 41.
94. Crown closing submissions (#3.3.404), p 42.
95. Crown closing submissions (#3.3.404), p 42.
96. Crown closing submissions (#3.3.404), p 11.

- Māori title to very large tracts of land could be extinguished through purchase for merely 'nominal' payment. In this way, sufficient land would become available before it was required for Pākehā settlement.
- Areas of land sufficient to meet the future needs of Māori would be reserved from such purchases.
- The real payment to Māori for their land would come not from the initial purchase price but rather from the security that Crown title provided to their reserves, the increased value of their remaining land resulting from Pākehā settlement, and the economic benefits of trade with settlers.[97]

The Crown submitted that the tenets of Grey's policy continued to underpin the Crown's purchasing policy during this period.[98]

The Crown recognised that 'there is no evidence that its instructions to land purchase officers to ensure Māori retained a sufficiency of land were systematically acted upon between 1840 and 1865'.[99] However, a large proportion of the Native Department's records from this period were lost in the 1907 Parliament Buildings fire. Crown counsel submitted that this meant that the Tribunal could not conclude with certainty that the Crown's records were inadequate before the fire, because of the possibility that they were destroyed. It argued that the absence of documents did not mean that the Crown did not take steps to ensure Te Raki Māori retained sufficient land. The Crown additionally submitted that it does not accept that 'a failure to retain adequate records of all its purchases is itself a breach of any treaty duty'.[100] The Crown accepted that in assessing whether hapū retained sufficient lands, issues such as the quality of land retained and retention of wāhi tapu were relevant considerations.[101] However, as we noted earlier, the Crown's position was that Te Raki Māori 'did retain a sufficiency of land at 1865 for their then and future needs'.[102]

The Crown acknowledged that it had a duty to pay a 'fair' or reasonable price for land, and that an independent valuation system was not established until after 1865. However, it submitted that there was little specific evidence from the inquiry district showing that it purchased blocks at an unreasonably low price.[103] The Crown referred to the example of the Mokau block where, in its submission, the price paid was 'low but fair' and 'was comparable to other forested blocks'.[104] Crown counsel further submitted that it is inherently difficult for the Tribunal to take into account the value of collateral benefits associated with land sales when

97. Waitangi Tribunal, *The Kaipara Report*, Wai 674 (Legislation Direct: Wellington, 2006), p 51; Crown closing submissions (#3.3.404), p 12.
98. Crown closing submissions (#3.3.404), p 12.
99. Crown closing submissions (#3.3.404), p 17.
100. Crown closing submissions (#3.3.404), p 17.
101. Andrew Irwin, transcript 4.1.32, Waitaha Events Centre, p 221.
102. Crown closing submissions (#3.3.404), p 10.
103. Crown closing submissions (#3.3.404), pp 41–43.
104. Crown closing submissions (#3.3.404), p 42.

assessing the price paid for land.[105] In the Crown's view, the failure of several negotiations over the question of price was a clear indication that Māori retained control over the sale process, and, with particular reference to the Kaurihohore block, it rejected claims that the Crown profited from land acquired from its customary owners.[106]

As we have already noted, the Crown conceded that where it did not conduct an adequate inquiry into customary interests in the lands it purchased in Te Raki during this period, it failed to uphold its duty to actively protect the interests of Te Raki Māori.[107] Nevertheless, the only instance where the Crown conceded that it did not make adequate inquiries into customary rights in the land it purchased was in the extensive 1841 Mahurangi and Omaha purchase.[108] Crown counsel noted that it began purchasing land in the Mahurangi and Gulf Islands district from as early as 1841, but '[i]t was only in the early 1850s that the Crown began to investigate customary rights in the district and it then entered into further agreements with Māori it found had rights in the area.'[109] The Crown argued that by 1855 'it was much more skilled at, and committed to, identifying all owners of land it sought to purchase.'[110]

Other than in the Mahurangi and Omaha purchase, the Crown submitted that further instances where it failed to carry out adequate inquiries into the nature and extent of customary rights in the lands it purchased were relatively rare. The Crown referred to Dr O'Malley's evidence that after 1865 there were few formal petitions or complaints made regarding Te Raki pre-Native Land Court Crown purchases, with the exception of the Mokau block. Counsel submitted that the evidence available did not indicate widespread Māori dissatisfaction with the Crown's investigations.[111] The Crown's submissions referred to the Mokau block as a significant case in this inquiry. Māori had petitioned Parliament about its purchase, stating that their interests had been sold without their consent; the Crown argued that this case was investigated by a Royal Commission of Inquiry (the Myers commission) during the 1940s which found that the owners had been identified and had consented, and that 'there was nothing untoward with the sale'. The Crown submitted that 'there is no basis for this Tribunal to reach findings that are different to the finding of the Myers Commission.'[112]

With regard to Crown purchasing practices between 1846 and 1865, counsel argued that there is little evidence as to the extent to which the Native Land Purchase Ordinance 1846, which reinstated Crown pre-emption in law (following

105. Crown closing submissions (#3.3.404), p 42.
106. Crown closing submissions (#3.3.404), p 43.
107. Crown statement of position and concessions (#1.3.2), p 3; Crown closing submissions (#3.3.404), p 18.
108. Crown statement of position and concessions (#1.3.2), p 3.
109. Crown closing submissions (#3.3.404), pp 7–8.
110. Crown closing submissions (#3.3.404), p 8.
111. O'Malley, 'Northland Crown Purchases' (doc A6), p 497; Crown closing submissions (#3.3.404), p 18.
112. Crown closing submissions (#3.3.404), pp 40–41.

Governor Robert FitzRoy's pre-emption waiver proclamations of 1844; see chapter 6, section 6.6) and prohibited private leasing of Māori land, was implemented in Te Raki. The Crown noted that there was evidence of private leasing occurring between Māori and settlers despite the 1846 ordinance, and that it was unaware of any cases where the prohibition against leasing was enforced in Northland.[113] In relation to the adequacy of surveys, counsel said that from 1856 onwards 'there does not appear to have been a general failure to ensure surveys were completed before a deed was signed' and since the majority of the Te Raki purchases took place after that date, counsel was unaware of specific cases of prejudice to Te Raki Māori resulting from failures in surveying.[114]

Counsel contended that the Crown's duty to ensure Te Raki Māori retained sufficient land did not mean that it had to ensure a reserve was created in every block purchased. Counsel stated that the Crown created 50 reserves comprising 13,940 acres from its pre-1865 purchases, in addition to lands that Māori withheld from sale altogether. Furthermore, in counsel's submission, the scarcity of available documents shedding light on how Crown purchase agents ensured Māori retained sufficient lands does not mean that purchase agents did not take such steps.[115]

In relation to Te Raki Māori understandings of the nature and effect of land sales, Crown counsel submitted that Māori intended their 1840-to-1865 transactions with the Crown to be permanent sales. Most of the Crown's pre-1865 purchases were made after 1854, by which time Te Raki Māori would have understood the notion of final and permanent alienation – in fact, counsel argued, this understanding was probably widespread by 1839. Crown counsel submitted that the Māori texts of purchase deeds from 1840 to 1865 also reflect this understanding.[116]

8.2.5 Issues for determination

We have identified three issues that we need to address relating to Crown purchasing activities in the Te Raki inquiry district between 1840 and 1865. These are as follows:

- In developing its purchasing policy, did the Crown recognise Te Raki Māori tino rangatiratanga?
- Was the Crown's implementation of its purchasing policy consistent with its treaty obligations?
- Were the Crown's on-the-ground purchasing practices consistent with its treaty obligations?

113. Crown closing submissions (#3.3.404), pp 50–51.
114. Crown closing submissions (#3.3.404), p 54.
115. Crown closing submissions (#3.3.404), pp 8–9.
116. Crown closing submissions (#3.3.404), pp 44–45.

8.3 In Developing its Purchasing Policy, Did the Crown Recognise Te Raki Māori Tino Rangatiratanga?

8.3.1 Introduction

Following the signing of the treaty, the settlement of land was a matter of great importance to both the Crown and Māori, and an area where their interests overlapped. In chapter 4 of this report, we discussed the Crown's policy for the recognition of Māori land and resource rights (see section 4.3.4.2.3). We set out how, through the doctrine of radical title, the Crown asserted paramount title to the land of New Zealand and placed Māori land rights in a contemporary, foreign, legal paradigm of 'aboriginal title' that made them vulnerable to alienation (see section 4.3.4.2.1).[117] While Māori customary rights were recognised as surviving proclamations of sovereignty over New Zealand, questions remained as to how extensive those rights were and how they would be defined.

We also discussed how the Crown expected to exercise its right of pre-emption in order to control the development and settlement of the colony. Contrary to its expectations, however, the Crown was confronted with the reality that Te Raki rangatira exercised substantial authority within the district over the enforcement of laws and breaches of tikanga, which continued even after the end of the Northern War in 1846. In the first years after the signing of the treaty, the colonial Government's resources were spread thinly across a number of significant policy challenges, including how to provide certainty and awards to settlers for the transactions they had entered into during the pre-treaty period (discussed in chapter 6). The New Zealand Company's claim to have purchased vast tracts of land in central New Zealand and the arrival of company colonists to found their settlements north and south of Cook Strait was a related problem that demanded the attention of officials in both New Zealand and London.[118]

During this period, the Crown struggled to establish its land purchasing programme and only made one purchase in Te Raki, in the Mahurangi and Omaha block (1841), which we discuss later. After that, purchasing in Te Raki came to a halt until the 1850s (with the exception of the ongoing payments made by the Crown to resolve outstanding claims to the Mahurangi–Omaha block). For observers in London and New Zealand, the results of the model of colonisation outlined in Lord Normanby's 1839 instructions, as historian Dr Donald Loveridge observed, 'was a house of cards which was in imminent danger of collapse'.[119] In 1844, Governor FitzRoy instituted a pre-emption waiver policy that provided for settlers to directly purchase lands from Māori provided certain conditions were met (we discuss this policy in chapters 4 and 6). This policy was terminated after FitzRoy was recalled as Governor and George Grey arrived as his replacement in 1845. Grey's Government would be substantially better funded than those of the

117. P G McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (New York: Oxford University Press, 2011), pp 1, 26–27.

118. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), pp 118–119; Alan Ward, *National Overview*, 3 vols, Waitangi Tribunal Rangahaua Whanui Series (Wellington: GP Publications, 1997), vol 2, pp 75–76.

119. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), p 118.

previous Governors;[120] however, as noted above, the Crown would not seek to purchase any futher lands in the district until the 1850s.[121]

From 1840, Te Raki Māori expected that their alliance with the Crown and the new colonial Government would bring further economic opportunities into the district, and they were open to making allowances to the small settler community for that reason. It would be reasonable to expect that Te Raki Māori, who had entered into numerous pre-treaty land arrangements with missionaries and settlers, would have been involved in decisions about the way in which their lands would be transacted, and their rights protected into the future. The Taranaki Tribunal made this point many years ago in *The Taranaki Report: Kaupapa Tuatahi* (1996), noting the expectation of the rangatira Wiremu Kīngi that the process of deciding on land transactions 'had to be settled on both sides'.[122] The interaction between the two spheres of authority (Māori tino rangatiratanga and British kāwanatanga) on this issue ought to have been the subject of negotiations between rangatira and Crown representatives, and the policies the Crown established for purchasing land should have accounted for the concerns and priorities of Māori leaders and their hapū.[123]

Instead, discussions in official circles during this period focused on whether Māori owned lands beyond those they actively occupied. Despite the Crown's recognition of Māori land rights in the treaty, the 1840s were marked by substantial debate over their extent. A central question was whether the treaty had affirmed Māori rights to all lands in New Zealand. Prior to the signing of the treaty, Normanby's 1839 instructions to Hobson acknowledged that this was the case. However, as we discussed in chapter 4 (see section 4.3.4.2.3), subsequent Crown officials did not all share this view. Over this period, colonialists (including the New Zealand Company) and prominent officials and members of the imperial government (including the 1844 House of Commons Select Committee on New Zealand) promoted the 'waste lands' theory that indigenous peoples were only guaranteed rights in the lands upon which they physically lived or they cultivated. While these ideas were resisted by some officials, such as the Permanent Under-Secretary to the Colonial Office, James Stephen, they remained influential. We return to these debates in this chapter in which we focus on a period when the 'waste lands' theory would become increasingly prominent in the Colonial Office with the appointment of Earl Grey as Secretary of State for War and the Colonies in 1846. Following his assumption of the governorship in 1845, George Grey would also move quickly to reinstate Crown pre-emption, but he waited until 1848 to formulate a new approach to land purchasing. Grey's 1848 policy set the terms upon which the large-scale purchasing of the 1850s and 1860s would proceed.

120. Loveridge notes that '[t]his largesse continued through Grey's term in New Zealand': Loveridge, '"An Object of the First Importance"' (Wai 863 R01, doc A81), pp 280–282.
121. O'Malley, 'Northland Crown Purchases' (doc A6), pp 13, 87–88, 91–92.
122. Waitangi Tribunal, *The Taranaki Report*, Wai 143, p 52.
123. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 527.

In this section, we consider the treaty compliance of the purchasing policies and guidelines the Crown established for itself between 1840 and 1848. The parties in this inquiry all agreed that the Crown's policy during this period was based on the land fund model of colonisation.[124] However, the parties disagreed about the efficacy of the protections this model provided for Te Raki Māori as the Crown asserted its sole right of pre-emption. In their submissions, the claimants argued that the primary motivation for the Crown asserting pre-emption in the colony was its 'fear that it would lose revenue by being deprived of control over the trade in land'.[125] As a result, few protections were established, and those that were, such as the role of Chief Protector of Aborigines, 'were strikingly unsuccessful'.[126]

Crown counsel argued that under the land fund model, 'a contribution to the future development of the colony was built into every purchase of land by the Crown and every sale of Crown land'. That is to say, Māori contributed to the colony's development through the difference between the price the Crown paid them and the sum they might have received for their land on the open market. Similarly, British settlers contributed the difference between what they might have paid for land on an open market and the price they actually paid to the Crown. Māori were also expected to benefit from the associated infrastructure and economic development that would flow from land sales – although Crown counsel allowed that this 'relied on those developments occurring while Māori retained enough land to benefit from them'.[127] To illustrate the intention of Crown officials to protect Māori landholdings, the Crown drew attention to Lord Normanby's instructions to Hobson and stressed that, contrary to Earl Grey's later opinion that all non-occupied lands were to be considered 'waste lands' and thus Crown demesne, Governor Grey instead pursued a policy of recognising Māori interests in all their lands and of purchasing land not 'occupied or needed by Māori'.[128]

8.3.2 The Tribunal's analysis

8.3.2.1 *Lord Normanby's instructions to Governor Hobson*

In our stage 1 report, we characterised the August 1839 instructions of Secretary of State Lord Normanby 'as the key statement of British intentions in New Zealand prior to the signing of te Tiriti'.[129] As we further discussed in chapter 4 (see section 4.3.4.2.2), Normanby's instructions set out succinctly the principles for the operation of the land fund model of colonisation. Hobson's first task in establishing the land fund was to proclaim upon his arrival in New Zealand that the Crown would not recognise any title to land that was not derived or confirmed by a Crown grant.[130] In accordance with Normanby's instructions, the Governor of New South

124. Claimant closing submissions (#3.3.208), pp 42–43; Crown closing submissions (#3.3.404), pp 41–42.
125. Claimant closing submissions on (#3.3.208), p 17.
126. Claimant closing submissions on (#3.3.208), pp 31–32.
127. Crown closing submissions (#3.3.404), p 46.
128. Crown closing submissions (#3.3.404), p 11.
129. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 315.
130. Normanby to Hobson, 14 August 1839, BPP, vol 3, pp 86–87.

Wales, George Gipps, issued a proclamation to this effect on 14 January 1840, and Hobson issued a further proclamation upon his arrival in the Bay of Islands.[131]

While Normanby's instructions recognised that all land was under Māori customary ownership, which extended to unoccupied and occupied land alike, he stated further, that much Māori land was unused and 'possesses scarcely any exchangeable value'. Contemplating the growth of the colony, he envisaged that the value of land would progressively increase through 'the introduction of capital and of settlers from this country', and Māori would 'gradually participate' in the ensuing benefits.[132] Hobson's duty was 'to 'obtain, by fair and equal contracts with the natives, the cession to the Crown of such waste lands as may be progressively required for the occupation of settlers'.[133] By preventing private interests from purchasing large tracts of land, Normanby envisaged that the re-sale of the Crown's purchases would provide the funds necessary for future acquisitions, as well as infrastructure and colonial administration. The price to be paid to Māori was to 'bear an exceedingly small proportion to the price for which the same lands will be re-sold by the Government to the settlers'.[134]

Crown pre-emption was also intended to protect Māori from what Normanby described as the 'dangers to which they may be exposed by the residence amongst them of settlers amenable to no laws or tribunals of their own'.[135] Normanby instructed that the Crown's dealings with Māori – by Hobson himself and by all Crown officials – were to 'be conducted on the same principles of sincerity, justice, and good faith, as must govern [the Crown's] transactions with them for the recognition of Her Majesty's Sovereignty in the Islands'.[136] Officials were not to permit Māori to enter into any contracts 'in which they might be the ignorant and unintentional authors of injuries to themselves', including by selling land the retention of which 'would be essential, or highly conducive, to their own comfort, safety or subsistence'.[137] Normanby instructed officials to ensure land purchases were confined to districts in which Māori could alienate land 'without distress or serious inconvenience to themselves'. To ensure compliance, he envisaged that all contracts would be made by the Governor 'through the intervention of an officer expressly appointed to watch over the interests of the aborigines as their protector'. As a consequence, the Chief Protector of Aborigines would have a dual role: to oversee the Crown's purchasing of land; and to ensure Māori were not disadvantaged by loss of land.[138] Taken at face value, Normanby's instructions to Hobson set general standards of conduct that required Crown agents to follow principles of fairness and good faith when engaging with Māori and securing purchases of

131. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 341.
132. Normanby to Hobson, 14 August 1839, BPP, vol 3, p 87.
133. Normanby to Hobson, 14 August 1839, BPP, vol 3, pp 85, 87.
134. Normanby to Hobson, 14 August 1839, BPP, vol 3, pp 85–90.
135. Normanby to Hobson, 14 August 1839, BPP, vol 3, pp 86–87.
136. Normanby to Hobson, 14 August 1839, BPP, vol 3, p 87.
137. Normanby to Hobson, 14 August 1839, BPP, vol 3, p 87.
138. Normanby to Hobson, 14 August 1839, BPP, vol 3, p 87.

land; Crown purchases were also not to leave Māori with insufficient lands and should not be injurious to Māori interests.

In his report on Crown purchasing during this period, Dr O'Malley gave evidence that Crown pre-emption was ostensibly intended to 'provide both a protective mechanism for Māori interests in their lands, and at the same time allow the government to fund further colonisation by means of its monopoly position as buyer and seller of land'.[139] These features of the Crown's plans for settlement were not revealed to Te Raki Māori until after the signing of te Tiriti. Prior to its signing, rangatira were not told of the Crown's intention to assert an exclusive right of purchase. Nor were they given to understand that Crown purchasing of Māori land would fund colonisation.[140] These were significant shortcomings in the Crown's negotiation of consent. The Crown's assertion of pre-emption introduced substantial limits on the options available to Māori for utilising their lands in the new economy and imposed reciprocal obligations on the Crown, including to ensure that Māori wished to sell the lands purchased, and that they retained sufficient lands for their future well-being.[141] In the absence of any negotiation over pre-emption, it was more incumbent on the Crown to recognise and protect Te Raki Māori tino rangatiratanga.

We agree (as Tribunals in other inquiry districts have) that there is a clear tension in Normanby's instructions between the Crown's protective intent and his direction to Hobson to acquire the lands required for settlement from Māori at nominally low prices. As the Crown acknowledged, this land fund model could only work if Māori were promptly delivered tangible economic benefits from settlement in exchange for parting with their lands.[142] Despite this inherent tension, Lord Normanby's instructions set out the key standards Crown officials should observe when seeking to purchase land. Nonetheless, those standards of conduct were fundamentally and uncomfortably bound to the Crown's commitment to systematic and progressive colonisation.

In the next section, we consider the purchasing guidelines developed by Crown officials following the signing of the treaty, intended to give effect to Normanby's instructions.

8.3.2.2 *The Crown's purchasing guidelines established under the Chief Protector of the Aborigines*

In accordance with Normanby's instructions, George Clarke, a lay member of the Church Missionary Society (CMS), was appointed Chief Protector of Aborigines in April 1840.[143] Nominated by the missionary Henry Williams, Clarke was endorsed by Hobson as someone who had resided in New Zealand for many years and was considered to be well acquainted with Māori language and custom.[144] Following

139. O'Malley, 'Northland Crown Purchases' (doc A6), p 26.
140. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 517–518.
141. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, Wai 9, p 206.
142. Crown closing submissions (#3.3.404), p 46.
143. O'Malley, 'Northland Crown Purchases' (doc A6), p 43.
144. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), p 64.

his appointment, Clarke quickly began to consider the practical challenges presented by negotiating purchases with Māori. While Normanby had outlined the standards that Crown purchasers should meet, as Dr Loveridge observed, his 'instructions provided little guidance, as far as methods and procedures were concerned, and New South Wales provided no institutional model to draw upon.'[145] Loveridge concluded that 'During the life of the Protectorate (1840–46) there were few, if any radical innovations in land purchase methods relative to what had gone before, even though the introduction of a Crown monopoly on purchase radically altered the environment in which purchasing took place.'[146]

Instead, it appears that in his first year as Crown purchase agent, Clarke relied on the practices established by the CMS. In a July 1840 report to the British Colonial Office, Clarke outlined a number of suggested practices for purchasing Māori land in order 'to prevent any embarrassment in this duty'. He observed that it was desirable that 'the most eligible situations' be purchased first, as he believed Māori in every district appeared interested in selling land. Clarke also suggested that it might be desirable to establish reserves for Māori where purchases exceeded 20,000 acres in order to secure an estate 'to carry out the philanthropic views of the Government towards the aborigines'.[147] In carrying out purchases, he believed Crown agents should define the area of land involved, specify the district in which the land was located, and establish the maximum price per acre. Further to this, 'some pains should be taken to ascertain the boundary line[s]' and to set out the proportion of the lands involved that would be reserved for Māori.[148] Clarke acknowledged that lands possessed in common were 'exceedingly difficult to purchase'.[149]

Clarke's first purchases, made between 1840 and 1842, were largely confined to the far north and Tāmaki Makaurau (Auckland). Among them, the April 1841 purchase of the Mahurangi and Omaha block was the only acquisition within our inquiry district and is discussed in the following section. Loveridge noted that the per-acre prices Clarke negotiated during this period were in line with Lord Normanby's assumption that 'waste lands' had virtually no value. Moreover, the first re-sales in 1841, in Auckland, where Hobson had decided to establish the capital of the colonial Government, 'were made at prices which were even higher than Normanby could have anticipated'.[150] However by September 1841, Clarke had already begun encountering difficulty navigating the conflicting imperatives of his two roles as Crown purchase officer and Chief Protector. In his first report to

145. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), p 65.
146. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), p 656.
147. Clarke did not specify what proportion of the land should generally be reserved: Clarke to Colonial Secretary, 28 July 1840 (cited in Henry Hanson Turton, comp, *An Epitome of Official Documents relative to Native Affairs and Land Purchases in the North Island of New Zealand* (Wellington: George Didsbury, 1883), C, p 147).
148. Clarke to Colonial Secretary, 28 July 1840 (cited in Turton, *Epitome*, C, p 147).
149. Clarke to Colonial Secretary, 17 October 1843 (O'Malley, supporting papers (doc A6(a)), vol 15, pp 5190, 5192).
150. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), p 70.

the Governor, he observed that two or three of his purchases had 'led to various remarks among the natives, more or less prejudicial to my duties as chief protector'. Clarke had further struggled to satisfy the complainants as to 'the great disproportion between the price the government gave for their lands, and the amount they realised when resold'.[151]

Hobson supported Clarke's concerns, and forwarding his report to the Colonial Office, he observed that Clarke's purchasing activities 'interefere in some measure, I fear, with his conservative vocation of Protector'.[152] In December 1841, Hobson requested that the Colonial Office relieve Clarke of his dual role.[153] Lord Stanley, then Secretary of State for War and the Colonies (1841 to 1844), agreed that the same official holding both positions was improper and Clarke was relieved of the responsibility of undertaking new purchases from December 1842, this duty being transferred to the oversight of the Surveyor-General.[154]

Governor Hobson died in September 1842, before the Colonial Office's decision on this matter reached New Zealand. Willoughby Shortland served as temporary successor as 'Officer Administering the Government' and, once Clarke was relieved of his purchasing duties, moved quickly to prepare 'a set of Instructions for the guidance of an Agent for the purchase of land from the Aborigines in this Colony on behalf of the Crown'.[155] The instructions had to do with both the standards to be observed and matters of procedure. They stipulated that purchases were to be conducted by a single agent acting on the recommendation of the Surveyor-General, while the Chief Protector was to report on whether the Māori concerned were disposed to sell and on the reserves that would be required. Notice of the proposed transaction was to be published in the 'Maori Gazette' (*Te Karere o Nui Tireni*) which was published by the protectorate from January 1842.[156] Once a decision had been made to proceed with purchase, the agent would 'treat with the owners of the soil on the spot', assisted by a surveyor. The latter would prepare a plan with the size of the block, the quality of land, and boundaries set out. The purchase agent would then provide the Governor with a signed agreement stating the amount to be paid and the timeframe for payment. If approved, the deed would be passed to the Surveyor-General who would record the purchased area 'in the Map of the District, County or Parish as the case may be'.[157]

151. George Clarke, 30 September 1841, BPP, vol 3, pp 539–540 (O'Malley, supporting papers (doc A6(a)), vol 24, pp 8091–8092).

152. Hobson to Stanley, 15 September 1841 (Turton, *Epitome*, A1, p 119).

153. Loveridge, '"An Object of the First Importance"' (Wai 863 RO1, doc A81), pp 71–72; Hobson to Stanley, 15 December 1841, BPP, vol 3, pp 538–539.

154. Loveridge, '"An Object of the First Importance"' (Wai 863 RO1, doc A81), pp 71–72; O'Malley, 'Northland Crown Purchases' (doc A6), p 44.

155. Officially, Shortland's title was Officer Administering the Government (cited in Loveridge, '"An Object of the First Importance"' (Wai 863 RO1, doc A81), pp 72–74).

156. Shortland to Clarke, 29 December 1842 (cited in Loveridge, '"An Object of the First Importance"' (Wai 863 RO1, doc A81), pp 72–73); Lachy Paterson, 'The New Zealand Government's Niupepa and Their Demise', NZJH, 2016, vol 50, pt 2, p 48.

157. Shortland to Clarke, 29 December 1842 (cited in Loveridge, '"An Object of the First Importance"' (Wai 863 RO1, doc A81), pp 72–73).

Shortland directed that purchases were to be of blocks no less than 10,000 acres and all competing claims were to be settled ahead of time. He directed that the price was not to exceed threepence per acre for land of agricultural quality, and 'Barren Hills, or lands unfit for these purposes, are not to be estimated for in the price, although included in the purchase'.[158] This decision to set the maximum price the Crown would pay for land would form an important and enduring element of its purchasing policy. The instructions also stipulated that the Crown would investigate ownership prior to sale, all those with customary rights were to be identified, and disputes were to be resolved. Finally, all negotiations were to be conducted in public, full and informed consent secured, agreement was to be reached over price, reserves were to be identified, and purchase deeds drawn up and signed by all parties.[159]

These guidelines appear broadly consistent with Normanby's instructions regarding good faith transactions and purchases of land held under customary title. However, Chief Protector Clarke opposed the stipulation regarding the minimum block size of 10,000 acres. His objection was partly that blocks of that size were at greater risk of being subject to disagreements between multiple groups with interests in the land, and partly that Māori needed more land for subsistence purposes than that which they occupied and cultivated – a need that might be imperilled by large-scale purchasing.[160] In Clarke's view, when seeking Māori land for British settlement, the Crown could only acquire it 'by a gradual process of small purchases'.[161] In our view, these were important statements made at the outset of the development of the Crown's purchasing policy. Clarke recognised Māori rights and interests in large tracts of land and was concerned that large-scale purchasing would have damaging effects on their communities. He first raised these objections in 1842 and would continue to raise the issue of the size of Crown purchases. However, his proposed approach implied higher purchase prices, higher transaction costs, a limited supply of land for settlement purposes, and limited revenues for the Crown. Shortland did not defer to this advice, and his guidelines were adopted as Crown policy.[162]

8.3.2.3 *The Mahurangi and Omaha transaction*

The Mahurangi and Omaha block was the only area of land the Crown sought to purchase in Te Raki during the 1840s. Historian Dr Barry Rigby described this

158. Shortland to Clarke, 29 December 1842 (cited in Loveridge, '"An Object of the First Importance"' (Wai 863 R01, doc A81), p 74.

159. Loveridge, '"An Object of the First Importance"' (Wai 863 R01, doc A81), pp 73–74.

160. Grey would also recognise that Māori did not support themselves solely by cultivation but also by food gathering and hunting. 'To deprive them of their wild lands, and to limit them to lands for the purpose of cultivation', he observed, 'is in fact, to cut off from them some of their most important means of subsistence, and they cannot be readily and abruptly forced into becoming a solely agricultural people': Grey to Grey, 7 April 1847, BPP, vol 6, p 16.

161. Clarke to Shortland, 1 November 1843, BPP, vol 2, p 360 (cited in Loveridge, '"An Object of the First Importance"' (Wai 863 R01, doc A81), pp 75–76).

162. Loveridge, '"An Object of the First Importance"' (Wai 863 R01, doc A81), pp 74–75.

large block as extending from the North Shore of the Waitematā in the south to Te Ārai Point in the north – covering the East Coast of the Mahurangi taiwhenua. The western boundary 'went inland to the watershed between the East Coast and the Kaipara Harbour'.[163] Rigby observed that Mahurangi became important to the Crown 'as the gateway to Auckland' after Hobson decided to move the colonial capital there from the Bay of Islands in 1840.[164] Clarke, who conducted the transaction, signed the deed in Auckland in April 1841 with only 22 'Chiefs and people of Ngatipaoa Ngati Maru Ngatitamatera and Ngatiwhanaunga' – all of them Hauraki tribes – for an area placed at 100,000 acres, although a more recent estimate suggests 220,000 acres.[165] The original 1841 deed included provision for a reserve at Te Waimai a Tumu, which was 'excepted as a place of residence';[166] however, Dr Rigby observed that the absence of a plan for the original purchase meant that the location of the reserve 'cannot be determined'.[167]

Customary rights to the Mahurangi coast, especially the prized shark fishery, were disputed.[168] In chapter 3, we discussed the conflicts between Hauraki peoples and Ngāti Manuhiri and Te Kawerau hapū during the 1700s. By the 1790s, other groups including Te Parawhau of Whāngārei and Ngātiwai, who had intermarried with Ngāti Manuhiri, were drawn into a series of raids into Ngāti Paoa territor-

163. Barry Rigby, 'The Crown, Maori, and Mahurangi, 1840–1881' (commissioned research report, Wellington: Waitangi Tribunal, 1998) (doc E18), p 20.

164. Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), p 11.

165. This acreage for the unsurveyed purchase of the Mahurangi–Omthaha block was not included in the Crown purchase figures provided by Dr Rigby in our inquiry because the area was repurchased by the Crown in a series of 'second wave' purchases. Rigby explains that a number of these subsequent purchases were also not surveyed and 'are better described as extinguishments of tribal claims than as measurable purchases of known areas'. In these cases, the evidence we received did not include acreage calculations. Instead of including the acreage of the original Mahurangi–Omaha purchase, Dr Rigby's evidence suggests that the acreage of the surveyed 'second wave' Mahurangi purchases was approximately 117,640 acres. This figure includes the Crown's GIS estimates for the following purchase blocks: Waikeriawera (AUC 287), Pakiri South (AUC 111), Ahuroa and Kourawhero (AUC 402), Komakoriki (AUC 98–99), Wainui (AUC 109), Parekakau (AUC 691), Pukekohe (AUC 103), Pukekauere (AUC 62), Pukeatua (AUC 152), and Papakoura (AUC 78): See Rigby, 'Pre-1865 Te Raki Crown Purchase Validation Report' (doc A53), app A; Rigby, corrections requested by Crown counsel (doc A48(e)), p 7; O'Malley, 'Northland Crown Purchases' (doc A6), pp 185–186.

166. Henry Hanson Turton, comp, *Maori Deeds of Land Purchases in the North Island of New Zealand*, 2 vols (Wellington: Government Printer, 1877–88), vol 1, p 252 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 186).

167. Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), p 20.

168. Michael Belgrave, Grant Young, and Anna Deason, 'Tikapa Moana and Auckland's Tribal Cross Currents: The Enduring Customary Interests of Ngati Paoa, Ngati Maru, Ngati Whanaunga, Ngati Tamatera and Ngai Tai in Auckland' (commissioned research report, Paeroa: Hauraki Maori Trust Board and the Marutuahu Confederation, 2006) (Wai 1362 ROI, doc A6), pp 8, 453–454; O'Malley, 'Northland Crown Purchases' (doc A6), pp 185–225; Peter McBurney, 'Traditional History Overview of the Mahurangi and Gulf Islands Districts' (commissioned research report, Wellington: Mahurangi and Gulf Islands District Collective and Crown Forestry Rental Trust, 2010) (doc A36), pp 223–225; Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), pp 12–13.

ies.[169] Conflict in the district continued into the 1800s as Hongi Hika and other Ngāpuhi leaders led a campaign south, attacking settlements on the Mahurangi coast as utu for the death of two Ngāti Manu rangatira in prior conflicts.[170] The Mahurangi hapū who survived the Ngāpuhi onslaught were pushed out of their homelands, but some returned later in the 1820s.[171] Ngāti Rongo, numbering about 100, went to live with Ngāti Manu under the protection of their rangatira Pōmare II, who had Ngāti Rongo ancestry, and Te Whareumu.[172] Peace was made during the 1830s, and Hauraki, Te Kawerau, and Ngāpuhi all asserted rights along the Mahurangi coast.

Ngāti Maraeariki, Ngāti Manuhiri, Ngāti Rongo ki Mahurangi, Te Uri Karaka, and Maki-nui descendants consider their tūpuna to have been the primary owners, while Ngāti Manu also asserted rights through a tuku to Pōmare II, and all should have been parties to any negotiation. Regardless of the respective strength of these claims, the Crown's peremptory approach to recognising – and extinguishing – rights in Mahurangi lands meant that other groups with interests 'were not even privy to the information that their lands were about to be sold'.[173] There was no prior investigation into the claims of the four Hauraki iwi who made the original offer, let alone those of any other claimants, and no public notification of the proposed transaction was issued.[174] Historian Peter McBurney argued (and we agree) that the Crown 'might have been expected to carry out a robust inquiry into the customary ownership of such an extensive and valuable tract of land as Mahurangi, rather than signing a deed of conveyance with the first "vendors" to appear on the scene'.[175] O'Malley dismissed the idea that the Crown lacked the resources at the outset to investigate the offer. Instead, he suggested, the Chief Protector could have convened a hui of interested parties at Mahurangi and sought information on the villages located on the block offered for purchase, and at least visited those that

169. McBurney, 'Traditional History Overview' (doc A36), pp 87–88, 198–199, 355.

170. The rangatira were Koriwhai and Taurawhero of Ngāti Wai, Ngāti Manu, and Ngāti Hine: McBurney, 'Traditional History Overview' (doc A36), pp 188–192, 200; Arapeta Hamilton (doc K7), p 3; Rowan Tautari, 'Attachment and Belonging: Nineteenth Century Whananaki' (MA thesis, Massey University, 2009) (doc I32(d)), fol 19; Garry Hooker, 'Maori, the Crown and the Northern Wairoa District – A Te Roroa Perspective', 2000 (Wai 674 ROI, doc L2), pp 55–56, 110, 182.

171. McBurney, 'Traditional History Overview' (doc A36), pp 308–311, 314, 329–330.

172. Arapeta Hamilton (doc K7(b)), pp 4–5; McBurney, 'Traditional History Overview' (doc A36), pp 315, 381–382.

173. O'Malley, 'Northland Crown Purchases' (doc A6), p 187.

174. O'Malley, 'Northland Crown Purchases' (doc A6), p 187.

175. McBurney, 'Traditional History Overview' (doc A36), p 379; Rigby posits that the extent of investigation in customary interests often depended on the particular inclination of relevant Crown officials: Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), pp 18–19. Rigby also agrees with Paul Goldsmith's contention that Crown under-resourcing at this time meant that Chief Protector Clarke 'had insufficient resources to undertake either effective protection or any consistent pattern of purchasing': Rigby, transcript 4.1.12, North Harbour Stadium, p 205.

were near the coast.[176] Dr Rigby described the transaction as 'hastily arranged, and . . . poorly documented', while Dr O'Malley labelled it as 'farcical'.[177]

The Crown's attempt to purchase Mahurangi–Omaha clearly failed to match even its own standards of the time, as enunciated by Normanby, Shortland, and Clarke. According to Dr Rigby, the doubtful integrity of the Crown's purchase was soon evident. Within weeks of the deed having been signed in 1841, the Crown began to engage in a series of further transactions in an effort to satisfy other claimants who were not involved in the original 1841 transaction.[178] In June 1841, the Crown acquired the signatures of five Ngāti Whātua chiefs and made payment for their interests within the original purchase area.[179] Six months later, Clarke reported he had made a further payment to Kawau and Reweti of Ngāti Whātua for 'a portion of land to the north-west of Auckland, containing Ten thousand, more or less'.[180] The receipts for both payments were recorded on the back of the original April 1841 deed, and Dr O'Malley observed that 'the location of the interests the Crown had purportedly extinguished by virtue of this latest deed remain a mystery owing to the absence of appropriate documentation'.[181] Then in April 1842, Pōmare II of Ngāti Manu entered negotiations with the Crown to ensure he received some compensation for the land in which he had gained an interest in return for sheltering his Te Kawerau kin.[182] This round of further transactions was concluded when the Crown purchased the reserve at Te Waimai a Tumu from Ngāti Whanaunga in 1844, only three years after it had been set aside.[183]

By the mid-1840s, the Crown apparently had sufficient confidence that Māori title in Mahurangi had been extinguished to begin issuing timber licences to settlers in the area. John Taylor was granted a license in 1846 to cut timber 'on Government Land opposite to the Island of Kawau between George Paton's Grant and the headland commonly called Little Point Rodney'.[184] However, the arrival of sawyers in the area prompted an immediate complaint from Te Hemara Tauhia of

176. O'Malley, 'Northland Crown Purchases' (doc A6), p 188. The imperial government certainly desired a very lean colonial administration. Normanby made it clear to Hobson that official appointments would be strictly limited (he nominated seven of 'the most evidently indispenable') and that emoluments were to 'be fixed with the most anxious regard to frugality in the expenditure of the public resources": See Normanby to Hobson, 14 August 1839, BPP, vol 3, p 89.

177. Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), p 23; O'Malley, 'Northland Crown Purchases' (doc A6), p 185.

178. Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), pp 23–24.

179. Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), p 24; O'Malley, 'Northland Crown Purchases' (doc A6), p 192.

180. Clarke to Colonial Secretary, 29 December 1841 (Turton, *Epitome*, C, p 151); Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), p 24).

181. O'Malley, 'Northland Crown Purchases' (doc A6), p 193; Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), p 24.

182. See Turton, *Maori Deeds of Land Purchases*, vol 1, p 251; McBurney, 'Traditional History Overview' (doc A36), pp 384, 387–389; O'Malley, 'Northland Crown Purchases' (doc A6), pp 194–195.

183. Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), p 25; O'Malley, 'Northland Crown Purchases' (doc A6), p 195.

184. John Taylor to Colonial Secretary, 11 March 1846 (O'Malley, supporting papers (doc A6(a)), vol 1, p 179); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 196).

Ngāti Rongo and Te Kawerau and other rangatira. Within a month of the timber licence being issued, they sent a letter demanding:

> you will forthwith desist from felling & sawing Timber upon Land situate[d] at Mahurangi . . . I am also directed to say that payment will be immediately demanded by them for all Timber removed for the land referred to. The Land has never been sold to the Govt as can be proved by Public Documents and by the united testimony of many honorable and influential chiefs of several tribes.[185]

The letter was forwarded to Charles Whybrow Ligar, the Surveyor-General, who was caught by surprise when George Clarke informed him that in fact a reserve had been set aside 'near Waiwerawera' for Te Hemara 'and his dependents'.[186] The reserve, near the south head of Mahurangi Harbour (in what is today Te Muri Regional Park), was 'the result of a personal promise made by Governor Hobson to the chief at the time' and had not been recorded on the original 1841 deed. O'Malley suggested that at this point, '[p]erhaps the alarm bells were starting to ring just a little more clearly for at least some Crown officials.'[187] Ligar felt that he would be required to 'go to the place and see the Natives'.[188] However, without prior investigation into the nature of the claims to the land the Crown had supposedly purchased, neither Ligar, nor the Native Secretary, Charles Nugent, appreciated that the issue was not one of disgruntled owners who had missed out on a share of the payment, but a 'distinct tribal groupings who had not been party to the original transaction at all'. O'Malley argued, 'These groups, most notably Kawerau and Ngāti Rongo, now saw lands which they had never relinquished being allocated by the Crown for the purposes of settlement and timber licensing without any prior consultation with them.'[189]

The Crown eventually took steps to investigate customary ownership in the block after a further dispute arose over timber licensing of land in Matakana in 1851. That year, settler John Heyd'n wrote to the Government that a chief named Parihoro 'claims the timber on the Land that I have licensed from the Government and . . . insisted that I shall not cut any of the timber until he is paid'.[190] Here the Crown faced a problem. By 1852, the timber trade had become well established in the district, and a substantial shipyard had been constructed on the Mahurangi

185. O'Malley, 'Northland Crown Purchases' (doc A6), p 196.

186. Clarke, minute, 24 April 1846 (O'Malley, supporting papers (doc A6(a)), vol 1, p 169); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 197); McBurney, 'Traditional History Overview' (doc A36), pp 389, 391–392.

187. O'Malley, 'Northland Crown Purchases' (doc A6), p 197.

188. Charles Ligar, minute, 23 April 1846 (O'Malley, supporting papers (doc A6(a)), vol 1, p 167); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 197.

189. O'Malley, 'Northland Crown Purchases' (doc A6), pp 200–202.

190. John Heyd'n wrote to the Commissioner of Crown Lands again in February 1852 when he reminded him that he had first brought these issues to the Government's attention in November 1851: O'Malley, 'Northland Crown Purchases' (doc A6), p 197; John Heyd'n to Commissioner of Crown Lands, 3 February 1852 (O'Malley, supporting papers, doc A6(a), vol 2, p 391).

Harbour,[191] but as settlement and economic activity in the district progressed, the existence of outstanding Māori claims to the land posed a real risk of further unrest. In chapter 5, we discussed a muru at Matakana in January 1845 conducted by Parihoro and others against the sawyers Millon and Skelton, who, Rigby noted, 'had negotiated [their] pre-Treaty land transaction there with the same Hauraki chiefs who featured in the . . . 1841 Mahurangi Crown purchase'.[192]

In response, Nugent directed the surveyor (and later Native Land Purchase Commisioner) John Grant Johnson to investigate 'the nature and extent of the Native claims to the Mahurangi and Matakana District, [and] the limits into which their reserves could be confined, and the relative extent of those reserves compared with the rest of the block'.[193] In his report to the Native Secretary, Johnson identified the outstanding claims as belonging to 'Ngati rongo [*sic*], a branch of Kawerau, of whom Parihoro and [Te] Hemara are the remnants'.[194] Te Hemara, Johnson recorded, sought 'a large reserve to live on', while Parihoro had 'extravagent claims on a large portion of the block'.[195] Over this same period, rangatira from Ngāti Whātua, including Te Keene, also lodged further claims with the Crown and received compensation,[196] as did some Hauraki chiefs who secured further payments.[197]

In February 1853, Nugent travelled to Te Hemara's residence near the south head of the Mahurangi Harbour and reported that 'this Native has a claim to some reserve or compensation in that district'.[198] This should not have been a surprise to Crown officials; as O'Malley noted, Te Hemara's reserve at Waiwera–Puhoi had already been the subject of a timber dispute in 1846.[199] Nugent also found that Parihoro had claims to '[a] considerable block . . . which includes land sold by the Government, and also land belonging to land claimants'.[200] He suggested that Te Hemara should receive a liberal settlement. However, Parihoro's claim overlapped with 'several farms belonging to the Europeans who have purchased from old land

191. Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), p 32.

192. Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), p 90.

193. O'Malley suspected that this report in response to the Colonial Secretary's direction was erroneously dated as 1852; 1853 seems more likely: John Johnson to Native Secretary, 24 February 1852 [*sic*: 1853] (Turton, *Epitome*, C, p 139); cited in O'Malley, 'Northland Crown Purchases' (doc A6), pp 203–204; see also O'Malley, supporting papers (doc A6(a)), vol 4, pp 1248–1249.

194. Johnson to Native Secretary, 24 February 1852 [*sic*: 1853] (Turton, *Epitome*, C, p 139); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 205; Peter McBurney gave evidence that 'Parihoro belonged to Te Parawhau of the Whangarei district, but he also had connections to Mahurangi': McBurney, 'Traditional History Overview' (doc A36), p 390.

195. Johnson to Native Secretary, 24 February 1852 [*sic*: 1853] (Turton, *Epitome*, C, p 139); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 206.

196. O'Malley, 'Northland Crown Purchases' (doc A6), p 203.

197. O'Malley, 'Northland Crown Purchases' (doc A6), p 204; Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), pp 35–37.

198. Charles Nugent to Colonial Secretary, 24 February 1853 (Turton, *Epitome*, C, p 140); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 204.

199. O'Malley, 'Northland Crown Purchases' (doc A6), p 204.

200. Nugent to Colonial Secretary, 24 February 1853 (Turton, *Epitome*, C, p 140); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 204.

claimants who have got Crown grants, and also a farm of 50 acres, for which a settler named Boyds has got a Crown grant'. Nugent suggested 'it would be judicious to extinguish [Parihoro's claim] by giving a money payment and also a reserve of land'.[201]

In August 1853, Te Hemara and others, including Reweti and Te Peta, again obstructed sawyers' efforts to harvest timber on the land, and Ligar once again sent Johnson to Mahurangi to establish the boundaries of Te Hemara's reserve.[202] After resuming negotiations with Te Hemara, Johnson reported that the matter of the Waiwera–Puhoi reserve was settled and sawyers were back at work after making payment to local Māori for their timber.[203] He also provided Nugent a sketch map of the reserve that showed the northern and southern boundaries 'to the back line of the block formerly cut'; the areas to the north of Puhoi and south of Waiwera were labelled government land.[204] Shortly after, in November 1853, Parihoro and four 'Rangatira o te Kawerau' signed a deed to extinguish their interests between the Whangateau and Mahurangi Harbours for £150.[205]

O'Malley commented that while the text of Parihoro's deed included no mention of reserves, the accompanying plan showed three possible sites,

> including Te Hemara's reserve at Waiwera (even though he was not a signatory to the deed), a section of the Tawharanui Peninsula labelled simply 'Parihoro', and an area at Matakana, adjacent to the controversial old land claim of Millon and Skelton, marked simply 'Reserve for the Natives'.[206]

There is no evidence that any further steps were taken to establish any of these reserves, or to provide Te Hemara or Parihoro with grants for the reserved land.[207] Historian Paul Thomas observed that prior to a Native Land Court investigation into the ownership of the Waiwera–Puhoi blocks in 1866, Te Hemara's reserve 'was legally neither a reserve nor Te Hemara's'.[208] As we discussed in chapter 6, a 20-acre

201. Nugent to Colonial Secretary, 24 February 1853 (Turton, *Epitome*, c, p 140); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 205.

202. O'Malley, 'Northland Crown Purchases' (doc A6), p 208.

203. Johnson to Native Secretary, 3 September 1853 (O'Malley, supporting papers (doc A6(a)), vol 2, pp 431–433).

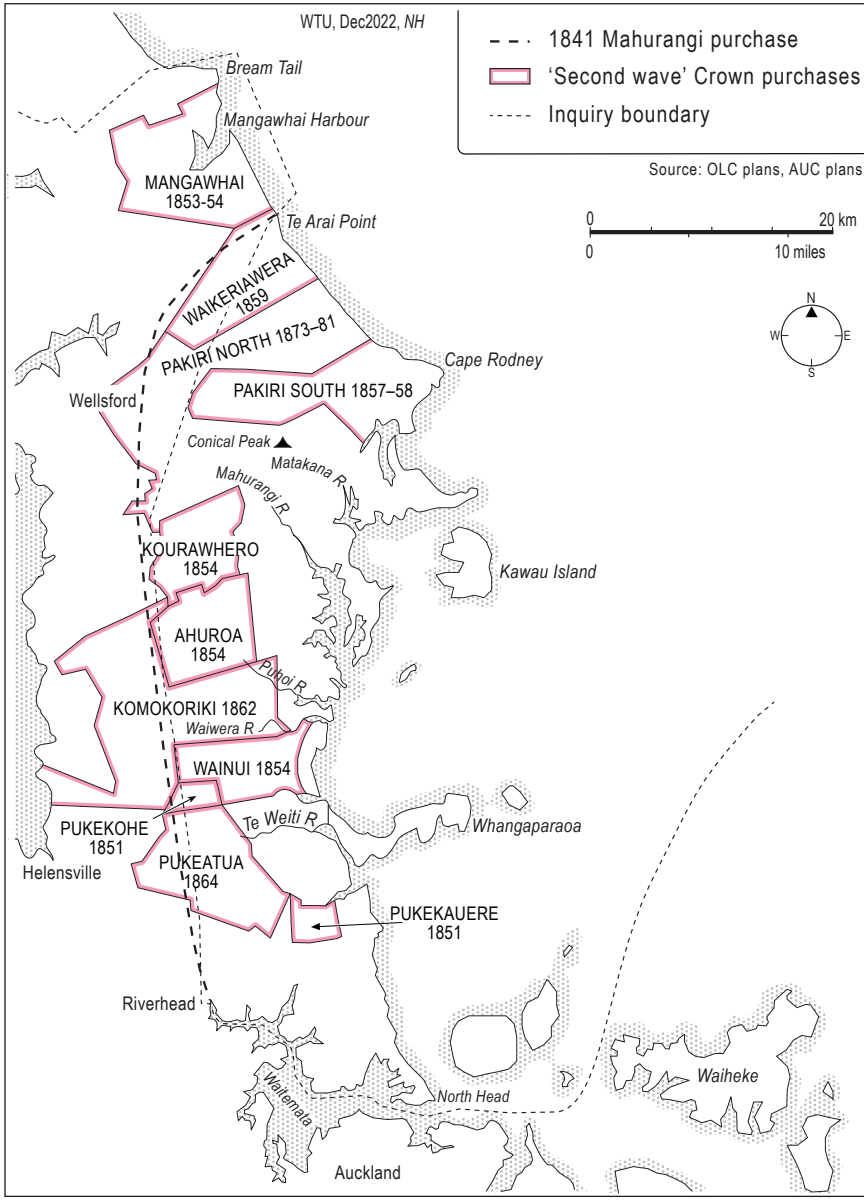
204. Johnson to Native Secretary, 3 September 1853 (O'Malley, supporting papers (doc A6(a)), vol 2, p 434); Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), p 42.

205. AUC 85, LINZ (O'Malley, supporting papers (doc A6(a)), vol 22, pp 7308–7311); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 208; however, just a few days later, Johnson would be required to make further payments of £10 and £20 respectively to Haimona Pita (O'Malley observes he was apparently a relative of Parihoro) and Te Ara Tinana, who had complained that they had not received payment for their interests: O'Malley, 'Northland Crown Purchases' (doc A6), p 209; this claim (OLC 1/337) is also discussed in Paula Berghan, 'Northland Block Research Narratives', 13 vols (commissioned research report, Wellington: Crown Forestry Rental Trust, 2006) (doc A39(a)), vol 2, p 206.

206. O'Malley, 'Northland Crown Purchases' (doc A6), p 208.

207. Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), pp 38, 40.

208. Paul Thomas, 'The Native Land Court in Te Paparahi o Te Raki: 1865–1900,' report commissioned by the Waitangi Tribunal, 2016 (doc A68), p 53.



Map 8.2: Crown purchasing in Mahurangi and Omaha.

portion of Te Hemara's reserve was also purchased under FitzRoy's pre-emption waiver policy (see section 6.6.2.4). The native reserve identified in Parihoro's deed similarly came before the Court as customary Māori land during the 1873 Mangatawhiri and Tawharanui title investigations (we return to discuss the fate

of native reserves excluded from Crown purchase blocks in section 8.5.2.7).[209] O'Malley observed that, after 1854, the Crown's attention 'shifted to more localised transactions within the boundaries of the 1841 Mahurangi block, or overlapping into it'.[210] We discuss the Crown's general purchasing practices during this period in section 8.5.[211]

As we have recorded earlier, the Crown conceded 'that in purchasing the extensive area called "Mahurangi and Omaha" in 1841 it breached Te Tiriti o Waitangi/the Treaty of Waitangi and its principles'.[212] The Crown acknowledged that it undertook the initial purchase of the 220,000-acre block without an adequate investigation of customary rights in the district, and that it 'failed to provide adequate compensation and reserves for the future use of and benefit of all Māori owners when it later learned of their interests in the purchase area'.[213] In closing submissions, Crown counsel also acknowledged its failure to properly survey or prepare a plan prior to the deed's signing. The Crown argued, however, that by 1854 it 'had made efforts to identify and purchase Mahurangi lands off all possible vendors' and had greatly improved its skill in and commitment to identifying all landowners. The level of European settlement in the area at this time meant that Māori were 'obliged' nonetheless 'to accept the Crown's position that the sale would not be revisited in any substantial way'.[214] Those who had not yet agreed to the transaction could only accept payment and possibly seek the creation of reserves. The Crown thus conceded:

> In this way, the disadvantage created by the 1841 transaction was permanently locked into place. Iwi who had not participated in that initial agreement lost treasured resources, landmarks and wāhi tapu, substantial interests in land on the eastern coastline of the district, valuable landing places, harbours and estuaries that had supported their traditional way of life and, over time, their identity. The long-term effect of this transaction was to increase tension between tribal groups and settlers, with consequences that continue to be felt today.[215]

We welcome the Crown's concession concerning the 1841 Mahurangi–Omaha purchase. Ngāti Manu, Te Uri o Karaka, Te Uri o Raewera, Ngāti Rongo, and Ngāpuhi ki Taumarere claimants also submitted that this was an important concession.[216] However, as we noted in section 8.2, the parties disagreed as to whether

209. Thomas, 'The Native Land Court' (doc A68), pp 58–59.
210. O'Malley, 'Northland Crown Purchases' (doc A6), p 211.
211. Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), pp 1, 32.
212. Crown statement of position and concessions (#1.3.2), p 3; Crown closing submissions (#3.3.404), p 2.
213. Crown statement of position and concessions (#1.3.2), p 3; Crown closing submissions (#3.3.404), p 2.
214. Crown closing submissions (#3.3.404), pp 7–8.
215. Crown closing submissions (#3.3.404), p 8.
216. Closing submissions for Wai 354 (#3.3.82), p 5.

Mahurangi hapū retained sufficient lands by 1865, when native title was finally extinguished in the block. We return to this issue later.

8.3.2.4 *Purchasing paused*

With the exception of the Crown's efforts to resolve outstanding claims in the Mahurangi–Omaha block, purchasing in Te Raki practically came to a halt during the decade following that transaction and did not resume until after 1850. Initially, this slowdown stemmed primarily from an economic downturn in the new colony, growing Māori awareness of the value that Pākehā placed on their lands, and a pronounced lack of finance for land purchasing available to the new Governor, Robert FitzRoy, who had been appointed in 1843. Dr O'Malley noted that by the beginning of 1844, the colonial Government was £24,000 in debt and 'unable to pay the salaries of its own staff and denied credit from any bank'.[217] At this time, some Māori, who resented 'the government's inability to purchase land offered to it and . . . evidence of profiteering at their expense in respect of those blocks it had managed to acquire and resell', were increasingly reluctant to 'sell' to the Crown and joined in calls for pre-emption to be abolished.[218] Where before the Bay of Islands and its environs had been seen as the engine of the colony's growth in the North Island, the focus had shifted to nearer Auckland and the Crown's land fund purchasing model suddenly seemed precarious.

Dr Loveridge observed that in 1843, settlers were increasingly dissatisfied with the Crown's failure to provide 'secure titles for lands claimed on the basis of pre-1840 purchases'[219] (we discussed the first Land Claims Commission in chapter 6). Similarly, no grants had been issued for lands the New Zealand Company claimed to have purchased. According to Loveridge, 'the only Europeans who had any kind of Crown-guaranteed security of tenure were those who had purchased lands from the Crown in the Auckland district from 1841 onwards'.[220] The land fund model was heavily criticised and indeed was often termed 'the quackeries of Wakefield', as it was negatively associated with Edward Gibbon Wakefield and his New Zealand Company's purchasing practices in central New Zealand – much further south – and high land prices. Auckland interests, in particular, favoured a free trade in lands owned by Māori.[221] As a result, by the start of 1843, the opposition of northern settlers to the Crown's policy of pre-emption and the land fund model for colonisation 'was reaching a peak'.[222]

Partly in response to the failures of the Crown's early purchases and growing settler and Māori dissatisfaction, FitzRoy would move to institute a pre-emption waiver policy in March 1844 for direct private purchase from Māori (we discussed the operation of the pre-emption waiver system in chapter 6). Concerned about

217. O'Malley, 'Northland Crown Purchases' (doc A6), p 39.
218. O'Malley, 'Northland Crown Purchases' (doc A6), pp 39–40.
219. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), pp 125–126.
220. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), p 126.
221. See, for example, Untitled, *Auckland Times*, 16 March 1843, p 2. The context indicates that the reference was to E G Wakefield.
222. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), p 126.

the impact on the land fund, Lord Stanley reluctantly approved of FitzRoy's decision to waive pre-emption over what he thought would be limited areas of land. However, the Crown reasserted its right of pre-emption in 1846 after the arrival of the new Governor, George Grey, who denounced the waiver scheme as dangerous and unjust to settlers and Māori, and criticised FitzRoy for acting in excess of his powers.[223]

In the next section, we examine how the protective intent of the Crown's purchasing standards expressed first by Normanby were tested by the new Governor's arrival and changes in leadership at the British Colonial Office during these years.

8.3.2.5 *The arrival of George Grey and the development of the Crown's policy for large-scale land purchasing*

Stanley appointed Grey as Governor in June 1845, to replace FitzRoy. In the instructions he issued Grey on 13 June 1845, Stanley repudiated the allegations made by the New Zealand Company and the 1844 Select Committee on New Zealand (see chapter 4, section 4.3.4.2.3) 'that the treaties which we have entered into with these people are to be considered as a mere blind to amuse and deceive ignorant savages'. He directed Grey to 'honourably and scrupulously fulfil the conditions of the treaty of Waitangi', though he also observed that '[t]he settlement of the lands in New Zealand has . . . been a fertile source of difficulty'. In his view, the source of the problem had been the Crown's inability to divide the land 'between the Crown, the natives, and the settlers claiming title through them'. He considered that the challenge would not have been so great had Lord John Russell's 1841 instruction that Māori land be registered and defined on maps of the colony been carried out (see chapter 4); had the work of the first Land Claims Commission been completed faster; and had FitzRoy not implemented a pre-emption waiver policy (see chapter 6).[224]

In a second despatch dated 27 June 1845, Stanley emphasised the importance of registering all New Zealand lands.[225] He saw it as a 'natural consequence' of the treaty that the limits of Māori lands 'should be distinctly recognised and set forth under the sanction of sovereign authority', and directed Grey to register all Māori claims to land within two or three years. Stanley considered that, once this was completed, it would be apparent to Grey 'what portion of the unoccupied surface of New Zealand' could be claimed as the Crown's demesne.[226] We agree with the Wairarapa ki Tararua Tribunal's characterisation of these instructions as 'broad in

223. Grey to Stanley, 9 June 1846, BPP, vol 5, p 555.

224. Stanley to Grey, 13 June 1845, BPP, vol 5, pp 230–232; O'Malley, supporting papers (doc A6(a)), vol 24, pp 8123–8125.

225. Loveridge recorded that during June 1845 'the land question in New Zealand had been discussed at some length in Parliament. Stanley had stated that "a general registration of all titles to land, native or European, within the limits of the two islands" would be of "vital importance" – if, at least, one could "be successfully carried into effect within a limited time"': Loveridge, '"An Object of the First Importance"' (Wai 863 R01, doc A81), p 263.

226. Stanley to Grey, 27 June 1845, BPP, vol 5, p 233; O'Malley, supporting papers (doc A6(a)), vol 24, p 8126.

scope, and not readily capable of implementation',[227] though we note that Stanley provided further explanation in a speech he made in the House of Lords the following month as to how he expected that Māori land rights and interest should be registered. He observed that while he remained of the view that there were areas of the North Island 'wholly waste and uncultivated', they were few in number. He recognised that 'a large portion of the district in question is distributed among various tribes, all of whom have as perfect a knowledge of the boundaries and limits of their possessions'. Most importantly, Stanley acknowledged that the Crown was required to consult Māori on those lands that were not claimed and could be 'vested in the Crown'. He went on to state that Māori law and custom, and the rights arising from them, had been guaranteed under the treaty, and that

> those rights and titles the Crown of England is bound in honour to maintain, and the interpretation of the treaty of Waitangi, with regard to these rights is, that except in the case of the intelligent consent of the natives, the Crown has no right to take possession of land, and having no right to take possession of land itself, it has no right – and so long as I am a minister of the Crown, I shall not advise it to exercise the power – of making over to another party that which it does not possess itself. (cheers).[228]

As noted earlier, upon his arrival in New Zealand, Governor Grey acted quickly to terminate FitzRoy's pre-emptive waiver scheme and then to legally enforce the Crown's right of pre-emption under the Native Land Purchase Ordinance 1846.[229] Introduced into the Legislative Council and passed within just three days, the ordinance rendered it a criminal offence to engage in private land transactions with Māori, whether by sale, lease, or licence. While private transactions of land had been declared null and void by the Land Claims Ordinance 1841, penalties for infringements of the Crown's right of pre-emption were first introduced by the 1846 ordinance.[230] This specified that penalties would be imposed on any person who had entered an agreement with Māori 'for the purchase of the right of cutting timber or other trees, or of the right of mining, or of the right of pasturage, or for the use or occupation of land'.[231]

The key question, asserted the colony's Attorney-General, William Swainson, during the debate in the Legislative Council, was 'whether New Zealand should be colonised regularly and systematically, or the contrary'. FitzRoy's pre-emption waiver scheme, Swainson claimed, had encouraged a revival of 'illegal' purchasing and leasing, practices that 'struck at once at the root of all regular and systematic colonisation'. Thus, the core assumption upon which the measure was based was that 'the peaceable and prosperous colonisation of New Zealand' demanded that

227. Waitangi Tribunal, *The* Wairarapa ki Tararua Report, Wai 863, vol 1, p 55.
228. 'Treaty of Waitangi, New Zealand', *New Zealander*, 13 December 1845, p 4 (cited in Loveridge, '"An Object of the First Importance"' (Wai 863 R01, doc A81), p 264).
229. O'Malley, 'Northland Crown Purchases' (doc A6), p 42.
230. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, pp 39, 51.
231. Native Land Puchase Ordinance 1846 10 Vict 19, cl 1.

'the disposal of land therein should be subject to the control of the Government of the Colony'.[232]

There was nothing in the Legislative Council debate to suggest that Māori had been consulted or their interests considered, although it was possible that Grey did talk to a small number of rangatira such as Wiremu Maihi Te Rangikāheke, who the *New Zealander* claimed 'commonly [had] access to the Governor', but whose interests were, at least in the newspaper's assessment, only marginally affected.[233] Grey appears to have made no reference to Māori during his address to the Legislative Council on 5 November 1846, nor in the debates on the first and second readings of the Native Land Purchase Bill on 9 and 14 November. The preamble made no reference to the protection of Māori interests. The ordinance's express objective was the creation of a structured rather than free land market, in which the Crown would control the vital matter of price and so be able to implement its preferred land fund model of colonial development. However, it seems to have had other less obvious objectives as well. Halting the emergence of an informal and unregulated land market would constrain the power and authority of rangatira. Outlawing informal 'leasing' would shut down an unpalatable contemporary dynamic in which the rents Māori were earning indicated values for their lands greater than the Crown was willing to pay, and by which Māori could continue to derive an income from their lands without having to sell them.[234] In effect, the ordinance promised to limit Māori contribution and participation in the colonial economy to the roles of land seller and cultivator of such lands as they managed to retain. It would remain in force until 1865.

Complementing the ordinance was Grey's decision, citing cost, to wind down the office of the Chief Protector of Aborigines. To justify this decision, he highlighted the outlay of sustaining the protectorate, observing that while Clarke and his sons' salaries incurred an annual cost of £2,500, no hospitals or schools had been established 'for the benefit of natives'.[235] In a despatch to Earl Grey, Governor Grey wrote that he found the protectorate department 'for all practical purposes, an utterly useless establishment'.[236] Grey first brought the department under the control of the New Zealand Colonial Secretary in 1846, and a year later abolished

232. 'Legislative Council', *New Zealander*, 21 November 1846, p 3.

233. 'The Native Land Purchase Bill', *New Zealander*, 21 November 1846, p 2. For reports of the debates, see 'Legislative Council', *New Zealander*, 10 October 1846, p 2; 'Legislative Council', *Nelson Examiner and New Zealand Chronicle*, 16 January 1847, pp 183–184; and 'Legislative Council', *Nelson Examiner and New Zealand Chronicle*, 23 January 1847, pp 187–188; Jenifer Curnow, 'Te Rangikāheke, Wiremu Maihi', DNZB, Te Ara – the Encyclopedia of New Zealand, 1990, https://teara.govt.nz/en/biographies/1t66/te-rangikaheke-wiremu-maihi (accessed 7 June 2022).

234. Hobson stated in 1840 that in Auckland, where he had decided to put the capital, the practice of 'leasing' for long terms was 'most universal': Hobson to Gipps, 25 October 1840, BPP, vol 3, p 438.

235. Grey to Stanley, 10 May 1846 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 46). As part of what was referred to as a 'flour and sugar policy', Grey did implement a range of measures intended to make medical and educational services available to Māori and to provide for loans for economic development purposes: O'Malley, 'Northland Crown Purchases' (doc A6), p 49.

236. Grey to Grey, 4 February 1847, BPP, vol 5, p 640; O'Malley, supporting papers (doc A6(a)), vol 24, p 8085.

it altogether, replacing it with a Native Secretary.[237] In the *Ngai Tahu* report, the Tribunal observed that this later decision, made before Grey began his land purchasing programme, 'recombined the role of land purchase officer with that of the protection of Maori interests.'[238]

8.3.2.5.1 Earl Grey's 'waste lands' instruction

In 1846, it remained unclear how the Crown would re-establish its purchasing policy following FitzRoy's pre-emption waiver experiment. In June 1846, Grey indicated that he would 'not fail to endeavour to devise and introduce some system by which Lands the property of the Natives may be brought into the market, under such restrictions as are required by the interests of both races'.[239] However, the Colonial Office's position would shift again in July 1846 with the appointment of Lord Howick, now Earl Grey, as Secretary of State for War and the Colonies. As he had in the 1844 select committee (see chapter 4, section 4.3.4.2.3), Earl Grey sought the implementation of the waste lands theory. In December 1846, he sent a despatch rejecting the declaration in the treaty that Māori were the exclusive proprietors of all the lands of New Zealand:

> To contend that under such circumstances civilized men had not a right to step in and to take possession of the vacant territory, but were bound to respect the supposed proprietary title of the savage tribes who dwelt in but were utterly unable to occupy the land, is to mistake the grounds upon which the right of property in land is founded . . . I must regard it a vain and unfounded scruple which would have acknowledged their right of property in land which remained unsubdued to the uses of man. But if the savage inhabitants of New Zealand had themselves no right of property in land which they did not occupy, it is obvious that they could not convey to others what they did not themselves possess, and that claims to vast tracts of waste land, founded on pretended sales from them, are altogether untenable. From the moment that British dominion was proclaimed in New Zealand, all lands not actually occupied in the sense in which alone occupation can give a right of possession, ought to have been considered as the property of the Crown in its capacity of trustee for the whole community.[240]

Earl Grey recognised that the conditions on the ground in New Zealand were such that 'a strict application of these principles is impracticable', but the Governor was still to look to them 'as the foundation of the policy which, so far as it in your

237. Loveridge, '"An Object of the First Importance"' (Wai 863 R01, doc A81), pp 279–280; Grey to Grey, 4 February 1847, BPP, vol 5, p 640; O'Malley, supporting papers (doc A6(a)), vol 24, p 8085.
238. Waitangi Tribunal, *The Ngai Tahu Report 1991*, Wai 27, vol 2, p 272.
239. Grey, 'Proclamation', 15 June 1846, *New Zealand Gazette*, 1846, no 10, p 42 (cited in Loveridge, '"An Object of the First Importance"' (Wai 863 R01, doc A81), p 277).
240. Grey to Grey, 23 December 1846, BPP, vol 5, pp 524–525; O'Malley, supporting papers (doc A6(a)), vol 24, pp 8137–8138.

power, you are to pursue'.[241] Dr O'Malley gave evidence that although Governor Grey was sympathetic to this position, he realised that if he were to follow Earl Grey's instructions and proceed (in effect) to confiscate large tracts of land from Māori, it would risk further conflict in the colony.[242] As we noted in chapter 5, the views of the 1844 select committee had prompted alarm among officials when they reached New Zealand. At the time, Clarke had suggested to FitzRoy that the committee's report would confirm the worst fears of Te Raki Māori at a time when tensions were rising in the north, with Hōne Heke felling the flagstaff on four occasions in Kororāreka in 1844.[243] O'Malley noted that Earl Grey's instructions prompted further disquiet amongst settlers and Māori in Te Raki, and Tāmati Waka Nene was 'employed to reassure Northland Māori that there was no truth to the claims that their lands not under tillage were about to be seized'.[244] When reports of these concerns reached London in April 1848, Earl Grey denied that the Crown intended to confiscate lands forcibly.[245]

8.3.2.5.2 Governor Grey's policy

Governor Grey made his first land purchases as Governor at Porirua and Wairau, on either side of Cook Strait, in March 1847, where the Crown acquired large tracts of land to resolve the New Zealand Company's claims in those areas and enhance the security of Pākehā settlement.[246] In a despatch the following April, the Governor set out his view that native title could be extinguished more effectively through large purchases, rather than pursuing the solution advocated by the company (that the Crown could take possession of any perceived 'waste lands' in those districts). Grey reasoned that Māori did not just support themselves through cultivation but from hunting, and other traditional means of gathering food and other resources. Any attempt to deprive them of access to these resources would be unjust, Grey wrote, and indeed would fail. He considered that Māori yet possessed insufficient agricultural implements to survive from farming alone, and '[t]o attempt to force suddenly such a system upon them must plunge the country again into distress and war'.[247] Grey noted, by contrast, that he had successfully purchased sufficient 'waste lands' in the areas claimed by the company at low cost and had 'concluded a most advantageous arrangement for Her Majesty's European subjects'.[248]

241. Grey to Grey, 23 December 1846, BPP, vol 5, p 525; O'Malley, supporting papers (doc A6(a)), vol 24, p 8138.
242. O'Malley, 'Northland Crown Purchases' (doc A6), p 34.
243. Clarke to FitzRoy, 24 February 1845 (O'Malley, supporting papers (doc A6(a)), vol 16, p 5434).
244. O'Malley, 'Northland Crown Purchases' (doc A6), p 35.
245. O'Malley, 'Northland Crown Purchases' (doc A6), p 36.
246. The Poririua purchase included 69,000 acres, where the Wairau block has been estimated to be 3,000,000 acres: Ward, *National Overview*, vol 2, p 133; Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), pp 333–334; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, Wai 785, vol 1, pp 317–319.
247. Grey to Grey, 7 April 1847, BPP, vol 6, p 16.
248. Grey noted that of the 270 sections of land the New Zealand Company claimed in the Porirua district, the colonial Government had purchased all but 16: Grey to Grey, 7 April 1847, BPP, p 15 (IUP,

In his response, Earl Grey enclosed a letter from his Under-Secretary, Herman Merivale, to the Reverend J Beecham (Secretary of the Wesleyan Methodist Missionary Society) which, he stated, 'contains a full exposition of my views'.[249] Dr Loveridge considered that this letter was forwarded to Grey in response to his despatch regarding the Wairau and Porirua purchases.[250] On the question of the Crown's right over 'waste lands', Merivale wrote that if Crown pre-emption were to be enforced,

> it is of little practical importance whether the title to unoccupied land is considered to reside in the natives or in the Crown, since, admitting it to belong to the former, the surrender of their rights can easily be obtained for a mere nominal consideration; and if the Crown is regarded as the proprietor, it is so merely in the character of guardian of the interest of its subjects, and especially of those of the native race whose want of knowledge causes them to stand peculiarly in want of protection.[251]

Merivale also did not accept that the Crown should not purchase lands that could support a settler population because they contained resources on which hapū had customarily relied to help sustain themselves. However, he did stipulate that if the settlement of large areas of land were to deprive Māori of resources, they would have to be provided with other advantages, 'fully equal to those which they might lose'.[252] In the *Te Tau Ihu o te Waka a Maui* report, the Tribunal considered that following receipt of this despatch, there was a 'shift in the New Zealand Government's views, in response to those of its imperial masters'.[253] The Tribunal found Grey's policy would subsequently place less emphasis on the importance of providing for traditional Māori economies and resource use, and reserves would be restricted to those lands in occupation or cultivation.[254]

In May 1848, Grey provided the Colonial Office with an outline of his proposed policy for land purchasing. In a despatch dated 15 May 1848, the Governor advised the Secretary of State that it would be impossible to acquire Māori assent to the principles contained in his 1846 instructions. Grey noted that if the colonial

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vol 6).

249. Grey to Grey, 3 May 1848, BPP, vol 6, p 144; Merivale's letter had been written as a response to a memorial written to Earl Grey by the Wesleyan Missionary Society, expressing concerns about the Colonial Office's interpretation of the treaty: Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), p 320.

250. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), p 325.

251. In strictly legal terms, Merivale also reached the conclusion that the Crown remained 'the general owner of the soil as trustee for the public good', and '"[t]he existing rule then contemplates the native race as under a species of guardianship"': H Merivale to the Reverend J Beecham, 13 April 1848, BPP, vol 6, pp 155–156.

252. H Merivale to the Reverend J Beecham, 13 April 1848, BPP, vol 6, p 155.

253. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, Wai 785, vol 1, p 302.

254. For instance, comparably large reserves had been set aside as part of the Wairau and Porirua purchases. Ward notes that '[s]ome 10,000 acres, about 40 acres per head, were reserved for Ngati Toa at their insistence' as part of the Porirua purchase, and '[r]eserves of over 117,000 acres were made' as part of the Wairau purchase: Ward, *National Overview*, vol 2, p 132; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, Wai 785, vol 1, pp 302–304.

Government were to require Māori to register their claims to land, it would likely prompt disputes where claims overlapped, and risk conflict. It would also require 'a general survey . . . of the island'.[255] However, Grey believed that it was possible to reach a compromise that would 'secure the interests and advantages' of both Māori and settlers.[256]

He claimed that Māori would recognise the Crown's right of pre-emption and would sell their unused lands for a 'nominal consideration'. Grey further expected that there were lands that Māori would cede to the Crown without payment in order to receive the benefits of settlement to their communities, stating,

> in many cases if Her Majesty requires land, not the purpose of an absentee proprietary but for the *bonâ fide* purposes of immediately placing settlers upon, the native chiefs would cheerfully give such land up to the Government without any payment, if the compliment is only paid them of requesting their acquiescence in the occupation of these lands by European settlers.[257]

Grey went on to suggest that even in 'the most densely inhabited portions of the northern part' of the North Island, the hapū involved would 'cheerfully relinquish their conflicting and invalid claims in favour of the Government, merely stipulating that small portions of land, for the purposes of cultivation, shall be reserved for each tribe'.[258] He argued that Māori resistance to settlement had only occurred in instances where boundaries had not been properly defined or 'lands were not validly purchased before a considerable European population was placed upon them'. As a result, Māori had become aware of the value of their lands and 'refused to part with them for a nominal consideration, but insisted upon receiving a price bearing some slight relation to the actual value of the lands at the time the purchase was completed'.[259] However, the possibility of Māori resistance could be avoided, he continued, by the Crown purchasing land in advance of the spread of British settlement. Grey felt that if the Government took the proper precautions, then the benefits of land sales would become apparent to Māori communities. Māori, he continued,

> are every day becoming more and more aware of the fact, that the real payment which they receive for their waste lands is not the sum given to them by the Government, but the security which is afforded, that themselves and their children shall for ever occupy the reserves assured to them, to which a great value is given by the vicinity of a dense European population. They are also gradually becoming aware that the Government spend all the money realized by the sale of lands in introducing Europeans into the

255. Grey to Grey, 15 May 1848, BPP, vol 6, p 24.
256. Grey to Grey, 15 May 1848, BPP, vol 6, p 23.
257. Grey to Grey, 15 May 1848, BPP, vol 6, p 23; see also Kirstie Ross, 'The 1854 Mangawhai Crown Purchase' (commissioned research report, Whangārei: Ngati Wai Trust Board, 2000) (doc E22), pp 26–27.
258. Grey to Grey, 15 May 1848, BPP, vol 6, p 24.
259. Grey to Grey, 15 May 1848, BPP, vol 6, p 24.

country, or in the execution of public works, which give employment to the natives, and a value to their property, whilst the payment they receive for their land enables them to purchase stock and agricultural implements.[260]

One innovation in the purchasing policy Grey proposed was the certification of reserves. Where Crown purchases extinguished native title over large areas of land, reserves would be established and 'registered as the only admitted claims of the natives in that district'. Grey stipulated that Māori were to receive plans of the reserves and 'certified statements that they were reserved for their use, which documents are somewhat in the nature of a Crown title to the lands specified in them'.[261] This was a departure from the earlier practices under the Chief Protector, where lands were broadly reserved for Māori by being excluded from the purchase, and thus remained under native title.[262] The creation of reserves under a form of tenure similar to a Crown grant would simplify the problem of land registration, and would assimilate Māori into the colonial land system without clothing the process in a 'compulsory character'. Grey anticipated that Māori would hold such 'grants' in high esteem, and that such a system would 'accustom them to hold land under the Crown, which is an extremely desirable object to attain'.[263]

While defending his own stance, Earl Grey endorsed Governor Grey's proposals.[264] Grey's solution did represent a different approach from the Secretary of State's 1846 'waste lands' instruction, but was a practical compromise that would achieve the same outcome as that envisaged by supporters of the waste-lands theory; he was following what he described to be a 'nearly allied principle'.[265] Instead of claiming 'unoccupied' land as Crown demesne, Grey proposed large-scale purchases ahead of settlement; low prices in anticipation of rising land values; and the certification of the remaining land required for Māori subsistence and future enjoyment as reserves. Māori ownership of all lands had been recognised in principle, but as Dr Loveridge observed, like Earl Grey, Governor Grey 'treated the Maori tenure of unused lands in the context of a pre-emptive regime as being different from their tenure over occupied and cultivated lands'.[266] The Colonial Office found that Grey's policy did not require Earl Grey's instructions to be altered nor his proposed system for registering Māori lands abandoned.[267] Grey's solution had simply reshaped those principles, as Loveridge put it, 'to better suit local conditions'.[268] As a result, the shadow of the treaty remained, but the spirit was undermined.

260. Grey to Grey, 15 May 1848, BPP, vol 6, p 25.
261. Grey to Grey, 15 May 1848, BPP, vol 6, p 25.
262. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), p 70.
263. Grey to Grey, 15 May 1848, BPP, vol 6, p 25.
264. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), pp 319–320.
265. Grey to Grey, 15 May 1848, BPP, vol 6, p 23.
266. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), p 328.
267. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), p 329.
268. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), p 329.

8.3.2.6 *Te Raki Māori understandings and expectations of Crown land purchase*

A key question before the Tribunal on the issue of early Crown purchasing relates to Te Raki Māori understandings and expectations of land transactions after 1840, and whether these were respected by the Crown. The claimants submitted that Te Raki Māori understood transactions involving land in terms of tuku whenua; that is, as conditional and temporary allocations of rights which did not prevent their own continuing use rather than as permanent sales. Furthermore, they argued that the Crown was aware of the understanding Māori held and of their expectation of both immediate payment and future benefits, but that regardless of this, the Crown treated land transactions as straightforward commercial sales – full and final.[269] Crown counsel, on the other hand, maintained that Māori accepted that these transactions with the Crown constituted permanent alienations.[270]

We have already considered at length Te Raki Māori understandings of pre-treaty transactions in chapter 6 of this report (see section 6.3) and need not repeat that discussion here. Our conclusion was that, while there may have been a growing awareness of what settlers meant by sale by 1840, Te Raki Māori did not accept that the British view should prevail. Rangatira retained substantive authority in the district in their dealings with individual settlers and conducted these tuku whenua in accordance with tikanga.

We observe, first, that there is little available evidence on this issue in the period following 1840. As we discuss further in section 8.5.2.1.1, official correspondence concerning land purchases in Te Raki provides limited evidence on the events leading up to purchase agreements and offers little insight into how Māori viewed these transactions.[271] The documentary record also contains few statements from Te Raki rangatira concerning how they viewed land purchasing during this time. By contrast, we have a better picture of Te Raki Māori views on pre-treaty land transactions thanks to the te Tiriti discussions and the evidence provided by the first Land Claims Commission (see chapter 6, section 6.3).[272] As a result, in considering this issue we must also look to the wider context in which the Crown undertook its purchasing programme in Te Raki, official statements about Māori attitudes, and evidence of Māori action following purchase agreements.

Following the signing of the treaty, the Crown began its process for investigating the validity of the large number of pre-treaty transactions in Te Raki. However, many of these claims remained undefined for many years, and lands continued to be in shared occupation with Māori. It is likely that some Te Raki Māori came to better understand how the British viewed sales when the boundaries of grants made to settlers and the 'surplus' land claimed by the Crown were eventually surveyed, and as the words of the written deed were consistently preferred by officials to the oral evidence Māori offered in various commission hearings of the 1840s and 1850s. The Crown's assertion of pre-emption in the treaty marked a further

269. Claimant closing submissions (#3.3.207), pp 5–6.
270. Crown closing submissions (#3.3.404), pp 44–45.
271. O'Malley, 'Northland Crown Purchases' (doc A6), p 475; we continue to discuss this later.
272. See also Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 357–367.

important shift in the options available for Te Raki Māori in transacting their lands. As we have noted, Te Raki Māori were not informed of this feature of the Crown's plans in February 1840 and protested to FitzRoy about the new restrictions placed on the ways in which they could transact their own lands.[273] Whether Māori came to accept the British concept of sale after these developments is a separate question entirely. We explore this issue in the discussion that follows.

It is unlikely that Te Raki Māori expectations and understandings of land sales would have changed much in the first years after the signing of the treaty. During the early 1840s, the lands transacted with settlers in the preceding decade remained undefined on the ground and largely in shared occupation. The only Crown 'purchase' in Te Raki during this period was the Mahurangi–Omaha block, and McBurney considered it doubtful that the Hauraki chiefs who made the initial 'sale' fully understood that the Crown intended the transaction to permanently and totally extinguish their rights in the land.[274] When Pōmare II signed a further purchase receipt in 1842 to formalise the sale of his interests in Mahurangi, the document describes a tuku. Claimant Arapeta Hamilton defined this as a 'gift' to the Crown, rather than a hoko (sale).[275] We also note that Ngāti Rongo's 'sale' of the Waiwera hot springs to the settler Robert Graham under a pre-emption waiver certificate was considered a tuku; one which claimant counsel submitted 'has never been honoured and is still in place'.[276] As we discussed in chapter 6, rangatira continued to act as if they understood that they retained authority over the hot spring decades later: in 1885, Te Hemara Tauhia returned to the Waiwera hot pools and removed their plugs. According to researchers David Armstrong and Evald Subasic, he did this in 'anger and frustration at the manner in which his ambitions for himself and his hapu had come to nothing'.[277]

Some insight into whether the views of Te Raki Māori on land sales had changed by the mid-1850s is provided by the 1856 Board of Inquiry Appointed to Enquire Into and Report Upon the State of Native Affairs,[278] established by Governor Thomas Gore Browne to investigate Native Affairs policies under consideration by the Government. The board consisted of Charles Whybrow Ligar (chairman of the board and Surveyor-General), Major Nugent (former Native Secretary to Governor George Grey), Thomas Smith (Acting Native Secretary and resident magistrate at Rotorua), and William C Daldy (member of the House of Representatives (MHR) for Auckland City).[279] Among the topics before the board

273. Loveridge, '"An Object of First Importance"' (doc A81), p 182 n; Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 512–513.

274. McBurney, 'Traditional History Overview' (doc A36), p 376.

275. Turton, *Maori Deeds of Land Purchases*, vol 1, p 253; Arapeta Hamilton, transcript 4.1.12, North Harbour Stadium, p 283; O'Malley, 'Northland Crown Purchases' (doc A6), p 194.

276. Counsel for Wai 354 and Wai 1535, transcript 4.1.31, Otangaroa Marae, p 24.

277. David Armstrong and Evald Subasic, 'Northern Land and Politics: 1860–1910' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2007) (doc A12), pp 940–941.

278. 'Report of a Board Appointed by his Excellency the Governor to Enquire Into and Report Upon the State of Native Affairs', 9 July 1856, AJHR, 1856, p 4.

279. 'Report', 9 July 1856, AJHR, 1856, p 3.

were Māori expectations and understandings about land transactions. The questions posed to participants on this subject included:

> 'Are the Natives generally willing to sell their Lands?'
> 'Can the Natives who desire to sell land be required to mark it out, either by a trench or in some definite manner, before the survey is commenced, and after the survey of the outline has been made?'
> 'Would the Natives generally sell most readily to Government or Private Individuals?'
> 'Would the Natives be satisfied with the Government selling their lands as agents for them, by auction or otherwise, they receiving the nett proceeds?'
> 'Has a Native a strictly individual right to any particular portion of land, independent and clear of the tribal right over it?'
> 'After the boundaries are defined, should a public notice be given, calling upon all claimants to appear within a given time, or forfeit their claims?'
> 'If individual Native owners received Crown Grants, would there be any danger of their selling all their land and becoming paupers?'[280]

The 25 Pākehā men who gave evidence to the inquiry included settlers, missionaries, and government officials who were experienced in dealing with Māori land – including many based in Te Raki.[281] Nine rangatira also presented their views to the board on issues relating to land purchasing practices and policies. 'Te Hira Taiwhanga' of Kaikohe (most likely Hirini Rāwiri Taiwhanga of Ngāti Tautahi and Te Uri o Hua), the only Te Raki rangatira who gave evidence, stated:

> They [Māori] consider the country as their own, and the Europeans as visitors, and should the natives sell land extensively, they imagine that their present position would be changed or reversed. I am not aware of any individual claim among the native people . . . I do not know the natives would like to have Crown grants; they do not understand the nature of Crown grants. Those who are enlightened would like to have Crown grants. In cases where the majority of the tribe understood the matter – the object, – they would consent . . . They would allow the Government to sell [to settlers] should they receive the net proceeds.[282]

Taiwhanga's evidence suggests that he understood the distinction between customary Māori title and Crown grants and considered that the latter had some benefits; however, he was clear that this was not a widely held view. In particular, Māori would be more open to the permanent sale of their lands to settlers if they thought they were receiving the full value, not just nominal prices under the land fund model.

280. 'Report', 9 July 1856, AJHR, 1856, pp 1–2.
281. 'Report', 9 July 1856, AJHR, 1856, p 2.
282. Te Hira Taiwhanga, evidence, 26 April 1856, BPP, vol +10, pp 560–561.

Overall, the board received a mix of affirmative and negative opinions on the willingness of Māori to sell their lands. Notably, all but two of the witnesses provided evidence that Māori did not hold individual rights to land, independent and clear of a tribal right.[283] After receiving evidence in person and in writing from these witnesses, the board addressed the question of Māori expectations of Crown purchase transactions. It noted that Māori had initially only offered settlers 'a title similar to that, which they, as individuals hold themselves. The right of occupancy'. However, it observed that after further contact with Europeans who had communicated the shortcomings of this form of tenure, Māori had quickly taken up the practice of offering 'written titles in perpetuity'. The board's main concern appeared to be that delay in the extinguishment of Māori title would make land purchasing more difficult and expensive, as Māori became more aware of the value of their lands.[284]

The solution the board proposed was to issue 'to individual natives, or to the heads of families, a Crown Grant for such portions of land as may be actually required for occupation'.[285] The board recommended that Crown grants with individual titles be issued to Māori. According to the board, 'While they continue as communities to hold their land, they will always look to those communities for protection, rather than to the British laws and institutions.' The board stated that these grants 'should be similar in effect to that issued to Europeans in every respect' and should not include 'a restriction preventing the sale of [land] within a certain number of years'. Board members argued that the 'strong attachment' of Māori to their land 'would prevent them from parting with it, so as to leave themselves destitute'.[286]

After the board reported to the General Assembly, Donald McLean wrote to the Governor's Private Secretary, F G Steward, stating that his views 'do not materially differ from those of the board's'. The board had suggested that native title should be extinguished or transferred to the Crown in order for Crown grants to be issued to Māori landowners through repurchase. Nonetheless, McLean was concerned that Māori misunderstandings about the permanence of land sales could impede any effort to implement this suggestion. He argued that Māori had

> no original idea of a transfer or exchange of land in perpetuity, and . . . this idea has only of recent years become fully intelligible to them as a matter of bargain and sale, in which light alone can they understand the subject, and in which manner alone could they be induced to give to the Crown such a title as would enable the Crown to issue grants to individuals.

McLean followed this up, however, by stating:

283. The two witnesses who offered a negative opinion on this question were David Graham and Captain Porter, both of Auckland: 'Report', 9 July 1856, AJHR, 1856, app, p 1.
284. 'Report', 9 July 1856, AJHR, 1856, p 4.
285. 'Report', 9 July 1856, AJHR, 1856, p 5.
286. Browne to Henry Labouchere, 23 July 1856, BPP, vol 10, pp 512–513.

> I consider it of the utmost importance that every facility should be afforded to the natives to acquire land by purchase from Government [the re-purchase scheme by individuals that he had already begun implementing], as this will be the surest means of breaking up their tribal confederacies, and of inspiring greater confidence in that power from which their more secure and permanent tenure is derived. I am aware that to effect this will be a work of time, as existing customs, and the mode of living in communities, will only be gradually relinquished when the natives – naturally a jealous race – feel an entire security, not only in the present, but in the eventual objects and intentions of the Europeans towards them; and nothing will tend so much to induce this confidence as the certainty that they can obtain land which they can leave with an undisputed title to their posterity.[287]

In other words, McLean was well aware from previous experiences that many Māori had not accepted British understandings of the nature and implications of land sales, and that this would only change gradually.[288] By 1856, McLean had begun implementing his policy of offering Māori Crown grants through the repurchase of lands already alienated to the Crown. His comments to the Private Secretary illustrate how he viewed this policy: as a means of replacing Māori community land interests with a form of individual title. This change, McLean suggested, would be key to enforcing the British notion of purchases as permanent alienation (we consider the repurchase policy further in our discussion of reserves in sections 8.4.2.3 and 8.5.2.7).

As we will also discuss further, purchasing started in earnest in Te Raki after 1854, and this increase in the exposure Te Raki Māori received to British expectations of permanent alienations likely had an impact on their understandings of land transactions. For the remainder of the 1850s, Crown land purchase commissioners would become a more regular presence in parts of the district. As more blocks were surveyed and purchase blocks were gradually on-sold to settlers, Te Raki Māori would have had more familiarity with the Crown's view of purchases, and may have felt increasing pressure to conform to that view. The start of the the second Land Claims Commission (the Bell commission) in 1857 (which we discussed in chapter 6) also signalled that the Crown wished to finally settle outstanding pre-emption waiver and old land claims with clearly delineated apportionments of transacted land between Māori, settlers and the Crown.

The Crown also made a strong statement of its intention to enforce its view of land transactions with its formulation of purchase documents once McLean became Chief Native Land Purchase Commissioner in 1854. Deeds became increasingly detailed and explicit. Printed deeds were also introduced during this period, which McLean distributed to his purchase commissioners.[289] From 1854,

287. McLean to Private Secretary, 4 June 1856 (O'Malley, 'Northland Crown Purchases' (doc A6), pp 447–448).

288. See also the discussion in Armstrong, '"A Sure and Certain Possession": The 1849 Rangitikei/Turakina Transaction and its Aftermath' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2004) (Wai 2200 R01, doc A166), pp 131–132.

289. McLean to Johnson, 18 May 1854, AJHR, 1861, C-1, pp 52–53.

earlier forms of these printed deeds were less detailed and simply stated agreement to 'sell the land' to the Crown ('te hoko i tenei whenua ki a Kuini').[290] In the main, Crown land purchase commissioners appear to have relied on handwritten deeds prior to 1856.[291] However, from 1855, a number of deeds introduced new language into these contracts, including references to the resources and features of the block.[292] In a December 1856 deed concerning land on Great Barrier Island, the te reo translation read as follows:

> Heoi kua oti i a matou te hurihuri te mihi te poroporoake te tino tuku rawa i tenei Kainga o a matou tipuna tuku iho i a matou me ona awa me ona Ma[u]nga me ona roto me ona wai me ona rakau me ona otaota me ona kohatu me ona wahi parae me ona wahi ataahua me ona wahi kino me nga mea katoa ki runga ranei o te whenua ki raro ranei o te whenua me nga aha noa iho o taua whenua ka oti rawa i a matou te tino tuku rawa atu i tenei ra e whiti nei kia Wikitoria te Kuini o Ingarangi ki nga Kingi Kuini ranei o muri iho i a ia a ake tonu atu.[293]

The English text given was:

> Now we have for ever given up and wept over and bidden farewell to and transferred this Land which has descended to us from our ancestors with its streams and its rivers and its lakes and its waters and its trees and its pastures and its minerals and its level spots with its fertile spots and its barren places with all above the said Land all below the said Land and with all appertaining to the said Land we have now entirely given up under the shining sun of this day to Victoria the Queen of England or to the Kings or Queens her successors for ever and ever.[294]

The use of more elaborate language to convey the permanency of alienations would be formalised in the standard forms McLean introduced in 1857, and which would be used in subsequent purchases during this period.[295] Dr Rigby commented that these standard printed deeds 'introduced legal language designed to make Crown purchase transactions more comprehensive and complete than pre-

290. For instance, see the deed used by Johnson in 1853 to purchase Parihoro's interests in the Mahurangi block, and the deed for the purchase of the Ruakaka block: AUC 85 (O'Malley, supporting papers (doc A6(a)), vol 22, pp 7308–7311); AUC 309 (O'Malley, supporting papers (doc A6(a)), vol 22, pp 7423–7427); Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), pp 38, 55.

291. See Rigby, 'Pre 1865 Te Raki Crown Purchase Validation Report' (doc A53), app A.

292. See the purchase deeds for the Aotea (Lands at Great Barrier Island), Manaia, Ruaranga, Maungatapere, and Ahuroa and Kourawhero blocks: Craig Innes, 'Northland Crown Purchase Deeds, 1840–1865', resource document commissioned by Crown Forestry Rental Trust, 2006 (doc A4), pp 161–164, 261, 267, 271–272, 285–286.

293. Innes, 'Northland Crown Purchase Deeds' (doc A4), p 161.

294. Innes, 'Northland Crown Purchase Deeds' (doc A4), pp 161–162.

295. Rigby 'The Crown, Maori, and Mahurangi' (doc E18), p 55; a survey of the 116 deeds compiled for this inquiry shows that most of the deeds issued contained references to the resources and features of the block in question to be included in the transaction: Innes, 'Northland Crown Purchase Deeds' (doc A4).

viously handwritten deeds recorded'.[296] For example, the deeds included a reference to a plan that would be annexed to the deed setting out the boundaries of lands purchased, and stipulated that the transfer of ownership would include 'its trees minerals waters rivers lakes streams and all appertaining to the said Land or beneath the surface of the said Land and all our right title claim and interest whatsoever thereon To Hold to Queen Victoria Her Heirs and Assigns as a lasting possession absolutely for ever and ever'.[297]

This was often expressed in te reo as:

> Me ona rakau me ona kowhatu me ona wai me ona awa nui me ona roto me ona awa ririki me nga mea katoa o taua whenua o runga ranei o raro ranei i te mata o taua whenua me o matou tikanga me o matou paanga katoatanga ki taua wahi; Kia mau tonu kia Kuini Wikitoria ki ona uri ki ana ranei e whakarite ai hei tino mau tonu ake tonu atu.[298]

In these standard deeds, such as that for the Waikare block in 1864, the Crown took pains to underscore to Te Waiariki the permanency of the alienation to which they were supposedly agreeing. The deed was stated in English to be

> a full and final sale conveyance and surrender by us the Chiefs and People of the Tribe of Te Waiariki whose names are hereunto subscribed And Witnesseth that on behalf of ourselves our relatives and descendents we have by signing this Deed under the shining sun of this day parted with and for ever transferred unto Victoria Queen of England Her Heirs the Kings and Queens who may succeed Her and Her [*sic*] and Their Assigns for ever in consideration of the sum of Nine Hundred and fifteen Pounds (£915.0.0) to us paid by William N Searancke on behalf of Queen Victoria . . . all that piece of our Land situated at Taiharuru and named Waikare the boundaries whereof are set forth at the foot of this Deed and a plan of which Land is annexed thereto.[299]

In the Māori text, however, a jumble of related but distinct words and phrases were presented to Te Waiariki as a translation of the English, such as 'tino hoko', 'tino hoatu', and 'tino tuku whakaoti atu'.[300] Indeed, all 51 of the deeds drawn up between 1858 and 1865 begin with these phrases (the standardised opening being 'he Pukapuka tino hoko tino hoatu tino tuku whakaoti atu na matou na nga Rangatira me nga Tangata o nga hapu o . . .').[301]

We note again the inherent difficulties of ascribing English meanings to Māori words and concepts (see chapter 6, section 6.3). Claimant Pereri Mahanga (Te

296. Rigby 'The Crown, Maori, and Mahurangi' (doc E18), p 55.
297. This language was included in some 51 purchase deeds from Te Raki: see Innes, 'Northland Crown Purchase Deeds' (doc A4).
298. For example, see Innes, 'Northland Crown Purchase Deeds' (doc A4), p 17.
299. Innes, 'Northland Crown Purchase Deeds' (doc A4), p 205.
300. Pereri Mahanga (doc AA79), pp 9–10.
301. Innes, 'Northland Crown Purchase Deeds' (doc A4).

Waiariki) gave evidence that illustrated how Māori could have taken away different understandings from the language employed in the deeds. Regarding the deed for Waikare, Mr Mahanga told us that the clustered phrases were clearly intended to emphasise to Māori that the Crown 'wished to give effect to the aims of the purchaser'. However, he also told us that the use of multiple phrases did not make grammatical sense, and amounted to 'an over use and perhaps even random uttering of these kinds of words and concepts'. He stated that the language 'does more to confuse what our tupuna's intentions were'. However, he argued that they 'would not, and could not, have understood that they were parting with their lands forever'.[302]

We have some sympathy with this view. The listing of the resources and topographical features, such as waterways, in purchase deeds was also largely a new development, and with few exceptions, had not appeared before in pre-treaty deeds. This list, and the invocation of a poroporoaki, were clearly intended to communicate the concept of permanent alienation of land in terms more familiar to Māori. The emphasis on full and final sale that McLean and his purchase officers were trying to convey through this wording – albeit somewhat clumsily – was clearer in these later examples. We do think, however, that the increasing precision of wording and the repetition of phrases also illustrates that the land purchasing department was conscious that customary practices had continued. Thus, while Māori still may not have accepted Crown claims to full and permanent purchases, they were likely becoming increasingly aware that this is what the Crown and settlers intended and that their own tikanga was being disregarded.

In our view, we cannot rely solely on the wording of the deeds signed by Māori to indicate their understandings and expectations of land transactions. As the Tribunal observed in *The Taranaki Report*, 'Maori parties cannot be presumed to have understood the transaction in the terms of the deed. It is likely they did not. It is well known now that not only was the sale of land unknown to Maori but it invoked concepts antithetical to their world view.'[303]

That there remained much room for different understandings to coexist is clear from the broader evidence of Te Raki Māori relationships to lands that they had supposedly sold and their continued use. Dr O'Malley observed that many of the lands purchased during this period 'were not settled by Europeans or cleared of bush sometimes for decades'. As a result, in his view, 'nominal purchases had no real meaning or discernable consequences on the ground'.[304] In the case of the Mokau block, which the Crown had supposedly purchased in 1859 from Wiremu Hau and nine members of Ngāi Te Whiu, various hapū (including Ngāi Te Whiu) continued to occupy the land for more than 40 years from 1865 (we discuss the Mokau purchase further in section 8.5.2.3).[305] In 1883, T W Lewis, the Native Under-Secretary, observed of continuing Māori claims to the Ruapekapeka block

302. Mahanga (doc AA79), pp 9–10.
303. Waitangi Tribunal, *The Taranaki Report*, Wai 143, p 35.
304. O'Malley, 'Northland Crown Purchases' (doc A6), p 490.
305. O'Malley, 'Northland Crown Purchases' (doc A6), p 375.

that lands were 'not utilised or sold by the Govt and this fact leads the natives to continue to assert their claims.'[306]

While these further claims of ownership related to lands that remained unsettled years after the Crown purchased them, Māori sometimes occupied purchased lands even where greater settlement had occurred. In 1863, the Russell resident magistrate, R C Barstow, reported that 'of late a practice of occupying "pakeha" land by "Maories" has prevailed in this neighbourhood, and I fear that at some future time trouble may arise on the white purchaser attempting to regain possession.'[307] The missionary Richard Davis made similar comments that same year:

> Even here there are cases in which the natives are resuming their lands, which they had fairly sold to Europeans, and the titles to which had been examined and proved valid in the Commissioners' Court, and for which Crown Grants have been issued. Of course they must be left to do as they like. The Government is not in a position to render protection.[308]

Dr O'Malley cited similar examples where Māori continued to occupy and use purchased lands. For instance, the *Daily Southern Cross* reported in 1863 that the Maungakaramea block 'was literally in possession of the Maoris, who were engaged in digging it over for the kauri gum.'[309] The block, which was purchased in 1855, was sold to settlers in 40-acre lots, the last of which had been on-sold in 1861. However two years later, no settlers had taken up residence on their sections, and it was reported that the bush had been 'burnt off three times . . . by the Maori gum diggers.'[310] The newspaper's correspondent saw these events as 'further evidence of the uncertain tenure by which European settlers hold their land and property in this island.'[311]

There are similar examples throughout Whāngārei, the taiwhenua most affected by Crown purchasing at this time. For instance, the Nova Scotian settlers at Waipū complained that Māori had 'no sense of private property, and as a consequence would walk over the wheat fields, appropriate potatoes, or enter houses just as if they were their own property.'[312] Settlers at Parua Bay recorded in 1858 that a track used by Māori on the site of their residence remained in continued use, with local

306. T W Lewis to Native Minister, 23 May 1883 (O'Malley, supporting papers (doc A6(a), vol 6, p 1989); O'Malley, 'Northland Crown Purchases' (doc A6), p 490.

307. R C Barstow, 'Report on a piece of land claimed by Mata Topi,' 19 January 1863 (O'Malley, supporting papers (doc A6(a)), vol 6, p 1941); O'Malley, 'Northland Crown Purchases' (doc A6), p 491.

308. Richard Davis to J N Coleman, 25 February 1862 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), pp 491–492).

309. 'Mangapai and Maungakaramea', *Daily Southern Cross*, 27 January 1863, p 3 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 492).

310. Mangapai and Maungakaramea', *Daily Southern Cross*, 27 January 1863, p 3 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), pp 492–493).

311. 'Mangapai and Maungakaramea', *Daily Southern Cross*, 27 January 1863, p 3 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 492).

312. O'Malley, 'Northland Crown Purchases' (doc A6), p 493.

Māori 'marching in the front door and out the back'.[313] O'Malley argued that such examples reflect a Māori understanding of what land transactions entailed which differed markedly from that of Pākehā settlers, and suggested that Māori did not consider 'sales' to have extinguished their authority over and access to land well after 1840.[314]

This view was also adopted by the Tribunal in the *Muriwhenua Land Report*. The Tribunal explained that the behaviour of Māori with respect to their purchased lands during this period served as a test for their understanding of land sales. The fact that blocks acquired by the Crown were not occupied by settlers for many years, and that Māori were able to continue to use the 'sold' land without restriction or interruption, would have reinforced Māori assumptions that they had not permanently and irrevocably parted with it. Further, the reservation of land and the promises of 'collateral benefits' were likely to have been interpreted to mean that Māori maintained an enduring authority over, a close association with, and a material interest in the lands they had transacted. In short, the Tribunal concluded that Māori interpreted the negotiations as establishing an alliance with the Crown and creating new economic and social relationships from which both parties would benefit, rather than involving permanent alienation and permanent displacement. For Māori, purchase deeds thus marked a beginning, and they expected further benefits to follow. However, for the Crown, purchase deeds marked an end; the extinguishment of customary title and the opportunity to construct a new social and economic order.[315]

The Tribunal reached a similar conclusion about Māori understandings of Crown purchases during the 1850s in *The Wairarapa ki Tararua Report*.[316] With the end of the leasehold economy in Wairarapa, the Tribunal considered that 'Māori must have known that more was being asked of them than before, and they expected more back as a result'. But Wairarapa Māori were concerned with more than the immediate payments, as '[o]ther benefits both tangible and intangible were promised, and were expected'. The Tribunal noted that in promoting Crown purchasing, Grey had spoken of the marriage of two peoples, Māori participation in the district, and equal access to education and services. Wairarapa Māori placed great value on these promises and viewed subsequent transactions as forming a partnership between the Crown and themselves.[317] As a result, the Tribunal concluded that Wairarapa Māori agreed to provide the Crown with practical authority over purchased lands. However, this did not mean that they understood the transaction as a permanent alienation by which they had surrendered all their own rights.[318] There was, in the Tribunal's view, 'strong evidence that things continued

313. R S Anderson, Diary, 10 May 1858 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 494).
314. Vincent O'Malley, transcript 4.1.17, Akerama Marae, pp 612–613; see also Merata Kawharu (doc W10), pp 11–12.
315. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, pp 194–211.
316. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 178.
317. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, pp 178–179.
318. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 178.

to be dealt with using customary practices and understandings, although inevitably with changes over time'.[319]

We consider that the Tribunal's conclusions in these inquiries are also broadly applicable in Te Raki from the late 1850s to 1865. Furthermore, we agree with the Tribunal's conclusion in *The Wairarapa ki Tararua Report* and *He Whiritaunoka* that the tikanga of land transactions created a partnership with reciprocal obligations. The 'collateral benefits' or 'real payments' that, at Governor Grey's explicit direction, Donald McLean, Henry Kemp, and other Crown purchase agents emphasised, served to assure Māori that their relationship with their land had not been irrevocably surrendered. The message to them was that only the Crown could provide security of title in the form of land grants and the roads and other infrastructure that they so desired, in which they would participate and from which they and settlers would benefit together. Govenor Gore Browne himself, along with Te Raki rangatira, invoked the language of a 'union' between the races, and shared prosperity.[320] These promises were not included in the written deeds but remained significant to Māori. This was well recognised by Crown officials. As McLean wrote in 1858,

> It is well ascertained that the New Zealand tribes regard their land as a National property, the cession of which when decided on, they prefer making as a National Act to Her Majesty, even while they are aware, that the sums to be realized by such cessions are inconsiderable. Nor do they generally attach so much importance to the pecuniary consideration received for land held by them in common, as to the future consequences resulting from its alienation.[321]

Among the benefits Māori expected were new markets for their produce. One settler in the Whāngārei district described how local Māori discussed with him the advantages arising from hosting a Pākehā on their land: they would be able to 'sell all the maize and potatoes they could raise' and sell pigs from home rather than driving them to the Bay of Islands.[322] They were encouraged to expect other direct material and political gains from dealing with the Crown: notably towns, hospitals, schools, roads, and 'other sought-after infrastructure'. According to O'Malley, similar expectations were fostered by the Crown and drove the purchase of the Mokau and Kawakawa blocks, which were also acquired very cheaply.[323] Elsewhere, Bay of Islands rangatira, including Tāmati Waka Nene, understood

319. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 31.

320. O'Malley, 'Northland Crown Purchases' (doc A6), pp 124–125; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 13, 30, 263,

321. Memorandum by the Native Secretary, 25 June 1858 (O'Malley, supporting papers (doc A6(a)), vol 12, p 3785).

322. A M Rust, *Whangarei and Districts' Early Reminiscenses* (Whāngārei: Mirror, 1936), p 59 (O'Malley, 'Northland Crown Purchases' (doc A6), pp 465, 494).

323. O'Malley, 'Northland Crown Purchases' (doc A6), pp 345–346; Tony Walzl, 'Ngati Rehia: Overview Report' (commissioned research report, Kerikeri: Ngati Rehia Claims Group, 2015) (doc R2), pp 151, 154–155.

from discussions with purchase agent Kemp that the purchase of the Okaihau 1 block would result in the creation of an inland township in the area and consequent growth of the local economy.[324] These anticipated benefits were a major impetus for Māori offering the Crown rights to their land in exchange for nominal payments.

During this period, rangatira played a key role in fostering these new relationships and opportunities through land transactions. As we discussed in chapter 3, rangatira were economic leaders who were responsible for coordinating and guiding hapū activity. However, decisions about the distribution of rights in land were made through consensus and required the support of the collective.[325] Researchers Drs Manuka Henare, Hazel Petrie, and Adrienne Puckey gave evidence that Ngātiwai rangatira Te Kiri said to McLean and land purchase commissioner John Rogan in 1862 regarding Hauturu that 'Te Urunga, Hore te More, Wiremu Taiawa, Paratene Te Manu, Henare Te Whahipu Taukokoa, these are the people and the island is theirs, but it is through me only they can sell it'.[326]

In his treatise on customary law, Tā Eddie Taihakurei Durie commented that the influence rangatira had in land transactions 'does not necessarily indicate that they were motivated by personal greed or the elevation of their personal status'. Instead, he argued that 'historical evidence suggests that rangatira projected land sales as opening up long term and enduring benefits for their people by associations with settlers'.[327] Profits from land transactions funded investment in community assets such as schooners and mills, as well as the residences of rangatira as an expression of mana.[328] For example, in 1850, Rewa, a rangatira from the Bay of Islands, agreed to provide the Government with about 135 acres in and around Kororāreka in return for finance for the sailing ship he desired.[329] In response to Tribunal questions about whether this sale of land to fund the construction of a schooner was 'essentially a sale in the European sense of the word', O'Malley argued that 'the question of transacting land for capital . . . is not necessarily inconsistent with the notion of ongoing access to those lands that are transacted'.[330] Furthermore, as Paul Monin has argued in his article on the Māori economy of Hauraki, schooners

324. O'Malley, 'Northland Crown Purchases' (doc A6), pp 126–127.

325. Walzl, 'Ngati Rehia' (doc R2), pp 37–38; Manuka Henare, Hazel Petrie, and Adrienne Puckey, '"He Whenua Rangatira": Northern Tribal Landscape Overview (Hokianga, Whangaroa, Bay of Islands, Whāngārei, Mahurangi and Gulf Islands' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2009) (doc A37), p 157; Kiharoa Parker and Hera Dear (doc H11(b)), pp 7–8; Margaret Mutu (doc AA91), pp 37–39. Mr Tahere and Mr Klaricich discussed the importance of inter-hapū alliances: Pairama Tahere (doc B2), p 2; John Klaricich (doc C9), p 14. Mr Klaricich said that decisions were made by discussion and consensus: Klaricich, responses to questions (doc C9(c)), p 2.

326. Te Kiri to Rogan and McLean, 23 October 1862 (cited in Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 331).

327. Eddie Taihakurei Durie, 'Custom Law' (Treaty Research Series, Treaty of Waitangi Research Unit), 2013 ed, pp 101–102.

328. Paul Monin, 'The Maori Economy of Hauraki, 1840–1880', NZJH, vol 29, no 2 (1995), p 199.

329. O'Malley, 'Northland Crown Purchases' (doc A6), p 336.

330. Vincent O'Malley, transcript 4.1.17, Akerama Marae, pp 612.

and mills offered 'new ways of conducting inter-hapu competition'. He cited 'the boost schooner-ownership gave to mana, of both chief and hapu'.[331]

Dr O'Malley gave evidence that early settlers could find themselves under the protection of local Māori, despite having purchased their land from the Crown. He explained that 'the chiefs concerned were under an obligation to literally protect "their" Pākehā from harm's way – failure to do so would be seen as lessening the mana of the host'.[332] A notable example of a rangatira who acted in this way towards settlers was Te Tirarau Kūkupa, a Te Parawhau rangatira, who had substantial influence in the Mangakāhia and Whāngārei taiwhenua.[333] As Dr O'Malley put it, Te Tirarau 'personally visited' every settler who arrived at Maungakaramea 'and offered to help them in any way he could'.[334] Paul Thomas has written that Te Tirarau also acted as a marriage broker between European men and Māori women. Thomas considered that '[t]hese marriages, like all the other actions of assistance, were intended to benefit Maori as well as Pakeha through tying valued settlers more closely to the local community'.[335]

During the 1850s, land purchase commissioner Johnson came to rely on Te Tirarau to negotiate the Crown's purchase of a large area of land in Whāngārei (we discuss Johnson's purchasing practices in more detail later).[336] Te Parawhau claimants submitted that 'Te Tirarau was a Rangātira of foresight, and would have looked to the long-term advantages arising from transactions'.[337] Claimant Marina Fletcher gave evidence that '[Te] Tirarau's motivations were the strengthening of a long term mutually beneficial relationship in which his mana and rangatiratanga were enhanced not diminished'.[338] In our view, the evidence does not suggest that Te Tirarau (and other rangatira like him) could have foreseen that their authority over their lands would eventually be displaced as a consequence of these transactions. He continued to act as a rangatira, strengthening relationships with the Crown and settlers that he believed would bring benefits and enhance the mana of his hapū. He extended manaakitanga and whanaungatanga towards the new settlers under his authority, which suggests that the tikanga of reciprocal responsibilities remained important following land transactions and settlement.

It is also likely that these expectations of continued use and occupation would have been challenged as settlement progressed, fences were built, and boundaries increasingly enforced. We agree with Dr O'Malley that 'those early 1840 transactions[,] Maunganui and Mahurangi[,] take place in quite a different context to say Ruapekapeka in 1864'.[339] But even by the end of the 1850s, there is little evi-

331. Monin, 'The Maori Economy of Hauraki', NZJH, vol 29, no 2 (1995), p 199.
332. O'Malley, 'Northland Crown Purchases' (doc A6), p 493.
333. Waitangi Tribunal, *The Kaipara Report*, Wai 674, p 77.
334. O'Malley, 'Northland Crown Purchases' (doc A6), p 493.
335. Paul Thomas, 'The Crown and Maori in the Northern Wairoa, 1840–1865' (commissioned research report, Wellington: Crown Forestry Rental Trust, 1999) (doc E40), pp 40–41.
336. O'Malley, 'Northland Crown Purchases' (doc A6), p 276.
337. Closing submissions for Wai 2355 (#3.3.275(a)), p 36.
338. Marina Fletcher (doc AA126(b)), p 29.
339. Vincent O'Malley, transcript 4.1.17, Akerama Marae, pp 613.

dence that Te Raki Māori accepted the Crown's conception of land purchases as permanent alienations. As we discussed in chapter 7 (see section 7.4.2.1), during Governor Gore Browne's visit to the Bay of Islands in 1858 and the re-erection of the flagstaff at Maiki Hill, Te Raki rangatira sought to revive their alliance with the Queen after a period of neglect following the Northern War, and remained hopeful that the promise of a township in the Bay of islands (and the associated economic benefits) would soon be fulfilled.[340] Yet, the township at Kerikeri promised by Gore Browne did not eventuate, and when Te Raki rangatira attended the Kohimarama Rūnanga two years later, they remained reticent in response to McLean's proposals for the administration of their lands under Crown titles recognised by English law. As we noted in chapter 7, despite McLean's promises of substantial control over land title and dealings, rangatira were far from persuaded. Some consented to consider the proposals; others warned that a number of communities would reject them outright (see chapter 7, section 7.4.2.7).[341]

Despite the substantial efforts of Crown officials to impress their conception of land sales on Te Raki Māori, we consider it would be unrealistic to expect communities to have departed entirely and voluntarily from their long-held customary understandings since the foundation of the colony. While we are unable to generalise about every transaction across the district, there is little evidence that Te Raki Māori widely accepted the British conception of land purchases as permanent alienations that entailed neither ongoing rights on their part nor obligations on the Crown or settlers who came into possession; rather, the weight of the evidence suggests that Māori were motivated to enter new arrangements with the Governor, and with settlers, in the expectation that they would bring reciprocal benefits to their communities. As Professor Alan Ward put it, '[t]he line between "selling" in the European sense, and bringing in some Pakeha friends and allies in the Maori sense, was still a blurry one'.[342]

8.3.3 Conclusions and treaty findings

Normanby's 1839 instructions for the colonisation of New Zealand provided the new colonial Government with two policy priorities: to protect the Māori interests that the British government had already recognised, and to acquire sufficient land to promote British settlement and development of the colony by means of the land fund. In purchasing Māori land, the Crown expected to acquire large tracts for low prices and to be able to use the profits from the re-sale of the land to fund further purchases, infrastructure, administration, and emigration. In order to uphold its responsibilities to Māori, the Crown also required its officers to establish who the rightful customary owners of land were, and ensure that they understood the

340. O'Malley, 'Northland Crown Purchases' (doc A6), p 110.

341. 'Proceedings of the Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 15 August 1860, pp 11–13 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12(a)), vol 1, pp 103–104); 'Proceedings of the Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 1 September 1860, pp 4–6 (Armstrong and Subasic 'Northern Land and Politics: 1860–1910' (doc A12(a)), vol 1, pp 107–108).

342. Ward, 'National Overview', vol 2, p 170.

nature of the negotiations and the transactions into which they were entering and the deeds they were signing. The purchased blocks should be defined and surveyed, and the Crown would ensure that Māori retained sufficient lands for their immediate and future needs. The existence and acknowledgement of these standards, and particularly their status as binding instructions from the Crown itself, demonstrates that colonial officials recognised that they had an obligation to act in good faith towards Māori and to recognise their interests and rights as the British understood them. However, following the signing of the treaty, it remained to be seen how these standards would be reflected in a land purchasing policy.

In our view, it would have been reasonable to expect the Crown to engage with Te Raki Māori to come to a negotiated agreement as to how settlement would proceed in the district while ensuring these standards were met. The Crown faced significant challenges in establishing processes for determining who owned the lands it wished to acquire, and for the transfer of land to settlers without causing harm to the very communities it had sworn to protect. These were questions of great importance to Te Raki Māori, and there were clearly shared priorities which could have formed the basis for these negotiations. However, Crown officials made no efforts to involve Te Raki in decisions about the development of its purchasing policy despite the clear room for accommodation. Rather, as we found in chapter 4, the Crown assumed control over Māori land and how it would be transacted by asserting radical title over all the lands of New Zealand and a sole right of pre-emption neither of which had been explained to Māori (see chapter 4, section 4.3.5).

In the years following the signing of the treaty, Crown officials clearly struggled to find a balance between acquiring sufficient land for settlement and protecting Māori interests, or even upholding their own standards. We have discussed the only Crown purchase during the 1840s in the Mahurangi and Omaha block, which the Crown conceded was acquired without the knowledge and consent of all Māori owners and before an investigation into the customary ownership of the area was conducted, in breach of the treaty and its principles.[343] Those who had not yet agreed to the transaction could only accept payment and possibly seek the creation of reserves, and the Crown further conceded that it failed to provide adequate compensation and reserves for the future benefit of Mahurangi Māori with interests in the purchase area.[344] We have welcomed these concessions.

A further challenge to Māori tino rangatiratanga and ownership of all lands in New Zealand came from advocates of the 'waste lands' theory, such as Earl Grey. A shrewd observer, Governor Grey perceived that purchasing land would prove to be a more just and acceptable way of proceeding than peremptorily claiming under the British law all Māori land not currently occupied. Purchase at nominal prices and re-sale at a profit would enable the Crown to meet the colony's two

343. Crown statement of position and concessions (#1.3.2), p 3; Crown closing submissions (#3.3.404), p 2.

344. Crown statement of position and concessions (#1.3.2), p 3; Crown closing submissions (#3.3.404), pp 2 7–8.

greatest wants, immigration and public works, while for Māori the 'real benefits' would materialise in the form of health and education services, trade with settlers, and rising value and greater security of ownership of the lands they retained.[345] In 1847, before he set out his purchasing policy in full, Grey had also made some acknowledgement of the importance of providing sufficient lands to support the traditional Māori economy, and granted large reserves.[346] However, under pressure from the imperial government to establish the Crown's ownership of all unoccupied lands, Grey adopted a far more restrictive policy after 1848.

As Chief Protector, Clarke had warned in 1843 that purchasing large tracts of land risked causing conflict and injury among Māori communities,[347] a caution that was not heeded. As Governor Grey began to develop his vision for a large-scale purchasing programme, he disestablished the Chief Protector's office and reaffirmed the Crown's commitment to large purchases. In setting out his policy, Grey entirely dismissed the legitimacy of Māori claims to large tracts of land where multiple groups held interests, and suggested that Māori would readily relinquish their rights – open to challenge from others – in return for a Crown-protected title in any small reserves they required for their cultivations and occupation. He justified this vision on the basis that all that Māori wanted were settlers, public works, and capital with which to develop the lands that they retained.[348]

As Professor Ward has commented, Grey's claims were clearly 'over-optimistic'.[349] Indeed, Grey was himself aware of 'Maori attitudes to land and of Maori capacity for military resistance'.[350] In Te Raki, the end of the Northern War in 1846 had left an uneasy balance between the Crown's authority and the ongoing enforcement of customary law by rangatira. As we will discuss further, Te Raki Māori sought to re-engage with the Crown in the years after the war, not through large sales, but instead they primarily sought the establishment of townships which would offer them new markets for trade.[351]

In our view, his May 1848 despatch offered no indication that Governor Grey was concerned with Māori preferences for the settlement of their lands, or how economic benefits would be distributed. Despite his prior acknowledgment of the legitimate claims Māori had to lands outside of their cultivations and settlements, Grey adopted language that gave a far more limited view of Māori equity in land.[352] Furthermore, in denigrating Māori land rights in this despatch, Grey chose words that would achieve the imperial government's approval for his policy. As he framed it, he would not enforce 'a strict principle of law', such as the Crown's claim

345. Ward, *National Overview*, vol 2, pp 130–131; see also Ian Wards, *The Shadow of the Land: A Study of British Policy and Racial Conflict in New Zealand, 1832–1852* (Wellington: Historical Publications Branch, Department of Internal Affairs, 1968), pp 385–390.
346. Ward, *National Overview*, vol 2, pp 132–133; Grey to Grey, 7 April 1847, BPP, vol 6, p 16.
347. O'Malley, 'Northland Crown Purchases' (doc A6), p 439.
348. Grey to Grey, 15 May 1848, BPP, vol 6, pp 24–25.
349. Ward, *National Overview*, vol 2, p 131.
350. Ward, *National Overview*, vol 2, p 130.
351. O'Malley, 'Northland Crown Purchases' (doc A6), p 99.
352. Ward, *National Overview*, vol 2, p 131.

to the underlying title on what it perceived as unused waste lands, but sought 'some nearly allied principle'.[353] We agree with Professor Ward, who considered the 1848 despatch 'indicated the Governor's dangerous tendency to be patronising and manipulative'.[354]

In the *Te Tau Ihu* report, the Tribunal concluded that Grey's policy departed from fundamental parts of Normanby's instructions, and 'was shorn of the active protection' they envisaged and that the treaty promised.[355] We agree with this assessment. Though he did not propose to implement the widespread confiscations that were anticipated by proponents of the 'waste lands' theory, Grey nonetheless sought the same outcome: to extinguish customary title over large tracts of land and confine Māori to small reserves for the purposes of cultivation. In our view, such goals were inconsistent with the Crown's duty to recognise and respect Māori tino rangatiratanga, and crucially failed to account for Te Raki Māori independence within their sphere of authority under the treaty.[356] Within that sphere, the Māori understanding was that land transactions did not mean an end to all their rights but rather a partnership entailing obligations on both parties.

We therefore find that:

- The Crown failed to engage with Te Raki Māori in developing its purchasing and settlement policy during the 1840s, and prioritised its political and economic objectives at the expense of Māori interests and treaty-protected rights in breach of te mātāpono o te tino rangatiratanga, and te mātāpono o te houruatanga/the principle of partnership.
- By denigrating the validity of Te Raki Māori rights in land and accepting the principle that those rights could be extinguished over large tracts of land at low cost, while hapū and iwi could be confined to small reserves for cultivation and occupation, Crown policy breached te mātāpono o te houruatanga/the principle of partnership, te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development, and te mātāpono o te matapopore moroki/the principle of active protection.

In the next section, we consider how Grey's policy was implemented in the Crown's purchasing programme of the 1850s and 1860s.

8.4 Was the Crown's Implementation of its Purchasing Policy Consistent with its Treaty Obligations?

8.4.1 Introduction

The appointment of George Grey as Governor initiated major changes in the Crown's land purchasing policy, including the reassertion of the Crown's right of pre-emption and the crystallisation of the principle that Māori 'waste lands' would

353. Grey to Grey, 15 May 1848, BPP, vol 6, p 23.
354. Ward, *National Overview*, vol 2, p 131.
355. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, Wai 785, vol 1, p 304.
356. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 527.

be purchased at nominal prices. This strategy produced almost immediate results in the South Island, where Grey was focused on acquiring as much land as he could in sparsely populated areas well suited for the implementation of his policy of buying great tracts of land at low cost ahead of British settlement.[357] However, it was not until 1854 that Grey's purchasing policy would be implemented in Te Raki by the Native Land Purchase Department under Chief Native Land Purchase Commissioner Donald McLean. In this section, we consider the preparations the Crown made for its programme of large-scale purchasing in Te Raki, and how it planned to implement its policy. We also set out how Te Raki Māori responded to the Crown's reassertion of pre-emption, and how far this was considered in the Crown's planning and objectives.

Claimants contended that the Crown's prohibition of private leasing and purchasing of mineral and forestry rights in Māori land under the Native Land Purchase Ordinance of 1846 removed owners' rightful control over their own land and resources. The ordinance had the effect, they argued, of leaving sale to the Crown as the only real option for Māori wishing to transact their land.[358] The descendants of Hone Karahina, and members of the hapū of Te Uri o Hua and Ngāti Torehina; members and descendants of Whānau Pani, Tahawai, and Kaitangata hapū; Te Tahawai and Ngāti Uru hapū; Te Ihutai and associated hapū; and, Ngāti Hineira, Te Whānau Whero, Ngāti Korohue, Te Uri Taniwha, and Ngāpuhi iwi claimants argued that leasing was consistent with Māori tikanga, and their tūpuna had entered into similar private arrangements during this period – although they were referred to as 'tuku whenua'.[359] They submitted that the Native Land Purchase Ordinance removed from them the opportunity to lease or mortgage their lands, and was inconsistent with the assurance that the Crown gave Māori through te Tiriti that their existing rights would be actively protected with the utmost good faith and to the fullest practicable extent.[360] In the words of Te Ihutai hapū claimants, this policy shift was intended 'to keep Maori in a position of subservience and usurped the mana of rangatira and hapu'.[361] They argued that had their tūpuna been able to raise capital through leasing some of their hapū land in the northern Hokianga between 1840 and 1865, they might have been better

357. O'Malley, 'Northland Crown Purchases' (doc A6), p 179; Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), pp 335, 350–351; Waitangi Tribunal, *The Ngai Tahu Report 1991*, Wai 27, vol 2, pp 261–262.

358. Claimant closing submissions (#3.3.207), p 13; closing submissions for Wai 1514 (#3.3.357), p 61; closing submissions for Wai 1538 (#3.3.303), p 18; closing submissions for Wai 2394 (#3.3.336), pp 83–87.

359. Closing submissions for Wai 1538 (#3.3.303), pp 18–20; closing submissions for Wai 2394 (#3.3.336), p 85; closing submissions for Wai 1968 (#3.3.337), p 93; closing submissions for Wai 2382 (#3.3.339(a)), pp 86–87; closing submissions for Wai 1522 and Wai 1716 (#3.3.341(a)), p 55.

360. Closing submissions for Wai 2394 (#3.3.336), p 87; closing submissions for Wai 1968 (3.3.337), p 95; closing submissions for Wai 2382 (#3.3.339(a)), p 89; closing submissions for Wai 1522 and Wai 1716 (#3.3.341(a)), pp 56–57.

361. Closing submissions for Wai 1538 (#3.3.303), p 19.

placed to start their own businesses and reap the economic benefits of the booming timber extraction industry at this time.[362]

Crown counsel argued that the framework Governor Grey established for purchasing Māori land was clear in its intent: reserves sufficient for Māori present and future needs would be set aside and would benefit Māori, alongside the anticipated collateral benefits of settlement. From 1854, the new Native Land Purchase Department under McLean continued this approach.[363] In relation to the prohibition of the leasing of Māori land under the Native Land Purchase Ordinance, Crown counsel referred to the lack of evidence of an instance in which the Crown actually enforced the ordinance in Northland.[364] The claimants argued that although no evidence of the ordinance being applied in Te Raki has been located, its 'main effect . . . was probably not in actual prosecutions of Europeans who had occupied Māori land but in deterring others from doing likewise'.[365]

8.4.2 The Tribunal's analysis

8.4.2.1 *Māori respond to the Crown's purchase policy*

Grey's claim (noted in the preceding section) that Māori would 'cheerfully' part with their land at purely nominal prices was soon contested. Early in 1849, Te Wherowhero and a number of Waikato rangatira pressed the Governor 'very urgently, to permit them to sell their lands to Europeans as formerly', and complained of 'the great injustice of the Governor buying their lands for a penny or two per acre, and selling it afterwards for as many pounds'. By not allowing direct purchase, they added, Māori did 'not receive the true value of their lands, and are compelled to sell at any price that the Government chose to offer, if they wish to sell at all'.[366]

While there is evidence of resistance to Grey's policy of large-scale Crown purchasing from the late 1840s, Te Raki Māori also expressed their desire for settlement during this period. As we discussed in chapter 7, northern rangatira made several attempts after the Northern War to re-engage with the Crown as a means of bolstering the district's declining economy. In September 1847, Grey travelled to the Bay of Islands to discuss a proposed township in Kerikeri with Tāmati Waka Nene and Hōne Heke. Heke however objected to the proposed location of the town on the western side of the Bay of Islands as it would leave him without access to the sea.[367] After Heke's death, the question was reopened when 90 rangatira wrote to Grey in February 1851 asking for 'fulfilment of your word, that a Town should be laid out, so that the wishes of this meeting may be fully carried out by

362. Closing submissions for Wai 1538 (#3.3.303), pp 19–20.
363. Crown closing submissions (#3.3.404), pp 46–47.
364. Crown closing submissions (#3.3.404), pp 50–51.
365. O'Malley, response to Tribunal statement of issues regarding 'Northland Crown Purchases' (doc A6(c)), p 20 (claimant closing submissions (#3.3.207), p 13).
366. Untitled, *Daily Southern Cross*, 3 March 1849, p 2 (cited in Loveridge, '"An Object of the First Importance"' (Wai 863 R01, doc A81), p 351).
367. Richard Davis, *Memoir of the Rev. Richard Davis* (London: James Nisbet and Co., 1865), pp 335–336; O'Malley, 'Northland Crown Purchases' (doc A6), pp 99–100.

you, and that the Queen and ourselves may in truth be joined as one people.'[368] In 1855, C O Davis, the Government interpreter, also reported that he had heard '[s]everal touching appeals' for settlement in Hokianga.[369] O'Malley argued that 'Ngāpuhi could see no harm to themselves from encouraging further settlement'. He observed that during the 1850s, Te Raki Māori remained numerically dominant and did not consider that settlement, or the establishment of a township, would impact on their ability to control their own affairs.[370]

Te Raki rangatira also pressed for the right to lease their lands. In August 1849, the Legislative Council accepted a petition from 11 rangatira from around the North Island including Te Raki (listed as Epiha Putini, Arama Karaka, Wetere, Erneti Porutu, Ruinga, Taimo, Ngakete, Kupenga, Koinaki, Paora, and Wiremu), in which they stated that: 'At the Meeting of Waitangi we did not consent to allow the Governor to have control over our Island'. They stated that they had heard of Māori leasing land to settlers in Wairarapa and claimed the right to utilise their lands as they saw fit: 'Are we children? Or are we slaves, that we are not allowed to dispose of our property? . . . Give us laws like unto your own.'[371] Loveridge observed that frustrations of northern settlers at the lack of land available for pasture had also 'finally came to a head' during the 1849 session of the Legislative Council in Auckland.[372] In response, Grey proposed a sub-committee be appointed to consider the merits of allowing northern Māori 'the right to lease their waste lands to Europeans, so that large tracts of country shall be opened up for depasturing cattle'.[373] The committee was made up of five members of the Legislative Council, including Sampson Kempthorne, William Hulme, and Land Claims Commissioner Henry Matson.[374]

The sub-committee received testimony about the starvation of cattle as a result of overstocked runs, which 'the stockholders allege to have been forced upon them by the difficulties which they have met in obtaining suitable runs for themselves from the Crown'. It recommended that the Government provide relief in the form of permission for 'the Stockholders of the Northern Province to depasture cattle on the Lands of the Natives, on such terms and conditions as may be agreed upon between the Native landowners and the European stockholders'. This step, the sub-committee considered, would also benefit other trading industries by 'opening up the country to Europeans' and bring Māori and Europeans into 'more intimate and friendly connexion [*sic*]'. The sub-committee stipulated that the Governor

368. Kingi Wiremu Tareha and others to Grey, 5 February 1851 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), pp 104–105).

369. 'Of Mr Interpreter Davis's visit to Hokianga', *Maori Messenger/Te Karere Maori*, 1 November 1855, p 6 (O'Malley, supporting papers (doc A6(a)), vol 19, p 6059); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 108.

370. O'Malley, 'Northland Crown Purchases' (doc A6), pp 108–110.

371. 'General Legislative Council', *New Zealander*, 25 August 1849, p 3; 'General Legislative Council', *Nelson Examiner and New Zealand Chronicle*, 24 November 1849, p 151; 'Thursday, August 23, 1849', *Daily Southern Cross*, 24 August 1849, p 4.

372. Loveridge, '"An Object of the First Importance"' (Wai 863 R01, doc A81), p 351.

373. 'General Legislative Council', *New Zealander*, 11 August 1849, p 3.

374. Loveridge, '"An Object of the First Importance"' (Wai 863 R01, doc A81), p 353.

could introduce a measure to provide legal recognition for leasing of Māori land 'under such restrictions as are required by the interests of both races.'[375]

In response, Grey reiterated his conviction that the interests of both Māori and Pākehā were best served by the Government purchasing large tracts of land from the former and opening them to 'the European stockholder in the ordinary manner'. The latter, he added, 'would find it infinitely more advantageous to themselves to hold their runs under a secure tenure from the Crown, than to be subjected to the caprice of the Natives'.[376]

Despite the Governor's refusal to provide regulations or other statutory instruments formalising leasing, there was clear evidence at the time that illegal leasing of Māori land was continuing in Te Raki. Loveridge notes that it had emerged in mid-1847 that Grey had 'long since embarked on what might be described as a covert experiment in Government-controlled "direct leasing"'.[377] In the year following the passage of the Native Land Purchase Ordinance 1846, Pākehā lodged 57 applications relating to the leasing of lands in the Auckland district; of these, 29 related to lands owned by Māori under customary title. One of the applications was for Māori land in Whāngārei and a number were for Crown lands in Hokianga.[378] In effect, the Government was issuing leases and licences over lands owned by Māori and for which it charged the lessors fees.

A large portion of these applications dealt with timber-cutting rights. As we have discussed in earlier chapters and our stage 1 report, Te Raki Māori had participated in a valuable trade in timber for decades prior to the 1846 ordinance (see chapter 3, section 3.4.2, and chapter 4, section 4.4.2.2.1).[379] The trader Joel Polack had recorded the manner in which Te Raki Māori entered into transactions with Europeans for their timber in 1838:

> Where timber is purchased by the Europeans, the proprietor of certain trees or forest land, arranges the price he has to receive in return for a single tree, or a number of trees; providing to deliver the same in the dock or timber-yard of the purchaser, who furnishes the use of blocks, tackles, &c. required to drag the ponderous loads from the forest to the water.[380]

The Crown made early attempts to control the trade in kauri spars with the 1841 kauri proclamation. As we discussed in chapter 4, these regulations were largely ignored in parts of the district where the Government was unable to enforce its

375. 'General Legislative Council', *New Zealander*, 28 August 1849, p 3.
376. 'General Legislative Council', *New Zealander*, 28 August 1849, p 2.
377. Loveridge, '"An Object of the First Importance"' (Wai 863 R01, doc A81), pp 344–345.
378. Loveridge, '"An Object of the First Importance"' (Wai 863 R01, doc A81), p 345.
379. See Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 155, 239.
380. Joel Samuel Polack, *Manners and Customs of the New Zealanders: With Notes Corroborative of their Habits, Usages, etc., and Remarks to Intending Emigrants, with Numerous Cuts Drawn on Wood* (London: James Madden, 1840), p 168 (cited in David Alexander, 'Land-Based Resources, Waterways and Environmental Impacts' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2006) (doc A7), pp 43–44).

authority, but appear to have contributed to an economic downturn in the Bay of Islands and Hokianga by 1844.[381] The arrangements for the leasing of Te Raki Māori timber lands to Europeans differed from the pastoral leases, prevalent in other parts of the colony, where lessees occupied large runs of land that they improved with imported grasses, fences, stockyards, and permanent housing.[382] In contrast, timber leases enabled Te Raki Māori to sell rights to a resource already standing on their land and that could be harvested over a relatively short period. Mills could be built for processing timber outside of timber lands along adjacent rivers, and the land would revert to Māori customary tenure after the terms of the agreement had expired.[383] Informal timber leases were therefore a straightforward and well-established form of land transaction in the district, and the evidence in our inquiry is clear that Te Raki Māori expected to receive payment for access to this resource. Indeed, Dr O'Malley gave evidence that trade in illegally leased timber continued to flourish within the Mahurangi–Omaha block into the 1850s.[384]

That Māori and settlers continued to negotiate leasing and licencing arrangements is not surprising. As we have discussed, Te Raki rangatira were anxious for economic engagement with settlers and retained authority over the enforcement of laws in the district. Certainly, many settlers across the country were unwilling to wait for the Government to first buy and then on-sell land to them, instead entering into deals for the leasing of Māori land, in contravention of colonial law.[385] Despite Grey's pragmatic response to the situation he inherited, he was clearly opposed to private leasing. However, as the Crown noted in its submission in our inquiry, we received no evidence that the prohibition against leasing was enforced in Northland.[386] It appears that for a time, the Crown was willing to turn a blind eye to, or in some cases even tacitly support, such arrangements, provided they did not interfere with its own purchase plans.[387] Nonetheless, Grey remained committed to purchasing and did not, during his first term as Governor, introduce regulations allowing Māori to lease their lands privately, thereby denying Te Raki Māori an important continuing source of private revenue which may have enabled them to retain their lands and control their management and ultimate disposal.

8.4.2.2 *The establishment of the Native Land Purchase Department*

The Native Land Purchase Department was established in 1854 as the central agency responsible for land purchasing at a time of increasing pressure on the

381. Bruce Stirling and Richard Towers, '"Not with the Sword but with the Pen": The Taking of the Northland Old Land Claims' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2007) (doc A9), pp 448–449, 1094; Nicholas Bayley, 'Aspects of Maori Economic Development and Capability in the Te Paparahi of Te Raki Inquiry Region (Wai 1040) from 1840 to c 2000' (commissioned research report, Wellington: Waitangi Tribunal, 2013) (doc E41), p 49.

382. See Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 75.

383. As we noted in chapter 3, by 1840 more than 20 sawmills had been established along the Hokianga rivers, and another two at Whangaroa: Tim Nolan, mapbook (doc B10(b)), pl 18.

384. O'Malley, 'Northland Crown Purchases' (doc A6), p 209.

385. J Rutherford, *Sir George Grey: A Study in Colonial Government* (London: Cassell, 1961), p 182.

386. Crown closing submissions (#3.3.404), pp 50–51.

387. Loveridge, '"An Object of the First Importance"' (Wai 863 R01, doc A81), pp 80, 345–348.

Government to acquire areas for settlement in the North Island. Land operations under Grey's governorship were greatly assisted by the £220,000 he secured as grants-in-aid from the imperial government.[388] It is worth noting that FitzRoy, by contrast, had struggled to implement Crown policy without this assistance. Prior to the establishment of the central agency responsible for land purchasing, Grey's first acquisitions were intended to strengthen government control over particular districts, settle outstanding issues from the New Zealand Company purchases, and provide for landless immigrants; they included the Wellington–Hutt–Porirua purchase and the acquisition of Whanganui, Taranaki, Wairau, and Waitohi. Notably, Northland was omitted from these early purchase operations. This perhaps reflected the uneasy balance that existed between rangatira and colonial authorities in the aftermath of the Northern War, despite official pronouncements to the contrary. According to O'Malley, many settlers preferred to live in other parts of the country 'where the rule of (British) law was a reality rather than legal fiction'.[389]

The next focus of Crown purchase activity was the South Island where, Dr O'Malley noted, Grey's policy 'brought about almost immediate results'.[390] However, further north there was scarcely any impact felt at first. While progress was initially much slower in the North Island, from 1851 to 1853 this trend began to change with the Crown's acquisition of extensive areas in Hawke's Bay and Wairarapa.[391] O'Malley observed that 'a further influx of settlers into the province as economic conditions began to improve placed heavy pressure on the Crown to acquire further lands'.[392]

In part, the new settlers were attracted by the reduced cost of land, as Grey attempted to put more Crown land on the market from March 1853. Before the power to regulate the sale of the 'waste lands' of the Crown passed to the General Assembly (under section 72 of the New Zealand Constitution Act 1852), Grey issued new regulations that halved the price of Crown lands from £1 to 10 shillings per acre, or five shillings in the case of inferior land.[393] The regulations also provided for Māori repurchase of land from the Crown under the same terms as settlers (we will discuss McLean's repurchase policy further).[394] The reduction in price, Grey declared, was intended, in part, to enable 'the frugal and industrious easily to acquire small freehold properties'.[395] The decision was especially wel-

388. Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), p 282.
389. O'Malley, 'Northland Crown Purchases' (doc A6), p 92.
390. O'Malley, 'Northland Crown Purchases' (doc A6), p 179; For instance, in June 1848 the Crown purchased 20,000,000 acres of land from Ngāi Tahu in a transaction negotiated by Henry Tacy Kemp known as the 'Kemp purchase'. The Port Cooper purchase of August 1849 also involved 59,000 acres for which the Crown paid £200, and the following month the Crown purchased a further 104,000 acres at Port Levy: Ward, 'National Overview', vol 3, p 266; for a discussion of Crown purchasing in the South Island during this period see Waitangi Tribunal, *The Ngai Tahu Report 1991*, Wai 27, vol 1, pp 51–131.
391. Rutherford, *Sir George Grey*, pp 181–184, 187.
392. O'Malley, 'Northland Crown Purchases' (doc A6), p 179.
393. O'Malley, 'Northland Crown Purchases' (doc A6), p 179.
394. O'Malley, 'Northland Crown Purchases' (doc A6), pp 182, 444.
395. 'Prospectus', *New Zealander*, 17 September 1853, p 4.

comed in Auckland, whose business and speculator community had long lobbied for access to cheap Māori land.[396] Accordingly, demand for land in the province rose appreciably, as improving economic conditions also contributed to an influx of new settlers to the colony.[397] Between April 1853 and April 1855, 324 purchases of lots from 80 to 200 acres occurred in Auckland, compared with only 130 purchases of over 200 acres of land.[398]

An increase in sales of Crown land was not enough, however, to silence criticism, as the arrival of more settlers increased pressure on the Government to purchase more land.[399] The Auckland press claimed that Grey had 'never made any purchase of native lands adequate to the growing necessities of the northern settlers', but rather had abruptly terminated FitzRoy's pre-emption waiver policy, enticed Māori to repudiate their land transactions, prohibited private purchase, prohibited leasing, and denied Māori – as farmers, millers, ship owners, and dealers – the opportunity to use their lands as collateral security.[400] O'Malley commented that with much of the South Island and southern districts of the North Island already purchased from Māori or under negotiation, the focus increasingly shifted to the northern half of the North Island.[401]

Grey departed New Zealand in late 1853 and was succeeded by Robert Henry Wynyard as Acting Governor. Prior to Grey's departure, Donald McLean, who was then recognised as the Crown's most successful purchasing agent, proposed the establishment of a land purchase department so that 'under a steady and well-regulated system of negotiation, the whole country could be acquired at a comparatively moderate outlay'.[402] O'Malley gave evidence that McLean's proposal emphasised the need to place Grey's purchasing system 'on a permanent footing prior to the governor's departure'.[403] The following April, McLean was put in charge of land purchase operations by the Colonial Secretary, who directed him to 'effect the purchase of land in sufficient quantities to meet the probable requirements of this Settlement [Auckland] for some years to come', and to focus on the acquisition of 'all the lands north of the Waikato'.[404]

In the weeks immediately after the first General Assembly was convened in Auckland in May 1854 (we discussed the establishment of the settler Parliament in chapter 7), McLean pressed for the establishment of the land purchase department. It appears his primary concern was to avoid further delay and cost in facilitating settlement in those districts where little land had been purchased, including Te Raki. The sense of urgency was the result of McLean's belief that '[t]he longer the

396. See, for example, Untitled, *Daily Southern Cross*, 21 February 1854, p 3.
397. O'Malley, 'Northland Crown Purchases' (doc A6), p 179.
398. Rutherford, *Sir George Grey*, p 202.
399. O'Malley, 'Northland Crown Purchases' (doc A6), p 179.
400. Untitled, *Daily Southern Cross*, 21 February 1854, p 3.
401. O'Malley, 'Northland Crown Purchases' (doc A6), pp 179–180.
402. McLean to Grey, 29 June 1853 (O'Malley, supporting papers (doc A6(a)), vol 24, p 8364).
403. O'Malley 'Northland Crown Purchases' (doc A6), p 180.
404. Sinclair to McLean, 26 April 1854, AJHR, 1861, C-11, p 105 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 181).

purchase of land is delayed, the more will be the expense and difficulty in acquiring it'.[405] He thought that no other subject had 'embarrassed the Government in its dealing with the Natives, or retarded the progress of the Colony so much, as the adjustment of the Native Land question'.[406] McLean also shared Grey's view that sufficient land should be purchased to meet future settlement needs. 'While the demand for land was comparatively limited', he wrote, 'it might have sufficed to purchase merely what was required for immediate settlement', but that 'a system of purchasing which provides only for the exigency of the moment is not sufficient to promote, on an extended scale, the great objects of colonization'.[407]

McLean envisaged the appointment of dedicated officers to selected districts as the most efficient means of negotiating purchases. They would be required to acquire a knowledge of iwi, to ascertain the extent and nature of their claims, and 'to give their undivided energy and attention to the purchase of land'.[408]

McLean insisted that the proposed department should not be 'a mere contingent appendage of the Government', but an established agency with an annual appropriation and a leader responsible and accountable for the allocation and control of expenditure.[409] The Surveyor-General relinquished responsibility for the purchase of land from Māori, and McLean was appointed as Chief Native Land Purchase Commissioner. Among the districts nominated was the new province of Auckland, which covered the northern half of the North Island.[410] With the exception of the Mahurangi and Omaha purchase, almost all the purchases in Te Raki were conducted by the Native Land Purchase Department.

8.4.2.3 *McLean's purchasing plan for Te Raki*

As McLean pressed for the establishment of a land purchasing agency, in June 1854 the newly established settler Parliament indicated its desire for the purchase of a total of 12,000,000 acres over a five-year period (we discuss the first meeting of the General Assembly in chapter 7, section 7.3.2.1.3). That desire arose, in large part, from the growing inflow of immigrants (as noted earlier), especially

405. McLean, 'Memorandum relative to Organization of the Native Land Purchase Department', 15 June 1854 (O'Malley, supporting papers (doc A6(a)), vol 5, p 1748).

406. McLean, 'Memorandum', 15 June 1854 (O'Malley, supporting papers (doc A6(a)), vol 5, p 1749).

407. McLean, 'Memorandum', 15 June 1854 (O'Malley, supporting papers (doc A6(a)), vol 5, pp 1743–1744).

408. McLean, 'Memorandum', 15 June 1854 (O'Malley, supporting papers (doc A6(a)), vol 5, p 1747).

409. Ray Fargher, *The Best Man Who Ever Served the Crown?: A Life of Donald McLean* (Wellington: Victoria University Press, 2007), p 130.

410. McLean, 'Memorandum', 15 June 1854 (O'Malley, supporting papers (doc A6(a)), vol 5, p 1747); Grey defined the province's boundaries by proclamation on 28 February 1853. Auckland province contained all land north of this boundary line: 'By the River Mokau to its source, thence by a right line running from the source of the Mokau, to the point where the Ngahuinga or Tuhua the principal tributary of the Wanganui River is interesected by the thirty-ninth parallel of South Latitude, thence Eastward by the thirty-ninth parallel of South Latitude, to the point where that parallel of Latitude cuts the East Coast of the Northern Island of New Zealand': Grey, 'Proclamation', 28 February 1853 (cited in New Zealand Government, *The New Zealand Constituion Act: Together with Correspondence between the Secretary of State for the Colonies and the Governor-in-Chief of New Zealand in Explanation Thereof* (Wellington: The Honorable Robert Stokes, 1853), p 91).

into Auckland province, and the Government's conviction that 'The native lands are daily acquiring more value in native estimation, and [thus] there ought to be a proper and energetic arrangement made to effect the purchase.'[411] Pressed by the general Government and Auckland's newly formed provincial government (following the passing of the Constitution Act 1852), McLean was to prepare plans to purchase, 'under a judicious system' and over that five-year period, no fewer than 7,000,000 of the province's 14,000,000 acres (of which just 800,000 acres at that stage had been already acquired from Māori). Those 7,000,000 acres lay to the north of Auckland 'together with those [to the south] on the Waikato and Waiapa [*sic*], and the Manukau'. The cost was estimated at £500,000.[412]

By mid-1854, therefore, the major elements of the Crown's land purchasing apparatus were in place. A dedicated agency of the State had been established and staff assigned, McLean had been appointed to head the Native Land Purchase Department, and a decision had been taken to direct purchasing efforts north of the Waikato. There were two major concerns: namely, the speed with which land could be secured, and the cost. Purchase through the acquisition of large tracts would hasten the rate at which customary lands passed into Crown ownership, minimising both the number of separate and protracted negotiations and, as a result, the transactional costs involved. As noted earlier in this chapter, in 1854, John Grant Johnson was assigned as Native Land Purchase Commissioner for the Mahurangi and Whāngārei districts, and Henry Tacy Kemp was despatched to commence negotiations at the Bay of Islands and Whangaroa in 1855.[413] John Rogan, who was appointed as land purchase commissioner for the Kaipara district in 1857, would also operate in Te Raki during this period.[414]

The cost of the purchasing programme was expected to be funded initially through borrowing, and would be met in significant part by the prompt selection of 'the best sites at the mouths of rivers and harbours for towns and villages' so that 'an artificial value might be given to particular spots, which would render the land revenue raised by the resale enormously large'.[415] Extinguishing customary title over large areas was also considered to offer the Government a means of establishing its authority over Māori communities, especially those residing in the densely inhabited portions of the northern half of the North Island. McLean wrote in 1854 that 'in the acquisition of every block of land, the Natives residing thereon, become virtually incorporated with the European Settlers, become amenable to English Law, and imperceptibly recognise the control of the Government in their various transactions'.[416]

Another priority was to establish Crown control over ongoing illegal leasing. In the Wairarapa district, where a substantial illegal leasehold economy had been

411. 'House of Representatives', *Daily Southern Cross*, 16 June 1854, p 4.
412. 'House of Representatives', *Daily Southern Cross*, 16 June 1854, p 4; 'General Assembly of New Zealand', *New Zealand Spectator and Cook's Strait Guardian*, 29 July 1854, p 3.
413. O'Malley, 'Northland Crown Purchases' (doc A6), pp 13, 288, 334.
414. Waitangi Tribunal, *The Kaipara Report*, Wai 674, p 54.
415. 'House of Representatives', *New Zealander*, 17 June 1854, p 3.
416. McLean, 'Memorandum', 15 June 1854 (O'Malley, supporting papers (doc A6(a)), vol 5, p 1748).

established, the Tribunal observed that 'McLean's arrival on the scene brought new resolve to use the Land Purchase Ordinance to deter squatting'.[417] In Te Raki, the Government was concerned that the illegal trade in timber leases in the Mahurangi–Omaha block in particular would create a disincentive for Māori to agree to sell their lands to the Crown.[418] In 1853, Native Secretary Nugent reported that Mahurangi Māori who had been excluded from the original 1841 transaction were 'more obstinate on account of their receiving payments from Europeans for permission to cut firewood and timber on the disputed land, which there would be no means of stopping unless the Native Land Purchase Ordinance were put in force'.[419] In 1854, as Johnson continued his efforts to extinguish outstanding claims in the Mahurangi and Omaha block, McLean instructed him that the 'leasing of timber from the Natives . . . must be gradually checked, so that the existence of such an irregular system, that has grown up in consequence of land-purchasing being so much in arrear[s], may not impede your operations'.[420]

8.4.2.4 *McLean's repurchase policy*

Like the reserve policy set out by Governor Grey in 1848, McLean's repurchase scheme sought to eliminate the need for reserves in their previous form as lands that were simply excluded from purchase blocks and remained under customary title.[421] As noted, Grey's 1853 regulations enabled Māori to repurchase land from the Crown under the same terms as settlers.[422] Thus, repurchased lands were not reserves as such, but individual Crown grants that carried no restrictions on alienation. However, Crown officials discussed them as a form of reserve, or an alternative to previous forms of native reserve, and they are therefore relevant to our consideration of the Crown's policy on reserves during this period.

McLean was clear that repurchased sections would be 'within' purchase blocks, and in this way, the Crown could acquire large areas of land, or whole districts, and customary title would be completely extinguished.[423] The lands required by Māori for their cultivations and settlements could be repurchased by them using the original sale moneys, ensuring that a large portion of the Crown's expenditure was diverted back into the colonial economy. McLean expected that the repurchase scheme would be a means of speeding up the purchase of 'waste lands'. When advocating for the establishment of the Native Land Purchase Department in 1854, he had argued that the ability to repurchase lands would help overcome the challenges of purchasing land from Māori, created by what he patronisingly described as 'the complicated nature of their claims, their jealousies of each other', and 'their

417. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 64.
418. O'Malley, 'Northland Crown Purchases' (doc A6), p 211.
419. Nugent to Colonial Secretary, 24 February 1853 (Turton, *Epitome*, C, p 140); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 205.
420. McLean to Johnson, 20 June 1854 (Turton, *Epitome*, C, pp 141–142).
421. Grey to Grey, 15 May 1848, BPP, vol 6, p 25; O'Malley, 'Northland Crown Purchases' (doc A6), p 444.
422. O'Malley, 'Northland Crown Purchases' (doc A6), pp 182, 444.
423. McLean, 'Memorandum', 15 June 1854 (O'Malley, supporting papers (doc A6(a)), vol 5, p 1751).

superstitious objections to the alienation of the lands of their ancestors.'[424] As we have discussed, McLean also gave a lengthy response to the report of the 1856 Board of Inquiry on Native Matters that proclaimed the benefits of this repurchase mechanism as a means of reinforcing the British notion of permanent alienation.

The policy also reflected wider assimilationist goals. In his evidence, Dr O'Malley explained that a widely held belief among Crown officials during this period, including by McLean, was that Māori could only be saved from extinction through the adoption of British customs and values. They viewed Māori community rights in land as a fundamental obstacle to their survival, and 'it followed that the extinction of native title was deemed a vital part of the "civilising" process.'[425] Held under Crown grants, repurchased blocks would replace Māori collective ownership with a form of individualised title. McLean hoped that this fundamental shift in the organisation of Māori communities would break up what he termed 'tribal confederacies'.[426] Repurchase, McLean explained, would mean:

> their present system of communism may be gradually dissolved; and that they may be led to appreciate the great advantage of holding their land under a tenure more defined and more secure for themselves and their posterity than they can possibly enjoy under their present intricate and complicated mode of holding property.[427]

McLean clearly had great hopes for this policy initiative as a means of assimilating Māori communities into the structures of the settler State and the colonial land system. The new 'repurchase' component of Crown policy was applied in Taranaki when, in 1853 to 1854, the Crown acquired the Hua block, estimated at 12,000 acres, for £3,000. McLean justified the price on the grounds that Māori had agreed, 'instead of having extensive reserves, which would monopolize the best of the land', to repurchase 2,000 acres at 10 shillings per acre. Such purchase, he claimed, gave Māori a security of tenure that they had not previously enjoyed and would allow them to participate as voters in the colony's political life. Moreover, he added, 'it dispenses with the necessity that existed under their former precarious tenure and customs of living in confederate bands in large pas, ready at a moment's notice to collect and arm themselves either for defence or depredation'.

Such a system would ultimately lead

424. McLean, 'Memorandum', 15 June 1854 (O'Malley, supporting papers (doc A6(a)), vol 5, pp 1745–1746).

425. O'Malley further explains that a widely held belief was 'that Māori were a dying race, doomed to inevitable extinction', which was also shared by Crown officials during this period. However, the belief 'that Māori could be saved from extinction through their rapid adoption of European customs and habits appears to have held more sway with officials such as McLean': O'Malley, 'Northland Crown Purchases' (doc A6), p 444.

426. McLean to Private Secretary, 4 June 1856 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), pp 447–448).

427. Chief Land Commissioner, 'Instructions to District Land Purchase Commissioner relative to purchase of land from the Natives of Taranaki', 26 August 1857, AJHR, 1861, C-1, p 212.

> without much difficulty to the purchase of the whole of the Native lands in this Province [Taranaki], and to the adoption by the Natives of exchanging their extensive tracts of country at present lying waste and unproductive, for a moderate consideration, which will be chiefly expended by them in repurchasing land from the Crown.[428]

In this instance, the Māori owners were granted first choice over the purchase of surveyed allotments in the Hua block.[429] In *The Taranaki Report*, the Tribunal noted that 'hostilities broke out over who might receive sections'.[430] It found that 'uncertainty of ownership arose not from the Maori dispute but from the Government's practice of treating with sellers without allowing for a prior agreement on ownership and boundaries'.[431] It also appears that New Plymouth settlers became disenchanted by the fact that Māori were able to repurchase the best sections of the block first, and a pre-emptive right of repurchase was not again offered to Māori following the acquisition of Hua.[432] The Taranaki Tribunal concluded that repurchase gave the Government the greater advantage 'because non-sellers had to join in or miss out on the section allocations'.[433]

In June 1855, almost one year after his experiment in the Hua block, McLean drew the attention of Māori in the *Maori Messenger/Te Karere Maori* to clause 7 of the newly published land regulations adopted by the Auckland Provincial Council, which provided that they could 'purchase at the rate of ten shillings an acre any portion of such land, and the same may be conveyed by Crown Grant accordingly'.[434] Clause 7 did not offer vendors a pre-emptive right of purchase but an opportunity to purchase part of the land subject to the Crown's consent.[435] There is no evidence that Māori were advised of their liability for rates, taxation, and fencing costs that accompanied the purchase of land, or how the selection and survey of individual sections would be done. In his message to Māori, McLean did not attempt to disguise the assimilationist aims of his policy, stating: 'It is much more desirable that those Natives who desire to live peacably in accordance with English customs, should acquire land from the Government for themselves; that an end may be put to the continued troubles arising out of the lands held in accordance with Native tenure.'[436]

The Colonial Secretary described the repurchase arrangements as 'extremely satisfactory', and Acting Governor Wynyard was reportedly delighted. McLean was advised that Wynyard 'considers the new feature introduced by you in the

428. McLean to Colonial Secretary, 7 March 1854, AJHR, 1861, C-1, p198.
429. Rogan to McLean, 14 June 1855, AJHR, 1861, C-1, pp206–207.
430. Waitangi Tribunal, *The Taranaki Report*, Wai 143, p50.
431. Waitangi Tribunal, *The Taranaki Report*, Wai 143, p50.
432. Ann Parsonson, 'The Purchase of Maori Land in Taranaki, 1839–1859' (commissioned research report, Wellington: Waitangi Tribunal, 1990) (Wai 143 ROI, doc A1), p62.
433. Waitangi Tribunal, *The Taranaki Report*, Wai 143, p50.
434. 'Friends the Natives', *Maori Messenger/Te Karere Maori*, 1 June 1855, p4.
435. 'Friends the Natives', *Maori Messenger/Te Karere Maori*, 1 June 1855, p4.
436. 'Friends the Natives', *Maori Messenger/Te Karere Maori*, 1 June 1855, p4.

negotiations of Native land, to be one of great importance, and, with proper precautions, likely to lead to results highly conducive to the interests of both races'.[437] The Government expected that through repurchase, net costs would also be appreciably reduced as Māori would spend a 'very considerable' part of the purchase moneys on the repurchase of land from the Crown, for which they would receive individual Crown grants; they might then sell their titled sections to settlers. 'This money', it was anticipated, 'would therefore immediately return again into the treasury chest'. Reserves would be limited to areas around kāinga and māra. Moreover, by rendering land a tradeable commodity, repurchase would speed up the process by which Māori land would pass into settler ownership. Overall, the Crown expected that prompt and careful selection of key sites, the purchase of large tracts ahead of demand, and repurchase of land by Māori would result in the speedy recovery of government expenditure.[438] We look in vain in the discussion of this scheme for any government concern for Maori economic development or well-being.

8.4.2.5 *Crown purchasing tactics*

The instructions McLean issued to district land purchase commissioners are an important measure of the extent to which the Crown intended to uphold its obligations to Māori in implementing its purchase policy. In Te Raki, the instructions to land purchase commissioners were relatively limited at first.

In deploying Johnson to Whāngārei and Mahurangi in May 1854, McLean emphasised the urgency of acquiring land due to '[t]he increasing demand for land by the European inhabitants of this Province'. It would be important to encourage 'the Natives to act with greater fidelity in their land transactions than they have been recently in the habit of doing'. He was confident that Johnson would be able to effect this goal by conducting public negotiations, systematically arranging Māori claims, and clearly defining the lands purchased and any reserves. The boundaries were to be 'read aloud three times in the presence of the Natives, whose assent should be unanimously given before appending their signatures to the transfer'. McLean also supplied Johnson with two model purchase deeds. Johnson was to make payments in instalments and to advise Māori 'of the advantages of re-purchasing properties for themselves out of the Crown Lands'.[439]

When Kemp was deployed to the Bay of Islands and Whangaroa in 1855, McLean offered no additional instructions but simply directed him to 'make arrangements for the purchase of land from the Native Tribes in that district', stating that he would trust in his 'prudence and discretion in making such arrangements'.[440]

437. Sinclair to Cooper, 24 March 1854, AJHR, 1861, C-1, p 199; and Sinclair to McLean, 24 March 1854, AJHR, 1861, C-1, p 199.

438. 'General Assembly of New Zealand', *New Zealand Spectator and Cook's Strait Guardian*, 29 July 1854, p 3.

439. McLean to Johnson, 18 May 1854, AJHR, 1861, C-1, pp 52–53.

440. McLean to Kemp, 1 June 1855, AJHR, 1861, C-1, p 2.

Professor Ward observed that these instructions 'continued to emphasise Grey's policy of buying all the land in large districts, save for reserves'.[441]

Despite the lack of detail in these initial instructions, further parameters of the Crown's purchasing activities were to be fleshed out over time. As McLean observed to the Private Secretary in 1856, '[t]he duties of these officers have been defined by instructions issued to them from time to time for their guidance'.[442] For instance, that same year Governor Gore Browne instructed the land district commissioners 'to connect and consolidate Crown lands' so that the European population 'should not be more than necessarily isolated'. Indeed, district commissioners were instructed that, except with the consent of the Governor, they were 'not to commence negotiations for the purchase of land unless adjacent to and connected with Crown lands'.[443] In 1856, McLean also advised Kemp that small blocks 'entail[ed] great expense in the purchase and survey, which might be obviated by treating in a more general manner for a considerable extent of country'. The purchase of small blocks was to be avoided unless such transactions constituted part of a plan to acquire larger tracts.[444] Most importantly, district commissioners were directed, within their districts, 'to acquire from the Natives the whole of their lands . . . which are not essential for their own welfare, and that are more immediately required for the purposes of colonization'.[445]

From 1856, McLean would also require pre-purchase surveys.[446] As we discuss further in section 8.5.2.1.4, the Surveyor-General, Charles Ligar, previously considered it sufficient for the land purchase commissioner to walk the boundaries of the block and furnish a sketch plan to accompany the purchase deed.[447] However, when McLean secured the necessary surveyors to support the land purchase department in 1856, he directed Kemp and Johnson that '[t]he boundaries of each block must be carefully perambulated, as well as the reserves for the Natives, and a plan made of the same to be attached to the Deed of Sale before any payment is made to the Natives'.[448] On no account were purchase blocks to be surveyed until unanimous agreement to sale had been reached. Surveying, he recorded, was considered by Māori 'an exercise of the right of ownership' and would only excite animosity towards his officers and prejudice their land operations.[449]

441. Ward, *National Overview*, vol 2, p 145.

442. McLean to Governor's Private Secretary, 4 June 1856, BPP, vol 10, p 580.

443. Gore Browne, minute, 4 June 1857 (Turton, *Epitome*, c, p 166); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 485.

444. McLean to Kemp, 3 October 1856, AJHR, 1861, C-1, pp 12–13 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 485).

445. McLean to Johnson, 18 May 1854, AJHR, 1861, C-1, p 52.

446. O'Malley, 'Northland Crown Purchases' (doc A6), p 451.

447. Ligar, memorandum, September 1855 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 454).

448. McLean to Kemp, 8 September 1856, AJHR, 1861, C-1, p 11; McLean to Johnson, 9 September 1856, AJHR, 1861 C-1, p 73 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 456).

449. McLean to Private Secretary, 4 June 1856, BPP, vol 11, p 545 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 456).

In his 1857 communications with district commissioners, McLean began to emphasise the importance of ensuring that vendors retained 'ample' and carefully defined reserves, chosen by the 'wishes of the vendors' and at the discretion of his purchasing agents.[450] Previously, he had also advised Johnson that where possible, reserves were to be 'situated within natural boundaries, such as rivers, creeks, hills, ranges, or other conspicuous features of the country'.[451] But as we have noted, McLean was clear throughout this period that his preference was for his district land purchase commissioners to advise Māori about the advantages of repurchasing allotments under Crown grants.[452] In May 1854, McLean communicated this to Johnson, and in July 1855, he indicated to Kaipara land purchase commissioner Rogan that every encouragement should be given to Māori to create ample reserves for themselves through the repurchase of individual allotments 'in accordance with the pre-emptive right guaranteed to them by the Auckland Provincial Land Regulations': '[a]mple reserves should be made for the Natives'.[453] In 1857, with reference to land purchasing in Taranaki, McLean directed the district land purchase commissioner that if it were necessary to set aside land as reserves,

> I should prefer that you should follow the system adopted in the Hua purchase; that, namely, of allowing the Natives (subject to certain limitations) a pre-emptive right over such portions as they may desire to re-purchase; such land to be thenceforward held by them under individual Crown Grants – instead of having large reserves held in common.[454]

Importantly, customary ownership was to be determined in advance of purchase and an effort made to establish the nature of the rights and interests asserted. In October 1854, McLean directed Johnson to supply – for both 'the present use of the Government . . . [and] for the future well-being of the Natives' – details of:

1st: The original and derivative rights of conquest.
2nd: The rights of occupancy by permission of owners.
3rd: How these rights originated.

4th: The divisions or boundaries between the different tribes inhabiting the country between the North Cape and the district of Auckland.[455]

In 1857, land purchase commissioners were warned to be wary of those who were most eager to sell and of those who engaged in any 'noisy or boasting

450. McLean to Rogan, 31 January 1857 (Turton, *Epitome*, C, p 101).
451. McLean to Johnson, 18 May 1854, AJHR, 1861, C-1, p 52.
452. McLean to Johnson, 18 May 1854, AJHR, 1861, C-1, p 52.
453. McLean to Johnson, 18 May 1854 (Turton, *Epitome*, C, p 94); McLean to Rogan, 13 July 1855, AJHR, 1861, C-1, p 154.
454. Chief Land Commissioner, 'Instructions to District Land Purchase Commissioner relative to purchase of land from the Natives of Taranaki', 26 August 1857, AJHR, 1861, C-1, p 212.
455. McLean to Johnson, 17 October 1854, AJHR, 1861, C-1, pp 60–61.

demonstration' of ownership.[456] McLean directed his agents to study the history and genealogy of the iwi involved, and to investigate carefully all rival claims. 'To acquire a knowledge of the state of Native Title', observed McLean, 'is a preliminary of such urgent importance', adding that 'great care should be taken not to give too much prominence to that class of claimants who are frequently the first to offer their lands for sale, from the fact of their title being in many instances very defective'.[457] Johnson, in fact, had already attempted to distinguish between claims based on ancestral connections and those acquired through more recent warfare.[458] The lists of rangatira, hapū, and places of residence of Northland Māori supplied to Governor Grey on his arrival in New Zealand for his second term in 1861 indicated that the Crown had accumulated considerable information.[459] One reason McLean placed such importance on defining ownership was to ensure that later sales of the land by the Crown to settlers would not be challenged by owners excluded from purchase payments.

District land purchase commissioners operating in Te Raki were also advised to establish the area of land that Māori had already alienated, not with a view to ensuring that they retained 'sufficient' land but to make certain that lands were not being purchased twice over. This was a response to the significant uncertainty that surrounded the pre-treaty transactions and indeed, some Crown purchases.[460] The absence or inadequacy of surveys had led to general doubt around the precise delineation of blocks in this area and the extent of remaining Māori land, with many instances of single claims leading to multiple grants, single grants covering multiple claims, and areas of overlap between claims.[461] It was such situations that McLean sought to avoid and that the Bell commission was intended to resolve.

8.4.3 Conclusions and treaty findings

The reimposition of Crown pre-emption under Governor George Grey signalled the Crown's clear priority of regaining control of the colonial land market. The numbers of immigrants from the United Kingdom and the Australian colonies were growing, as settlers found ways of transforming the colony's natural resources into sources of output. As the demand for land rose accordingly, the Crown's commitment to protection originally enunciated by Normanby came under pressure. That pressure would further expose the different understandings of the treaty, the basis upon which Māori and the Crown entered into land transactions, and the expectations that each entertained of the outcomes. Following Grey's departure, McLean took steps to establish the organisational infrastructure that would place the Crown's land purchasing policies 'on a more regular and comprehensive

456. McLean to Parris, 26 August 1857, AJHR, 1861, C-1, p 212.
457. McLean to Parris, 26 August 1857, AJHR, 1861, C-1, p 212; see also McLean to Private Secretary, 4 June 1856, BPP, vol 10, pp 580–582.
458. See, for example, Johnson to Colonial Secretary, 20 March 1854, AJHR, 1861, C-1, pp 47–48.
459. 'Reports on the State of the Natives in various Districts', AJHR, 1862, E-7, pp 16–22.
460. McLean to Kemp, 24 October 1856, AJHR, 1861, C-1, pp 13–14.
461. O'Malley, 'Northland Crown Purchases' (doc A6), pp 451–453.

footing'.[462] McLean was familiar with the complex nature of Māori land rights and was critical of what he viewed as 'superstitious objections' to alienations.[463] He envisaged that these obstacles could be overcome by the land purchase commissioners of his department, who would work efficiently to facilitate purchase agreements. In this way, the Crown entrusted its responsibilities to recognise and protect Māori interests and land rights to purchasing officers with clear directions to proceed with urgency in, as McLean put it, 'opening up the country for steady and progressive colonization' (we discuss the Crown's delegation of its obligations to protect Māori interests further in section 8.5.2.1.2).[464]

Te Raki Māori remained interested in re-engaging with the Crown following the Northern War and sought further British settlement in the north. From 1847, Crown officials were aware of Te Raki Māori wishes for the establishment of townships, as concentrated settlements that offered trading opportunities for hapū and iwi. McLean himself acknowledged to the Colonial Secretary that '[t]he Natives regard the transfer of their land as an act of great national importance'.[465] Officials were also conscious that even after penalties for illegal leasing of Māori land or felling its timber were introduced by the 1846 ordinance, the practice continued in Te Raki where Māori remained interested in participating in the colonial timber trade. In a small number of cases, Grey did provide tacit support for direct leasing of Māori land in the form of Government-issued licences and leases. However, Dr Loveridge considered that this experiment appears to have been shortlived, and likely ended in 1847 as Grey prepared to begin his purchasing efforts in the lower North Island and South Island.[466] From 1849, rangatira, including Te Raki rangatira, expressed their opposition to Grey's refusal to provide statutory recognition for leasing of Māori land resources, and similar advice was reiterated by the Legislative Council.[467]

In our inquiry, the Crown submitted that it was not aware of 'any example where the Crown did enforce the 1846 ordinance in Northland'.[468] Despite the lack of evidence on this point, we consider that the Crown's unilateral decision to withhold recognition for informal leases, which it understood to be the preference of many Māori including those based in Te Raki, remains significant. In *The Wairarapa ki Tararua Report*, the Tribunal found that the Crown had an obligation to support Māori leasing their lands if it 'was more likely to enable Māori to continue to exercise te tino rangatiratanga, and it was an option that they preferred to outright

462. O'Malley, 'Northland Crown Purchases' (doc A6), p 181.

463. McLean, 'Memorandum', 15 June 1854 (O'Malley, supporting papers (doc A6(a)), vol 5, p 1746); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 182.

464. McLean, 'Memorandum', 15 June 1854 (O'Malley, supporting papers (doc A6(a)), vol 5, pp 1749–1750); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 183.

465. McLean to Colonial Secretary, 30 August 1855 (Turton, *Epitome*, A1, p 53); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 184.

466. Loveridge, '"An Object of the First Importance"' (Wai 863 RO1, doc A81), pp 345–348.

467. 'General Legislative Council', *New Zealander*, 25 August 1849, p 3; 'General Legislative Council', *Nelson Examiner and New Zealand Chronicle*, 24 November 1849, p 150; 'Thursday, August 23, 1849', *Daily Southern Cross*, 24 August 1849, p 4.

468. Crown closing submissions (#3.3.404), p 51.

purchase'.[469] We agree with this assessment. Dr O'Malley considered that while the 1846 ordinance may not have resulted in any prosecutions, it likely deterred settlers from entering into similar arrangements.[470] Claimant counsel agreed with Dr O'Malley that that 'chilling effect' (unless settlers had a license from the Crown) 'would be imposible to quantify'.[471] What is clear is that, as the Tribunal concluded in *The Wairarapa ki Tararua Report*, contrary to Grey's claims, the 1846 ordinance had little protective effect for Māori: '[i]t was intended primarily to benefit Europeans'.[472] The Crown viewed leasing as an obstacle to its purchasing ambitions and in refusing to recognise lease arrangements, it was motivated by its desire to acquire large areas of land as efficiently and cheaply as possible.

In addition to securing land for settlement, the Crown had political motives for extinguishing Native title over large tracts of lands, and entire districts where possible. In promoting the establishment of the Native Land Purchase Department, McLean made a clear link between his purchasing plans and the colonial Government's wider ambition to expand the authority and reach of the Crown, especially in the densely inhabited portions of the northern half of the North Island.[473] Grey's successor, Governor Gore Browne, also emphasised the importance of enhancing internal security by 'connect[ing] and consolidat[ing]' Crown lands and linking Pākehā settlements.[474] By such purchases, the Crown, through the establishment of a range of Crown agencies, would be able to exercise its policing powers and eliminate any obstacles that Māori might pose to surveys, the construction of public works, and the advance of settlement.[475] As Henry Sewell (the colony's first Premier) asserted in 1857, 'to govern a people who retain to themselves the paramount seigniory of the soil is simply impossible. Theoretically there is a plain and inseparable connection between territorial and political Sovereignty.'[476]

Crown officials had assimilationist ambitions for the implementation of the purchasing policy in Te Raki. By removing large areas from customary tenure, purchases would discourage shifting cultivations and seasonal food-gathering migrations, and limit Māori to small, rural settlements where, it was assumed, they would predominantly engage in subsistence farming. Acting Native Secretary Francis Dart Fenton deemed '[f]ixity of residence' essential for the purposes of security, policing, and administrative control. Civilisation was equated by many officials with concentration and permanency of residency (a view we first discussed in chapter 4).[477] McLean's repurchase policy was a centrepiece of this assimilation-

469. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 66.
470. O'Malley, Response to Tribunal Statement of Issues, 2015 (doc A6(c)), p 20.
471. Claimant submissions in reply (#3.3.423), p 28; O'Malley, Response to Tribunal Statement of Issues' (doc A6(c)), p 20.
472. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 79.
473. McLean, 'Memorandum', 15 June 1854 (O'Malley, supporting papers (doc A6(a)), vol 5, p 1748).
474. See, for example, Browne, minute, 4 June 1857 (Turton, *Epitome*, C, p 166).
475. See, for example, James Richmond, memorandum, 29 September 1858, AJHR, 1860, F-3, app A, pp 129–130.
476. Sewell to Secretary of State, 8 May 1857, AJHR, 1858, B-5, p 13.
477. Francis Fenton, minute, 13 October 1856, AJHR, 1860, F-3, app B, p 136.

ist vision. It was founded firmly on McLean's belief that offering individualised titles to Māori would not only facilitate the efficient transfer of land but also begin to transition hapū and iwi away from their communal landholdings towards a form of tenure based in British law. In addition to speeding up the purchasing process, an underlying goal of this policy was to transform the customary structures of tribal society, which McLean viewed as an obstacle both to Māori civilisation and to colonisation. As O'Malley observed, McLean's repurchase policy

> envisaged a landed gentry of Māori chiefs holding their estates under individual Crown grants from the Crown, but requiring significantly less land to live upon as the non-chiefly classes reverted to their correct role in society as 'hewers of wood and drawers of water' for their superiors, in much the same way that the Pākehā labouring classes were expected to do.[478]

In our view, the vision Crown officials had for the settlement of the district, which they laid out in their plans to purchase great tracts of land and replace customary tenure with Crown grants for defined sections, bore little-to-no resemblance to the future hopes and aspirations of Te Raki hapū and iwi. It seemed, indeed, that little land was to be left for Māori; on various occasions, McLean emphasised the importance of acquiring all Māori lands 'which are not essential for their own welfare'.[479] Māori were to pay a high cost for the land fund model, including not only the loss of their land at low prices but also the denial of their ability to secure a regular income from their lease. As McLean wrote in July 1854, 'leasing lands from the Natives was threatening to entail a most serious evil on the prospects of the Colony, as they would not of course alienate any of their lands to the Crown if such a system was permitted to exist'.[480]

The Crown's policy of shoring up and developing the colony through large purchases at low cost could only have benefited Te Raki Māori if they had been meaningfully involved in decisions about how lands were to be alienated and settlement advanced. However, this never occurred; nor did we receive evidence that the Crown sought Te Raki Māori support for its plans in the years after the Northern War and prior to the establishment of the Native Land Purchase Department in 1854. As the Muriwhenua Land Tribunal concluded, 'Maori never consented to the substitution of an alternative tenure system or the diminution of the laws of their ancestors'.[481] Instead of a negotiated solution that recognised the shared interest that Te Raki Māori and the Crown had in the settlement of the district, the purchasing programme that McLean sought to implement was intended to bring rangatira and their lands under Crown authority. The Crown's policies were designed to satisfy the demands of the growing settler population, and inasmuch

478. O'Malley, 'Northland Crown Purchases' (doc A6), p 445.
479. McLean to Johnson, 18 May 1854, AJHR, 1861, C-1, p 52.
480. McLean to Colonial Secretary, 6 February 1854, AJHR, 1861, C-1, p 264.
481. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 206.

as they sought to benefit Māori, they denigrated their customs and tikanga as obstacles to be overcome.

Accordingly, we find that:

- By limiting the ability of Māori to exercise all the rights of ownership through failing to provide legal recognition for existing lease arrangements in an attempt to induce Māori to part with their land, the Crown breached te mātāpono o te tino rangatiratanga and te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development.
- By not adequately considering Te Raki Māori views and interests and by implementing a land purchase policy after 1848 that favoured the interests of settlers and sought to bring Te Raki Māori communities under the control of British institutions and laws through assimilationist policies, the Crown breached te mātāpono o te houruatanga/the principle of partnership, te mātāpono o te tino rangatiratanga, and te mātāpono o te mana taurite/the principle of equity.

8.5 Were the Crown's on-the-Ground Purchasing Practices Consistent with its Treaty Obligations?

8.5.1 Introduction

Claimants raised a range of issues relating to Crown purchasing practices in the inquiry district. They noted the sheer extent of the purchasing programme that took place: some 482,115 acres of land in Te Raki prior to 1865, with old land claims and pre-emptive waiver purchases accounting for a further 274,601.88 acres.[482] A number of key issues emerged from the claims concerning Crown purchases during this period:

- the overall integrity of the purchasing process, including an alleged failure of the Crown to identify, engage with, and secure agreement of all owners in the blocks that it sought to acquire;
- valuations and the inadequacy of price paid;
- the failure of promised collateral benefits to materialise;
- the insufficiency of the lands retained by Māori; and
- the inadequacy of reserves.[483]

Claimants made further specific allegations about the Crown's failure to uphold its own purchasing standards across a range of taiwhenua. For example, claimants from the hapū of Te Uri o Hua and Ngāti Torehina stated that the Crown's failure to properly identify and consult with all owners prior to completing the purchase of the Okaihau blocks resulted in 'tribal land being taken from Te Uri ō Hua without giving the rangatira or any member of the hapū the opportunity to make

482. Crown closing submissions (#3.3.404), pp 5–6; Rigby, corrections requested by Crown counsel (doc A48(e)), p 7; the old land claim and pre-emption waiver figures are the Tribunal's own calculation, see chapter 6 table 6.1.

483. Claimant closing submissions (#3.3.208), pp 20, 54–58, 60–62, 62–63, 66.

a meaningful choice about whether they wished to sell or retain their lands.'[484] Claimants from Te Hokingamai e te iwi o Mahurangi, Ngā Wahapū o Mahurangi, and the Te Tāōū hapū of Makawe alleged that inadequate or non-existent surveys made it even more difficult for customary owners to protect their interests, since it was not always clear, even to Crown officials, which lands were affected by a transaction.[485]

Claimants made specific submissions criticising the Crown's extensive purchasing activities in the Whāngārei and Mangakāhia taiwhenua that created and exacerbated intertribal conflict, resulting in the transfer of over 250,000 acres out of Māori hands.[486] For example, claimants for Te Uriroroi, Te Parawhau, and Te Māhurehure ki Whatitiri hapū discussed the sale of the Maungatapere block and its uncertain transaction details due to the existence of two purchase deeds for it (discussed later).[487] Claimants from Te Parawhau and Ngāti Hau hapū described the extent of Crown purchasing in the Whāngārei taiwhenua (27,011 acres) in the two decades following the signing of te Tiriti, stating that much of this was Te Parawhau land.[488] Ngā Uri o Mangakāhia claimants argued that the Crown targeted rangatira who were willing to transact land but failed to ascertain 'who actually held interests to ensure the validity of the transaction'.[489] The claimants described Crown purchasing as the 'catalyst for conflict' between Te Tirarau of Te Parawhau, and Matiu Te Aranui of Te Uri o Hau (a hapū of Ngāti Whātua) and Te Māhurehure at Waitomotomo in May 1862.[490] Te Uriroroi, Te Parawhau and Te Mahurehure ki Poroti hapū claimants submitted that the conflict arose 'over rights to the gum field in the Kokopu area'.[491]

Whangaroa claimants cited Pupuke, the largest single purchase in that taiwhenua, which the Crown acquired to 'create a large contiguous area of Crown land, and provide access to Whangaroa Harbour'. It also contained extensive stands of kauri and other timber. Yet, the price paid was 'a mere fraction' of the sum settlers later obtained for the timber in the block. The claimants contended that after acquiring this valuable resource, the Crown failed to provide Whangaroa Māori with the economic benefits or investments in the district's infrastructure which it promised would accompany sales. As a result, they claimed, their tūpuna were prevented from exercising their rangatiratanga over their lands through the establishment of relationships with settlers of their own choosing, on their own terms, and in pursuit of their own objectives.[492]

484. Closing submissions for Wai 2394 (#3.3.336), pp 78–79.
485. Closing submissions for Wai 2206 (#3.3.400), pp 143, 166–167, 170, 205–208.
486. Statement 1.3.2(b).
487. Submission 3.3.267, pp 9–10.
488. Submission 3.3.247, pp 1–6.
489. Closing submissions for Wai 1467, 1930, and 990 (#3.3.274(a)), p 11.
490. Armstrong and Subasic, 'Northland Land and Politics' (doc A12), p 266; closing submissions for Wai 990 (#3.3.274(a)), p p 12; closing submissions for Wai 2059 (#3.3.267) p 8.
491. Closing submissions for Wai 2058 (3.3.267), p 8.
492. Closing submissions for Whangaroa Taiwhenua (#3.3.385), pp 38–40.

Crown counsel acknowledged that a key issue was whether the Crown inquired adequately into the nature and extent of customary interests in the lands that it acquired during the period from 1840 to 1865. The Crown conceded that where it failed to inquire fully into those rights, it breached the treaty.[493] However, as we have noted, the Crown did not concede that there was any systematic failure in the conduct of its purchasing policy and submitted that by 1855 it was better at and more committed to identifying all Māori who owned land it wanted to obtain.[494] Crown counsel asserted that Te Raki Māori lodged relatively few complaints about the identification of the rightful owners during the period under consideration. Counsel identified four blocks whose purchase had prompted complaints: namely, Kawakawa, Ruapekapeka, Ruakaka, and Mokau. Of these, counsel argued, Mokau was 'the only situation in this inquiry where there is evidence that Māori complained that their interests had been sold without their consent'.[495]

In respect of prices paid by the Crown, counsel argued that low purchase and high re-sale prices meant that both Māori and Pākehā contributed to and were able to benefit from the Crown's efforts to encourage and invest in the development of the colony.[496] Counsel cited the Tribunal's assessment in the Kaipara inquiry of the Mangawhai purchase to the effect that 'it had insufficient evidence to quantify the real or perceived benefits there may or may not have been for the sellers of Mangawhai or their descendants'. According to counsel, a similar position arose in the case of Te Raki blocks. Finally, the Crown 'acknowledged that an independent valuation system' was not established until some time after 1865.[497]

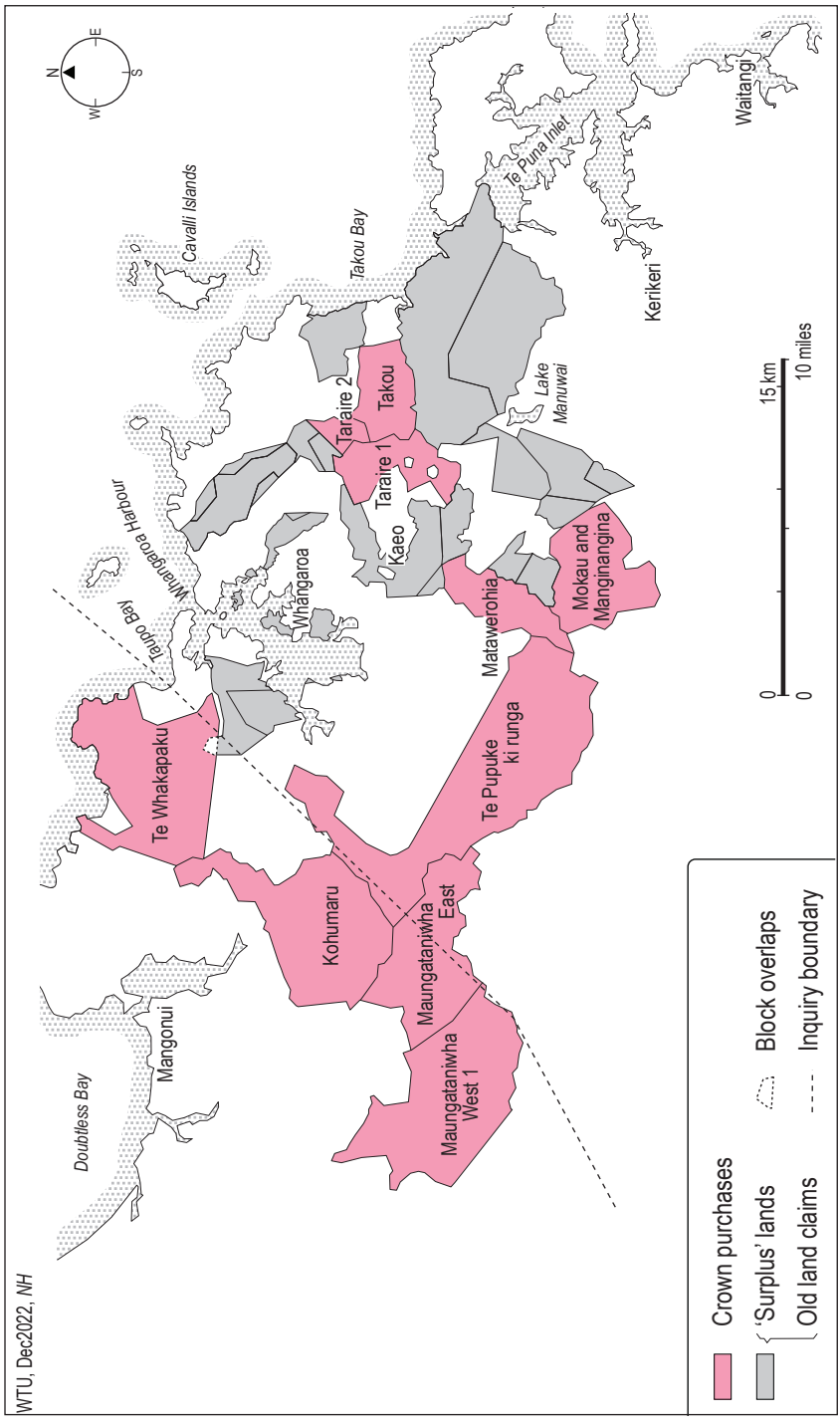
8.5.2 The Tribunal's analysis

8.5.2.1 *The purchasing process*

8.5.2.1.1 The matter of records

We deal first with the matter of records. Documentation assumes considerable importance in light of the Crown's claim that few Te Raki hapū and iwi lodged complaints regarding its failure to identify and conclude land transactions with all rightful owners. This claim rests upon the absence of records.[498] In making this argument, the Crown cited Dr O'Malley's evidence, which stated that '[w]ith the exception of the Mokau block, research undertaken for this report has revealed relatively few formal petitions and appeals relating to the Northland Crown purchases after 1865'.[499] It is important to note that O'Malley referred to *formal* petitions and appeals and that his observation related to the post-1865 period. In the Crown's view, the lack of complaints indicates satisfaction on the part of Māori

493. Crown closing submissions (#3.3.404), p 2.
494. Crown closing submissions (#3.3.404), p 8.
495. Crown closing submissions (#3.3.404), pp 18–19, 49.
496. Crown closing submissions (#3.3.404), pp 41–43.
497. Crown closing submissions (#3.3.404), p 42; and Waitangi Tribunal, *The Kaipara Report*, Wai 674, p 136.
498. Crown closing submissions (#3.3.404), p 18.
499. O'Malley, 'Northland Crown Purchases' (doc A6), p 497.



Map 8.3: Crown purchasing in Whangaroa, 1840–65.

that all rightful owners had been identified and purchase negotiations conducted in an equitable manner.

While the Crown argued that allegations of treaty breach had to be proved case by case, its own record-keeping makes this an extremely problematic demand. First, the existing reports of officers on the ground were brief and lacked detail as to what was said at negotiations. Also, as is well known, many of the Crown's records were destroyed, mostly by fire, the central incident being the 1907 Parliament Buildings fire that consumed many of the Native Department's key files covering the period from 1840 to 1891. In 1872, the destruction by fire of the Auckland Provincial Government Buildings had already resulted in the loss of the Auckland Provincial Government's records to that point.[500] Such loss has had serious implications for our ability to establish a full picture and analysis of land transactions in Te Raki. The Crown did not accept that the destruction of records accounts for the apparent absence of complaint.[501]

Māori commonly chose to register their objections to a purchase by means other than petitions and appeals. Extant files of Crown purchases in other districts, including large acquisitions in which ownership was contested, contain many letters of complaint, some numerously signed, and petitions that were not presented to Parliament and therefore not considered by the appropriate select committee. In some instances, Māori embarked upon extensive letter-writing campaigns through the colonial press. Complaints or objections also took the form of measures intended to prevent possession by the Crown: among them, the ejection of surveyors, the confiscation of survey equipment, the removal of survey pegs, and calibrated attacks on property.[502]

This happened in Te Raki as well. Māori objections to land purchases in this inquiry district included the removal of survey pegs, muru (plunder or confiscation as a form of dispute resolution; see chapter 3, section 3.2.5.4), and letter-writing. Claimant Pairaire Pirihi gave evidence of an example of an objection to a land sale when Patuharakeke tupuna Te Pirihi 'exercised his mana rangatiratanga . . . in the only way he then knew, by muru, i.e plundering the occupier of his land', in response to the 1841 Mahurangi purchase.[503] In March 1857, Haimona Te Hakiro temporarily stopped a land survey from being carried out at Parua Bay in Whāngārei Harbour by removing survey pegs and drawing a sword on surveyors while ordering them to leave. This was an attempt to prevent government intrusion on this land, which the Crown purchased the same year as the Kaiwa block.[504]

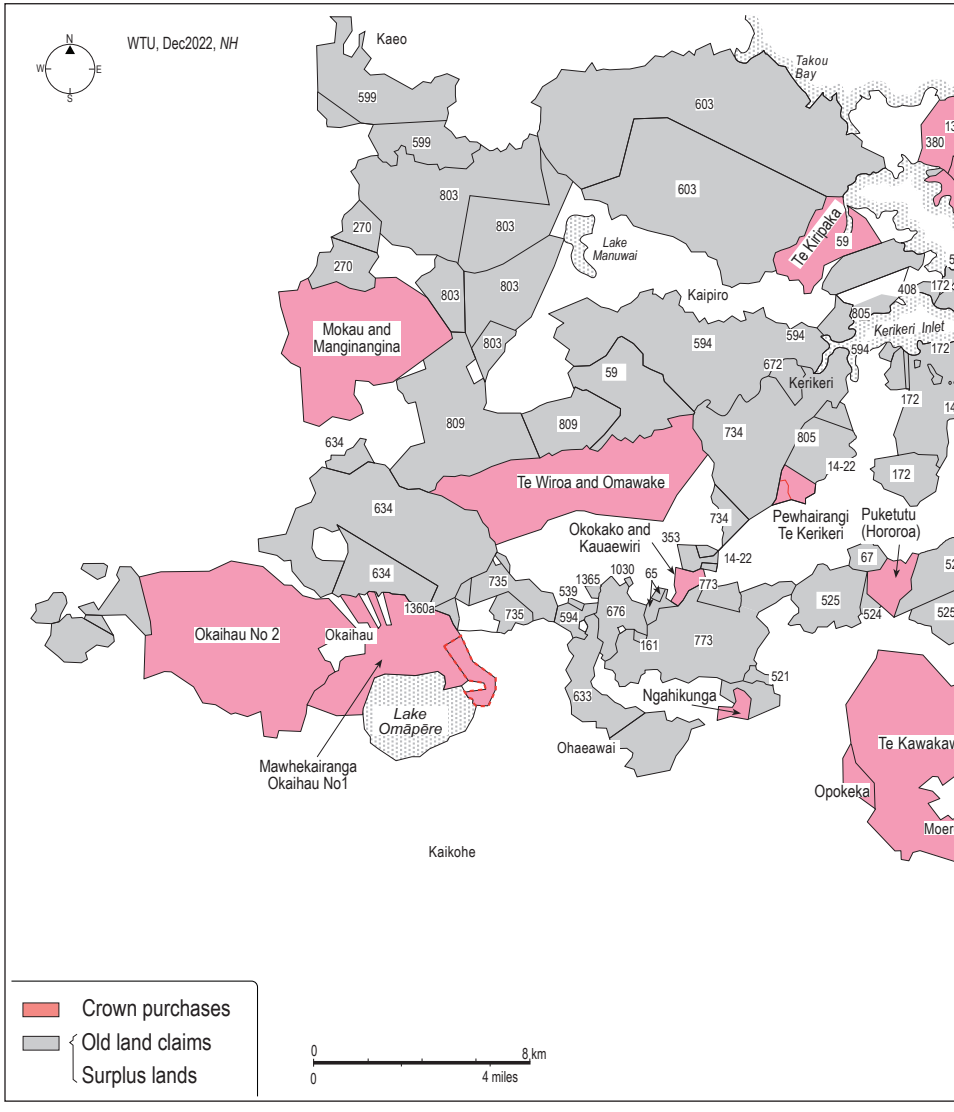
500. 'Great Fire at Auckland', *Press*, 21 Nov 1872, p 2.

501. Crown closing submissions (#3.3.404), p 17.

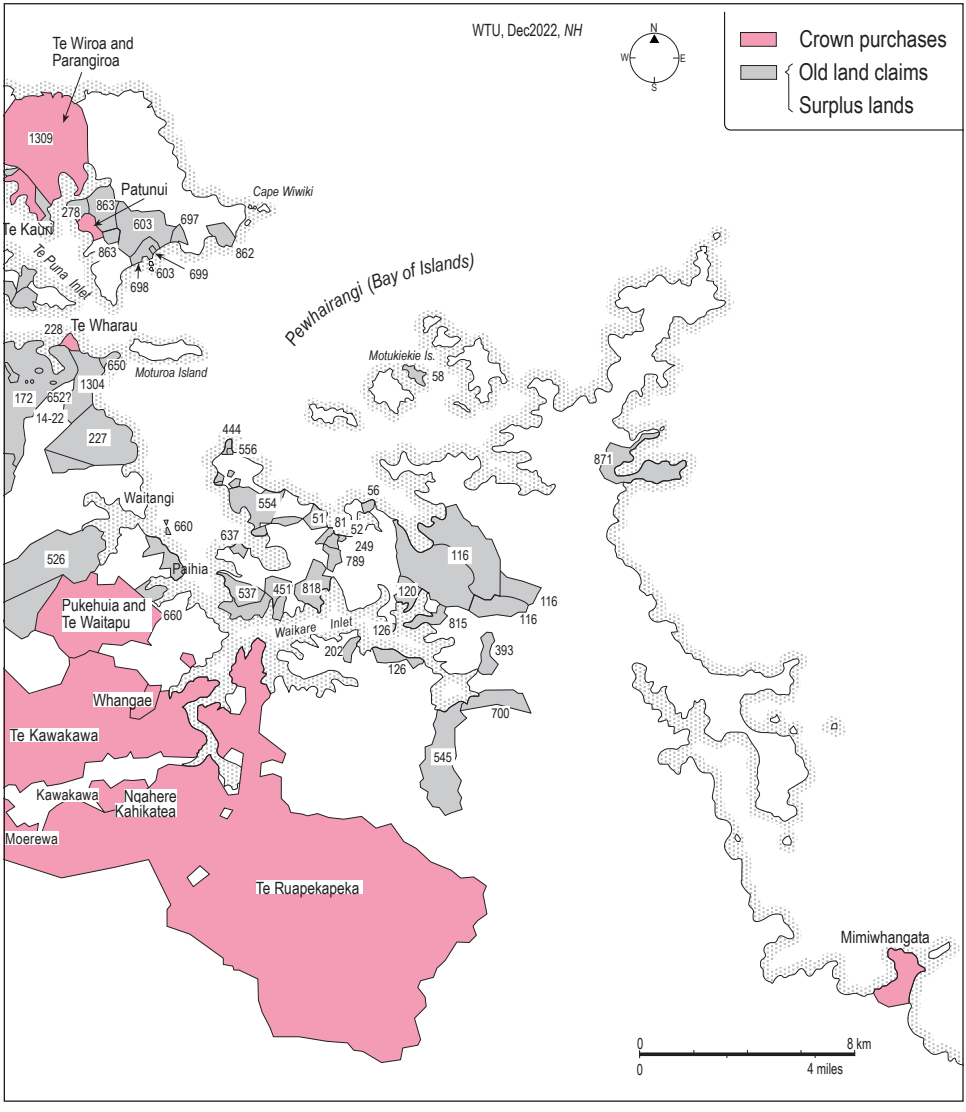
502. See, for example, Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, pp 45, 140; vol 3, p 755; Waitangi Tribunal, *The Taranaki Report*, Wai 143, pp 71, 75, 201, 221; Grant Phillipson, 'Bay of Islands Maori and the Crown' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2005) (doc A1), pp 174–175; Waimarie Bruce-Kingi (doc 125), p 30; Paraire Pirihi, supporting documents (doc 129(b)), pp 8–9; Ani Taniwha (doc 014), p 22.

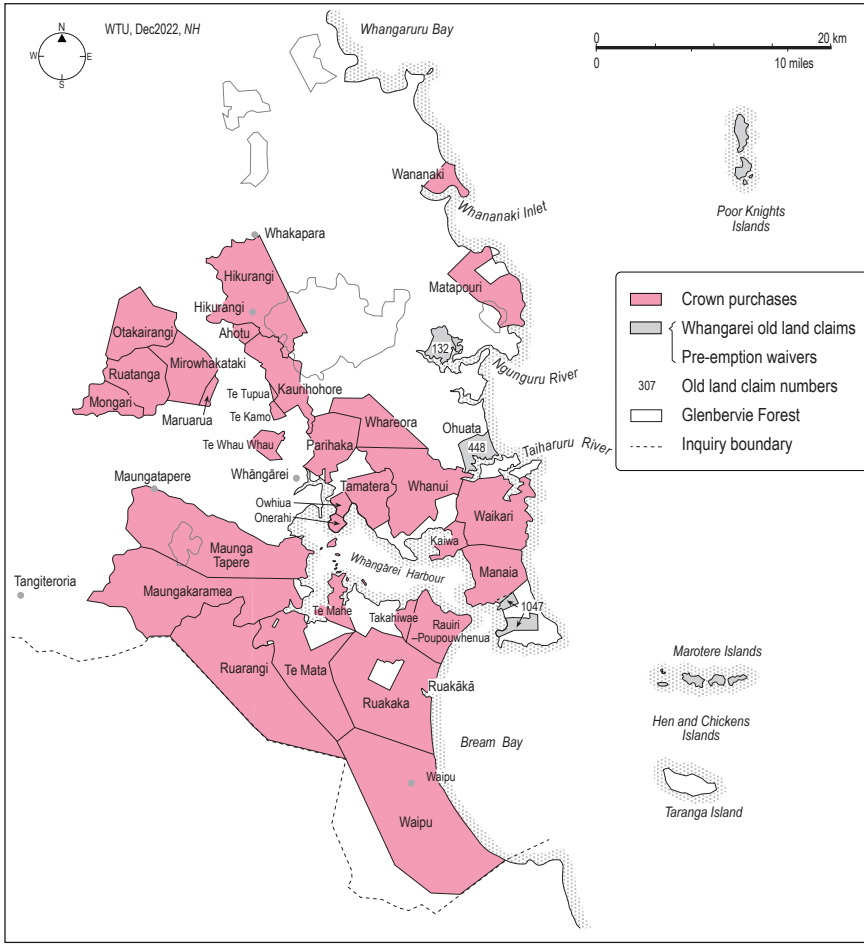
503. Pirihi, supporting documents (doc 129(b)), pp 8–9.

504. Bruce-Kingi (doc 125), p 30; see also O'Malley, 'Northland Crown Purchases' (doc A6), pp 304–305, 311–312.



Map 8.4: Crown purchasing in the Bay of Islands, 1840–65.





Map 8.5: Crown purchasing in Whāngārei, 1840–65.

The deed for this purchase was signed by rangatira Te Tirarau but neither Te Hakiro nor Hori Kingi Tahua, who had also been involved in negotiations and did not agree to the proposed price of £150 did so (see section 8.5.2.1.3.4).[505] Johnson's private correspondence with McLean explained that Te Tirarau had 'threatened either to tapu the place for ever, or seize upon it and the adjoining country, both of which courses would only have further complicated the question'. What was more, Johnson informed McLean, Hamiona Te Hakiro was 'indignant'.[506] Ngāi Te Whiu also protested the Crown's claims in 1859 to have purchased their Mōkau

505. O'Malley, 'Northland Crown Purchases' (doc A6), pp 302–308.

506. Johnson to McLean, 16 November 1857 (O'Malley, supporting papers (doc A6(a)), vol 10, pp 3077–3079); O'Malley, 'Northland Crown Purchases' (doc A6), p 311.

land. They disputed these claims in 'letters, petitions, protests and court actions' and continue to do so.[507] We discuss the Mokau purchase in section 8.5.2.3.

It is likely that prior to 1865, few among Te Raki Māori were familiar with either the mode or process of petition to Parliament, a purely Pākehā institution. The first Māori members of the House of Representatives would not be elected until 1868. Many Māori did not trust the Crown to deal with any complaints or objections that they might choose to lodge. In May 1861, the missionary Samuel Williams, who was based in Te Aute at the time, suggested that Governor Grey's departure at the close of 1853, followed in 1855 by that of Wynyard, his acting successor, had created a perception among Māori that they had no avenue of appeal, leading to growing distrust of the Crown. Williams also stated that Māori felt that 'they had been handed over to the tender mercies of the Land Purchase Commissioners, who almost entirely disregarded their remonstrances'.[508] Te Raki Māori had had little success with raising their objections before the Bell commission during the late 1850s. The commission had rejected Ngāi Te Whiu's claims in the Puketotara (Te Mata) block, for example, despite their continued occupation of the area (as we discussed in chapter 6).[509] In practice, for most Te Raki Māori their sole contact with the Crown during the period from 1840 to 1865 (in times of peace) was through the land purchase department, and as we have explained, its primary objective was the purchase of land for the benefit of settlers and the Government itself, not the protection or advancement of Māori interests.

We take the view that it was incumbent upon the Crown to create and maintain the records necessary to support and substantiate its claims to have concluded purchases in a full and proper manner. The scant nature of land purchase commissioners' reports indicates that deficiencies in the Crown's record-keeping cannot be solely explained by accidental fire. We endorse the position of the Muriwhenua Land Tribunal that it was the Crown's responsibility 'to enrol in some permanent public record the method by which the land ceased to be Maori land, and, if ever required to do so, to establish from clear records that the alienation was in all respects fair'.[510] Under questioning by the Tribunal about the 'practical implications' of the Crown's inadequate documentation of its land purchases, Crown counsel made some acknowledgement that it could have an adverse effect on the ability of Māori to challenge purchases afterwards.[511]

It is noteworthy that though the Crown claimed that by 1855 it was 'much more skilled at, and committed to, identifying all owners of land it sought to purchase', it did not identify any evidence to support this assertion.[512] As we discussed in section 8.4.2.5, by the mid-1850s the Crown had begun to compile information on the

507. Ani Taniwha (doc 014), p 22.
508. Untitled, *New Zealander*, 11 May 1861, p 3.
509. Bell, memorandum, 26 March 1858 (cited in Stirling and Towers, '"Not with the Sword but with the Pen"' (doc A9), p 939).
510. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, pp 336–337.
511. Crown counsel, transcript 4.1.32, Waitaha Events Centre, pp 220, 226, 229.
512. Crown closing submissions (#3.3.404), p 8; see also submission 1.3.2, p 30.

customary landscape of the district.[513] However, the existence of these records does not demonstrate that the land purchase commissioners always identified all those with rights in land. Nor does the fact that this information was collected relieve the Crown of its responsibility to maintain records of its transactions and any disputes that may have arisen. The question might reasonably be asked whether, in the absence of such records, the Crown can demonstrate that it conducted and completed all Te Raki purchases in a manner that was consistent with Normanby's instructions regarding 'fair and equal contracts', and with the Crown's obligations under the treaty. In the absence of sufficient evidence to demonstrate that these obligations were upheld, we do not expect claimants to prove, on a case-by-case basis, the impropriety of every purchases.

As we see it, the Crown cannot rely on the absence of records of formal petitions and appeals to suggest that Te Raki Māori were satisfied that the Crown had properly and fully identified all those holding customary rights.

8.5.2.1.2 Delegation and control

During the 1850s especially, McLean wielded a great deal of power as Chief Native Land Purchase Commissioner, and as Native Secretary from 1856. Accountable not to the general Government but to the Governor, and enjoying the full confidence of both Gore Browne and Grey, McLean established, staffed, and controlled the Native Land Purchase Department from 1854 to 1861. As we discussed in chapter 7, the newly formed settler ministry resented McLean as he was able to exert control over the Government's executive functions in relation to Native Affairs until his resignation as Native Secretary in 1861 (see section 7.3.2.3). In the face of growing resistance and criticism from the Stafford ministry (1856 to 1861) in particular, McLean shaped land purchasing policy, controlled its implementation, resisted ministerial influence, and supported the Governor's determination to retain imperial authority over Native affairs when responsible government was granted in 1856 and settler ministries were formed from elected members of the new House of Representatives. (The creation of the settler ministries and the development of responsible government is discussed further in chapter 7, see section 7.3.2.3.) Over these years, the Crown's protective obligations passed to McLean; and in respect of land purchase, he, in effect, delegated them to individual purchase commissioners. As we have discussed, the instructions he gave his land purchase commissioners recognised the importance of securing the consent of all owners, defining boundaries clearly, and providing sufficient reserves. However, his instructions gave little practical guidance as to how these obligations were to be met.

As we set out in section 8.4.2.3, in 1854 McLean had forecast that his department could acquire 7,000,000 acres of land in the Auckland province over five years.[514] Yet after one year, the Native Land Purchase Department faced financial obstacles to reaching this goal. In August 1855, McLean requested additional fund-

513. 'Reports on the State of the Natives in various Districts', AJHR, 1862, E-7, pp 16–22.

514. 'House of Representatives', *Daily Southern Cross*, 16 June 1854, p 4; 'General Assembly of New Zealand', *New Zealand Spectator and Cook's Strait Guardian*, 29 July 1854, p 3.

ing of £50,000 per annum 'to enable the Government to carry on arrangements for extinguishing the Native title to lands in these Islands.'[515] However, the desired funding was not granted, and O'Malley notes that 'a temporary halt was called to new purchases due to insufficient funds in September 1855'.[516] The following year, the Government allocated £180,000 to land, and half this sum was directed to land purchases within the Auckland province.[517]

In order to meet settler demand, McLean sought to ensure his purchasing processes were as efficient as possible. He demonstrated little interest in exercising control over his land purchase commissioners if it might result in delays in their negotiations. Instead, he was content to rely on their judgement and discretion. In June 1855, when he directed Kemp to commence work in the Bay of Islands, McLean assured him that '[f]rom your practical knowledge of the Bay of Islands . . . you are peculiarly qualified for undertaking this service; I shall, therefore trust to your own prudence and discretion in making such arrangements as you may deem advisable for carrying out an object of such importance.'[518]

McLean also considered it appropriate to leave the assessment of Māori ownership to his purchase commissioners. In June 1856, following the report of the Board of Inquiry on Native Affairs (discussed earlier, in section 8.3.2.6), McLean acknowledged the challenge that faced the purchase commissioners in tracing various claims, stating that 'a knowledge of the genealogical history of the tribes, their conquest, and all other subjects connected with the nature of their tenure, was considered necessary, in order to qualify the Commissioners for this difficult and sometimes very perplexing duty'.[519]

Despite this, he did not provide his land purchase commissioners with clear guidance on how to identify customary owners of blocks they wished to purchase, or the standards they were to apply in assessing Māori claims. No system in fact existed for investigating Māori customary rights in land, though the need would be increasingly accepted by officials and settlers alike over this period (see chapter 9, section 9.3). In the meantime, McLean wrote that Crown purchase agents had been directed 'to make themselves acquainted with the natives of their districts, to investigate their various and conflicting claims to land'.[520] His view was that '[t]he rule which applies to one portion of land does not apply to another; each piece of land has its own history', and therefore '[a] great deal must be left to the discretion of the person purchasing'.[521] In other words, purchase officers were deciding who owners were.

515. McLean to Colonial Secretary, 30 August 1855 (Turton, *Epitome*, A1, p53); O'Malley, 'Northland Crown Purchases' (doc A6), p184.
516. O'Malley, 'Northland Crown Purchases' (doc A6), p184; Sinclair to McLean, 26 September 1855 (Turton, *Epitome*, C, p162).
517. O'Malley, 'Northland Crown Purchases' (doc A6), p184.
518. McLean to Kemp, 1 June 1855, AJHR, 1861, C-1, p2.
519. McLean to Private Secretary, 4 June 1856, BPP, vol 10, p580.
520. McLean to Private Secretary, 4 June 1856, BPP, vol 10, p580.
521. 'Nature of the Maori Land Tenure and Claims', 3 July 1856, BPP, vol 10, p584.

Some of McLean's land purchase commissioners were uncomfortable with the absence of clear instruction. In 1858, Johnson, attempting to conclude the purchase of Kaiwa, complained that the Government had never defined

> what, in their opinion, constitutes a valid claim on the part of a Native to land, – or, if it has been determined, no instructions have ever been given on the subject for my guidance, and the usages of the Aborigines themselves being so completely at variance in parallel cases that no rule of action can be formed from them.[522]

Johnson does not appear to have secured the guidance that he clearly sought. The delegation of important decisions about customary ownership and terms of purchase appears to have been McLean's standard practice, which extended to other districts. He advised John Rogan, district land purchase commissioner for a short period in Te Raki, with respect to proposed purchases in the Waikato, that he considered 'it unnecessary to fetter you with any particular instructions, as I conceive you will be better able to decide on the spot, when you have communicated with the Native claimants, how the purchases should be conducted'.[523] On issuing instructions to Taranaki's land purchase commissioner, McLean advised him 'that it is an object of great solicitude on the part of the General Government to have purchases made on terms the most advantageous for the public interests'. He went on to add: 'Much must, however, be left to your own judgment and discretion in making the best and most economical terms with the Natives: and I may add, that it is not the desire of the Government to fetter you with any instructions that will impede your operations'.[524]

We note that Kemp and Johnson had mixed levels of experience in negotiating 'fair and equal' purchase agreements with Māori.[525] As we discussed in section 8.3.2.3, Johnson had been deployed to investigate outstanding claims in the Mahurangi and Omaha block in 1852, before he became the deputy commissioner of the Native Land Purchase Department in 1854. Prior to that, he had worked as a Government official in Auckland and Russell and as a trader in the Waikato.[526] As the son of a missionary, Kemp had local knowledge of parts of the district. He had previously worked as an interpreter and protector attached to the first Land Claims Commission, and subsequently as a land purchase commissioner in the South Island.[527] However, his major purchase there, in 1848, was marked by a failure to carry out his instructions to survey the boundaries of the reserves

522. Johnson to McLean, 17 May 1858, AJHR, 1861, C-1, p 86.
523. McLean to Rogan, 13 July 1855, AJHR, 1861, C-1, p 153.
524. Chief Land Commissioner, 'Instructions to District Land Purchase Commissioner relative to purchase of land from the Natives of Taranaki', 26 August 1857, AJHR, 1861, C-1, p 212.
525. This was the standard established in Normanby's 1839 instructions: Normanby to Hobson, 14 August 1839, BPP, vol 3, p 87.
526. Una Platts, *Nineteenth Century New Zealand Artists: A Guide & Handbook* (Christchurch: Avon Fine Prints, 1980), p 140.
527. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), pp 132, 143; Ward, *National Overview*, vol 2, pp 37, 133–134.

Ngāi Tahu wished to keep. As a consequence, Kemp had been reprimanded and replaced by Walter Mantell.[528] John Rogan, who succeeded Johnson as land purchase commissioner in Whāngārei in the late 1850s, had been involved in land purchasing at Kāwhia and Taranaki and was a qualified surveyor.[529]

The crucial point is that commissioners were responsible for purchasing land *and* determining its rightful owners. They were qualified to serve as land purchase commissioners by their previous success in acquiring land for the Crown, not their record of protecting Māori rights and interests. Overall, the Native Land Purchase Department, as a centralised Crown agency, seems to have viewed its role primarily as assessing the progress of land acquisition against the expected inflow of migrants and the demand for land (as indicated by the number of land orders issued), and identifying purchase priorities.[530] A key question thus arises as to whether, in the absence of clear and comprehensive directions and effective control from the centre, the district land purchase commissioners at work in Te Raki departed from established purchasing standards and did so to the disadvantage of Māori. A further question is whether the lack of intervention by McLean reflected his tacit endorsement of their conduct. We consider these issues in the following sections.

8.5.2.1.3 Monitoring purchasing standards: identifying owners and gaining collective consent for transactions

Almost from the time Crown Colony government was established, its key officials (some of whom had been raised in New Zealand) quite clearly understood the nature and complexity of Māori customary land rights. As discussed at section 8.3, they also understood and acknowledged the need to identify and secure the consent of all local hapū communities to any proposed alienation, and the requirement to ensure that payment was distributed appropriately. 'Lands that are thus possessed in common', the Chief Protector Clarke advised the Colonial Secretary in 1843, 'involving the interests of so many claimants, are exceedingly difficult to purchase.'[531] The complex nature of Māori customary rights was again recognised in 1856 in the report of the Board of Inquiry on Native Affairs (see section 8.3.2.6, and chapter 9, section 9.3.2.2). While rangatira would play an important role in purchase negotiations, the board maintained that they 'have only an individual claim like the rest of the people to particular portions'.[532] It was well established throughout this period that for lands held in common, alienation required collective consent. While it may have been appropriate for the Crown to conduct ne-

528. The Ngāi Tahu Tribunal noted that Mantell also failed to comply with his instructions: Waitangi Tribunal, *The Ngai Tahu Report 1991*, Wai 27, vol 2, pp 388–389.

529. O'Malley, 'Northland Crown Purchases' (doc A6), pp 317, 460; Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pts 1–2, p 249.

530. See, for example, McLean to Johnson, 18 March 1856, AJHR, 1861, C-1, p 69; McLean to Kemp, 24 October 1856, AJHR, 1861, C-1, pp 13–14; and Thomas Smith (for McLean) to Kemp, 29 November 1858, AJHR, 1861, C-1, p 32.

531. Clarke to Colonial Secretary, 17 October 1843, BPP, vol 2, p 357.

532. 'Report', 9 July 1856, AJHR, 1856, p 4.

gotiations via individual rangatira, Crown officials understood that it was inconsistent with their own standards to reach deals solely with those rangatira willing to enter land transactions, and to finalise such transactions before apprising themselves of the full extent of customary interests in the land, and of actual consent by the various communities who held rights there.

In order to establish collective consent for purchases, one recommendation made by the Board of Inquiry on Native Affairs was that purchase blocks should be perambulated and surveyed, and a description of the area publicised to ascertain any further claims to the land.[533] However, McLean saw practical difficulties in the land purchase department taking responsibility to ensure that all owners were informed of and participated in purchase negotiations. In response, McLean wrote to the Private Secretary that taking this additional step would be 'of no avail' in distant districts where the notices would not reach 'the natives interested'. Furthermore, he was concerned that 'the loss of time involved in sending up such a notice, in its publication and return, would, in most instances, be prejudicial to the negotiation'.[534] It appears that McLean considered that the demands already placed on his purchase commissioners by the requirement to investigate Māori customary rights in land were a substantial obstacle to his purchasing ambitions. As he put it,

> the various duties disconnected with the purchase of lands which the officers have been called upon to perform, such as the adjustment of disputes between the Europeans and natives, consequent upon the extension of English settlements, the arrangement of territorial and other feuds among the natives themselves, the opposition generally manifested by them to the sale of lands, the time required to obtain a knowledge of the natives in their several districts, together with various other causes, have operated against the acquisition of that extent of territory by the officers of this department which the European inhabitants, in their anxiety to obtain land, might expect.[535]

In these passages, McLean carefully defended the record of his land purchase department by setting out the difficulties that a thorough investigation of customary ownership presented to the Crown's aim of efficiently acquiring large areas of land for settlement. He went on to downplay the risk that disputes might arise from transactions where owners had been excluded from negotiations, assuring the Private Secretary that '[p]ublicity is generally pretty well attained on a subject so deeply interesting to the natives as the sale of land'. However, where issues did arise, or in cases where the Crown learned of further claims subsequent to purchases being completed, these could be 'provided for out of subsequent instalments, which may extend over a period of two or more years'.[536]

533. 'Report', 9 July 1856, AJHR, 1856, p 8.
534. McLean to Private Secretary, 4 June 1856, BPP, vol 10, p 581.
535. McLean to Private Secretary, 4 June 1856, BPP, vol 10, pp 580–581.
536. McLean to Private Secretary, 4 June 1856, BPP, vol 10, p 581.

The kind of instalments described by McLean were, in the first instance, payments to owners willing to transact their lands prior to a full investigation of other claims. If other owners were excluded from the initial purchase and disputed the transaction, he proposed that their interests could be acquired through the payment of further instalments, either out of the residue of the original purchase price or as payments additional to the original price. In this sense, they were a means of denying other owners the opportunity to withhold their lands from purchase. It appears that this was a tactic used by Johnson in the Whāngārei and the Mahurangi and Gulf Islands taiwhenua, and he recorded in October 1854 that he had paid by instalment for the blocks he had 'lately acquired' in those districts.[537] For example, in the 15,941-acre Wainui block, Johnson made a first payment of £600, a portion of which he specified was 'to appease the jealousy of Ngatiwhatua [*sic*]' and to 'set at rest any apprehension which may have existed of uneasiness in that quarter'.[538] In January 1855, Johnson would make a further payment of £200 pounds to a different group of owners to complete the purchase (we discuss Johnson's use of instalments in the Ruakaka, Waipu and Maungakaramea purchases further below (see sections 8.5.2.1.3.1–8.5.2.1.3.3)).[539]

McLean's position appears to have been that owners excluded from original transactions should only receive nominal payments, as the Crown had already purchased the land and made payment. For instance, he advanced £270 to owners of the Pakiri South block during his tour of the district in March 1857, which led to the completion of the purchase of the 35,144-acre block for a mere £1,070.[540] McLean justified the low price on the basis that the land had already been purchased by the Crown in 1841 as part of the Mahurangi and Omaha block despite the significant shortcomings of that initial transaction (see section 8.3.2.6), writing that, 'Where lands have been purchased, and a fair price given to the Natives, it appears to me that a nominal sum is all that can be considered as justly due to those claimants whose rights from various causes may not have been recognised at the time.'[541]

We note that instalments could also mean staggered payments to the same group of owners. In purchasing the 25,784-acre Ahuroa and Kourawhero block (nominally two blocks that were included in one deed as a contiguous area), Johnson wrote that 'I have endeavoured strenuously to extend the payments over a time, and to induce the Natives to re-purchase from the Crown any land they may

537. Johnson to Colonial Secretary, 7 October 1854 (Turton, *Epitome*, C, p 63).

538. Johnson to McLean, 22 June 1855 [*sic*: 1854], AJHR, 1861, C-1, p 57 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 214); Innes, 'Northland Crown Purchase Deeds' (doc A4), pp 133, 317.

539. We note that three names included in the first deed (out of 23 overall) were also included in the second, which only included 16 names: Innes, 'Northland Crown Purchase Deeds' (doc A4), pp 133–135, 317–318.

540. We note that no record was made of this initial payment until the owners received the second payment of £800 and the purchase deed was signed: O'Malley, 'Northland Crown Purchases' (doc A6), pp 215–216; Innes, 'Northland Crown Purchase Deeds' (doc A4), p 138.

541. McLean to Johnson, 21 March 1861 [*sic*: 1857], AJHR, 1861, C-1, p 75.

wish to retain in the blocks for themselves' (we discuss the 'repurchase' reserve created in the block further in section 8.5.2.7).[542] Dr O'Malley observed that Johnson 'succeeded with both measures to a modest extent . . . with the owners agreeing to accept three-quarters of the payment at the time of signing and the remainder on 1 January 1855' .[543] This kind of instalments were also used in two purchases in 1854 and 1856 that extinguished customary title over Aotea (Great Barrier Island) where there were also a number of unsurveyed old land claims and pre-emption waiver claims on the island (see chapter 6, sections 6.5.2.3 and 6.6.2.1). O'Malley noted that McLean personally undertook the second purchase, covering the central portion of the island to which the deed was signed by members of Ngāti Maru and Ngātiwai. The deed provided that a second payment of £100 would be made in June 1857 (out of an overall purchase price of £300), but there is no reciept to confirm that this was paid.[544]

Instalments may have been more widely used, and there is evidence that Māori disliked them.[545] Overall, there does not appear to have been a consistent practice, and it is difficult to tell whether subsequent payments were typically made to a new group of claimants, or whether they were actual instalments to owners involved in the original transaction. In the latter case, instalments were a means of ensuring Māori remained committed to the terms agreed, and allowing those not party to the original transaction to register their claims and receive compensation. Alternatively, payments could be withheld. In the case of the Okaihau lands, Kemp withheld purchase monies in a successful effort to persuade owners who supported the transaction to pressure those opposed to sale, or to induce them to ignore other claims.[546] In his evidence, Dr O'Malley considered that McLean's support for these practices reflected his lack of concern for 'the fact that such groups had no say as to whether to retain or sell their interests'.[547]

In the face of unrelenting settler pressure to acquire land, a shift from securing the consent of all owners to securing the consent of a handful in the comfortable or self-serving belief that they represented the views of all, or that other claimants could subsequently receive payment for their interests, held considerable appeal. We note that this was a practice previously employed by McLean while in the field himself in Taranaki during the early 1850s, where the Tribunal found that Māori 'were dealt with privately and secretly, and payments were made to secure cooperation'.[548] In *The Wairarapa ki Tararua Report*, the Tribunal found that 'McLean apparently felt comfortable conducting an unfolding process in which all

542. Johnson to McLean, 22 June 1854, AJHR, 1861, C-1, p 57 (cited in O'Malley, 'Nortland Crown Purchases' (doc A6), p 214).
543. O'Malley, 'Northland Crown Purchases' (doc A6), p 215.
544. O'Malley, 'Northland Crown Purchases' (doc A6), p 231; Innes, 'Northland Crown Purchase Deeds' (doc A4), pp 141–143, 161–163.
545. See, for example, Johnson to McLean, 22 June 1854 (Turton, *Epitome*, C, p 96).
546. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 393–395.
547. O'Malley, 'Northland Crown Purchases' (doc A6), p 470.
548. Waitangi Tribunal, *The Taranaki Report*, Wai 143, p 48.

was to be confirmed later (probably much later, given the limited surveying capacity), but it left Māori vulnerable indeed.'[549]

On occasion, purchase agents reported that their negotiations had proceeded smoothly and the agreement of all those with interests had been secured. Kemp recorded with reference to the Ōruru Valley, in 1856, that he had 'assembled the different claimants' and secured their agreement to a price 'after a series of well-conducted discussions.'[550] Referring to the purchase of several blocks in the Bay of Islands the year after, he again reported that '[t]he negotiations have been conducted in the most public manner, and every facility given to claimants, or other interested persons, to appear.'[551] The following December, again with reference to purchases in the Bay of Islands, he noted that '[a]ll the proceedings connected with the fixing of [purchase] sums have been carried out in the most public manner, on the spot.'[552] William Searancke, who for a short period acted as land purchase commissioner in the Whāngārei district, recorded with respect to the Whanui and Taiharuru blocks that he assembled 'the whole of the Natives interested in those blocks of land', and that his offer of two shillings per acre 'was unanimously agreed to by the whole of the Natives present'.[553]

Such claims were largely belied by the evidence. O'Malley considered that the evidence of Crown agents in Te Raki walking the boundaries of purchase blocks or convening hui with all customary owners is rare.[554] This might reflect the inadequacy of the Crown's record-keeping practices and the lack of available documentation. However, an analysis of the number of signatories to Northland deeds for the period from 1840 to 1865 suggests that only in a few instances did the Crown document the formal consent of all customary owners with interests in the land. Of 118 purchase deeds, 51 were signed by no more than five persons, and a further 29 by six to 10 persons. Only one purchase deed – for Maungatapere (16,640 acres) in January 1855 – was signed by over 50 persons, suggesting that extensive consultation had taken place and that general agreement to the sale had been secured. But as we discuss further, another deed for the Maungatapere purchase had been signed by only two owners beforehand, and it was this deed that was provided to the Colonial Secretary. The extent of the problem is apparent even when accounting for the relative size of the blocks: the 29,832-acre Waipu block was purchased with only 12 signatures on the deed.[555] It is possible that rangatira did consult and secure general assent or consensus, but there is no evidence that the Crown independently satisfied itself that they had done so in any systematic way.

In practice, McLean appears to have had little interest in intervening in the purchasing process to protect the rights and welfare of Māori, and he remained reluctant to issue any instructions that might have acted as 'fetters' upon his district

549. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 152.
550. Kemp to McLean, 29 September 1856, AJHR, 1861, C-1, p 12.
551. Kemp to McLean, 10 June 1857, AJHR, 1861, C-1, p 20.
552. Kemp to McLean, 7 December 1857, AJHR, 1861, C-1, p 22.
553. Searancke to Fox, 2 May 1864 (Turton, *Epitome*, C, p 88).
554. O'Malley, 'Northland Crown Purchases' (doc A6), p 18.
555. Based on Innes, 'Northland Crown Purchase Deeds' (doc A4), pp 8–14.

commissioners. In recognising the complexity of Māori rights in lands and the importance of investigating customary ownership, his instructions maintained appearances. However, there was a significant difference between McLean's carefully worded directions and the standards he was willing to enforce. We received no evidence that McLean rejected any purchase agreements because the price was too low or that insufficient signatures were recorded on the deed. This seems a significant omission in light of the small number of signatories evident in many deeds of purchase for substantial blocks of land. The absence of any intervention by the purchase department in the process suggests that McLean likely turned a blind eye to the shortcomings of hastily arranged purchase agreements. As McLean sought to keep up with settler demand for land, in Dr O'Malley's words, '[e]xpediency remained supreme'.[556]

In order to meet that demand, McLean was also overt in his support for the continuation of Grey's practice of fostering and favouring 'friendly' rangatira as a means of conducting purchasing. For instance, in 1857 McLean suggested to Grey's successor, Gore Browne, that

> it would not be difficult to ascertain the names of the principal [northern] Chiefs whose co-operation would be essential for carrying out the views of the Government, and who should, in return for their exertions (where efficiently rendered) to preserve the peace of their respective districts, be rewarded with marks of approbation, and fixed annuities for their services.[557]

McLean advocated dealing with particular rangatira, obtaining their consent first, and then using it as leverage to gain the agreement of neighbouring chiefs. This was a common practice by the land purchase department from the start of its purchasing activities in the district. In Whāngārei, Johnson employed this tactic, in particular with Te Tirarau Kūkupa (see section 8.3.2.6). In December 1853, Johnson reported that he had 'ascertained the nature of the native claims' in the Whāngārei area and decided that Ngāpuhi prevailed north of the harbour and Te Parawhau to the south, but that both were 'in a great measure, controlled by Tirarau'.[558] However, as we have discussed, rangatira such as Te Tirarau understood these relationships differently, and expected that the transactions they entered into would strengthen their partnership with the Crown and bring lasting benefits to their communities; these understandings were fostered by the Crown in its negotiations, its marks of favour, and promises of benefit.[559]

The flaws in the Crown's general purchasing practices were recognised at the time and attracted bitter criticism, not least from the missionaries Octavius Hadfield and Samuel Williams. Hadfield accused McLean of negotiating with

556. O'Malley, 'Northland Crown Purchases' (doc A6), p 471.
557. McLean to Browne, 20 March 1857, AJHR, 1862, C-1, p 356.
558. Johnson to Colonial Secretary, 12 December 1853 (Turton, *Epitome*, C, p 55).
559. O'Malley, 'Northland Crown Purchases' (doc A6), pp 345–346; Walzl, 'Ngati Rehia' (doc R2), pp 151–152, 154–155.

selected rangatira, of being 'guided by no fixed principles in acquiring the land . . . sometimes he dealt with the conquerors, when they were inclined to sell, at other times with the conquered, sometimes with the leading chief, at other times with an inferior one'.[560] Conducting purchase negotiations in secret, relying on small numbers of signatories, purchasing from persons who were not rightful owners or were not authorised to sell, and the system of 'paying money to any person in connection with the land who would receive it, leaving the money to work its way into the land' – otherwise known as 'potato planting' – were among the unsavoury tactics intended to subvert opposition to land sales that McLean's critics identified.[561]

In response, McLean resorted to what his biographer, Ray Fargher, termed 'self-righteous repudiation', unwilling to admit that he had placed settler demand ahead of protecting Māori interests.[562] By the late 1850s, as historians Rose Daamen, Barry Rigby, and Paul Hamer have observed, '[t]he apparent consensus on the complexity of Maori interests in land declared by the board of inquiry and McLean in 1856 had evidently foundered on the shoals of the Waitara dispute'.[563] As McLean and Governor Gore Browne sought to defend their decision to push through purchases despite opposition, they became increasingly dismissive of the need for common consent, as Professor Ward observed.[564] In our view, the Crown's increasingly pragmatic and cynical approach to these negotations was clearly self-serving and posed significant potential prejudice to Te Raki Māori hapū and iwi. In the following sections, we consider a number of case studies from the Whāngārei taiwhenua, a key area targeted for settlement, where Johnson provided a more extensive account of his purchases. These illustrate the Crown's failure to enforce its acknowledged purchasing standards.

8.5.2.1.3.1 *The Ruakaka and Waipu purchases*

Two of Johnson's first purchases in Whāngārei were the 16,524-acre Ruakaka and 29,833-acre Waipu blocks.[565] In December 1853, Johnson reported to the Colonial Secretary that Whāngārei Māori had offered approximately 240,000 acres of land for only £600, and that an area in the Ruakākā Valley had been identified by a group of Nova Scotian immigrants as a suitable site for settlement.[566] The prospect of such a grand purchase saw Johnson sent north to complete the negoti-

560. AJHR, 1860, E-4, p 11. For McLean's position, see AJHR, 1860, E-4, p 22; and 1861, E-1, app A, p 3; see also June Starke, 'Hadfield, Octavius', DNZB, Te Ara – the Encyclopedia of New Zealand, 1990, https://teara.govt.nz/en/biographies/1h2/hadfield-octavius, accessed 2 November 2022.

561. Samuel Williams to the Editor, *New Zealander*, 11 May 1861, p 3. In 1860, William Fox had levelled the same charges at McLean. See 'House of Representatives', *New Zealander*, 29 August 1860, p 3.

562. Fargher, *The Best Man Who Ever Served the Crown?*, pp 180–181; and AJHR, 1861, E-1, pp 6–7.

563. Rose Daamen, Paul Hamer, and Barry Rigby, *Auckland*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1996), p 168; See Waitangi Tribunal, *The Taranaki Report*, Wai 143, pp 67–77.

564. Ward, *National Overview*, vol 2, pp 160–161.

565. This acreage figure is the Crown's GIS estimate of the area of the block: Rigby, 'Pre-1865 Te Raki Crown Purchase Validation Report' (doc A53), app A, pp 4, 6.

566. Johnson to Colonial Secretary, 31 December 1853 (Turton, *Epitome*, C, p 56); Johnson to Colonial Secretary, 12 December 1853 (Turton, *Epitome*, C, p 55).

ations without delay, but he quickly discovered that things were less straightforward than he had assumed. As he reported 'the extinction of the native claims are fraught with more difficulty, and the price required will be much greater, than I had anticipated'.[567] Apparently, members of Ngāti Whātua had visited the area and divided the 240,000-acre block he had identified for purchase into four separate blocks (Mangawhai, Ruakaka, and Waipu blocks, and an area Johnson referred to as Ikaranganui) and had 'entrusted the disposal of the same to different parties'.[568] We have not seen any evidence that sheds light on this move by Ngāti Whātua, but perhaps they sought to ensure that the payment for land in each block was made to those specific groups associated with it.

Despite the changed circumstances, Johnson proceeded quickly to confirm arrangements for the Crown to purchase the areas targeted for settlement in the Ruakākā Valley. By the end of the following week, he reported that he had completed negotiations to purchase an area which he estimated to be 60,000 acres and included the Ruakākā and Waipū Valleys.[569] He had encountered difficulty in 'confining the natives into a reasonable reserve in the valley of the Ruakaka', and it was the view of the Nova Scotian settlers that 'unless the natives could be confined to a limited reserve, the valley could not be made available as their settlement' (we discuss the status of this reserve in section 8.5.2.7).[570] The Ruakaka block also contained an 'enormous extent of country' claimed by former British Resident James Busby (see our discussion of his claims in chapter 6, section 6.7.2.10), who had written to the Māori owners demanding that Johnson not be permitted to intrude on his land.[571] Johnson forwarded Busby's letter to the Colonial Secretary, reporting that it had been 'met with great applause when read at the several meetings of the claimants'.[572]

In the circumstances, Johnson was concerned that Busby's influence would become an obstacle to his purchase negotiations. For this reason, he said, he elected not to adopt 'the usual and safer method of assembling all the claimants before making payment'. Instead, Johnson proceeded to simply accept offers and began dealing with whoever had indicated their willingness to sell. He wrote to the Colonial Secretary:

> I accepted the offers of the Chiefs who first came forward to sell the Ruakaka, and paid to them the sum of One hundred pounds (£100) for their claims, reserving the

567. Johnson to Colonial Secretary, 31 December 1853 (Turton, *Epitome*, C, p 56).

568. Johnson also noted that he had made arrangements to purchase the 32,846-acre Mangawhai block (in the Kaipara inquiry district) from Āpihai Te Kauwau, Te Tinana, and Te Keene of Tangaroa Ngāti Whātua: Johnson to Colonial Secretary, 31 December 1853 (Turton, *Epitome*, C, p 56).

569. Johnson to Colonial Secretary, 6 January 1854 (Turton, *Epitome*, C, p 57); Johnson to Colonial Secretary, 20 March 1854, AJHR, 1861, C-1, p 48 (cited in Berghan, 'Northland Block Research Narratives' (doc A39(b)), pp 128–129).

570. Johnson to Colonial Secretary, 6 January 1854 (Turton, *Epitome*, C, p 57); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 279.

571. Berghan, 'Northland Block Research Narratives' (doc A39(b)), p 128; O'Malley, 'Northland Crown Purchases' (doc A6), p 279.

572. Johnson to Colonial Secretary, 20 March 1854, AJHR, 1861, C-1, p 48.

> sum of Two hundred and fifty pounds (£250) to satisfy the other parties with whom I had not yet come to terms. This decisive step showed the opposition that when the real owners of land are disposed to sell to the Government, it is not to be intimidated by the clamour of disaffected factions, exercising very little, if any, ownership at all over the lands sought to be purchased.[573]

It is unclear why Johnson reserved more than two-thirds of the purchase price for those who had 'yet come to terms' with him, while claiming that the 'real owners' had initiated the transaction.[574] However, as Dr O'Malley observed, the original deeds reveal a 'pattern of staggered payments made privately to individual groups'.[575] The Ruakaka deed is dated 16 February, and includes a signed acknowledgment from 'Pou, Te Mania and the rest of our tribe' as having received £250 on that date, but further payments of £50 were recorded as being made to two other groups of owners, including Te Rehe on 8 March and Te Piriki, Paora Pere, Eru Toenga, and Ti on 17 March 1854.[576]

Johnson 'adopted a similar course' in negotiations for the purchase of the Waipu block. The deed was dated 20 February 1854, when £200 was paid to Wiremu Pohe and his party with an undertaking that this payment would also satisfy the claims of Te Tirarau and Hori Kingi Tahua. However, two further payments of £50 were made on 2 March 1854 to Hone Tepa and Te Hu, and on 8 March 1854 to Pou and Te Rehe.[577] In this case, Johnson did convene a general meeting with the owners at Otaika in Whāngārei on 17 March, but not until after payments had already been made.[578] During this meeting, it was clear that Johnson's piecemeal payments had not satisfied all owners. Te Tirarau and Hori Kingi Tahua refused the share allocated to them by Wiremu Pohe and demanded an additional sum of £50 in recognition of their rights in the land.[579] Johnson acceded to their demands, and the payment to Te Tirarau was recorded in a further deed signed in July 1854.[580] A further payment would also be made to Eurera Toenga on 26 May 1854 for his claim in the Waipu block, by way of an additional deed.[581]

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573. Johnson to Colonial Secretary, 20 March 1854, AJHR, 1861, C-1, p 48.

574. O'Malley, 'Northland Crown Purchases' (doc A6), p 474; Johnson to Colonial Secretary, 20 March 1854, AJHR, 1861, C-1, p 48.

575. O'Malley, 'Northland Crown Purchases' (doc A6), p 285.

576. AUC 309, LINZ (O'Malley, supporting papers (doc A6(a)), vol 22, pp 7423–7427); Johnson to Colonial Secretary, 20 March 1854, AJHR, 1861, C-1, p 48; O'Malley, 'Northland Crown Purchases' (doc A6), p 285.

577. AUC 318, LINZ (O'Malley, supporting papers (doc A6(a)), vol 22, pp 7477–7481); Johnson to Colonial Secretary, 20 March 1854, AJHR, 1861, C-1, p 48; O'Malley, 'Northland Crown Purchases' (doc A6), p 285.

578. Johnson to Colonial Secretary, 20 March 1854, AJHR, 1861, C-1, p 48; O'Malley, 'Northland Crown Purchases' (doc A6), p 284.

579. Johnson also noted that a further 'Chief named Pirihi' sought a payment of £10: Johnson to Colonial Secretary, 20 March 1854, AJHR, 1861, C-1, p 48.

580. AUC 310, LINZ (O'Malley, supporting papers (doc A6(a)), vol 22, pp 7428–7434).

581. AUC 308, LINZ (O'Malley, supporting papers (doc A6(a)), vol 22, pp 7413–7422); O'Malley, 'Northland Crown Purchases' (doc A6), p 285.

For both the Ruakaka and Waipu blocks, Johnson's strategy of making payments to those who agreed to the purchase first, without conducting wider consultation, meant that the other owners had no choice other than to accept payment for the alienation of their lands, or perhaps demand a better price. Johnson conducted these negotiations prior to taking up his role as a land purchase commissioner in the Native Land Purchase Department. His subsequent appointment indicates that rather than taking any issue with his conduct, McLean was 'suitably impressed', and in May 1854, Johnson received his formal appointment.[582]

8.5.2.1.3.2 *The Maungatapere purchase*

In the case of the 1855 purchase of the 16,640-acre Maungatapere block, Dr O'Malley recorded that two purchase deeds were signed in what appears to have been a tactic intended to overcome opposition to sale.[583] One of these deeds was signed by some 114 owners on 31 January 1855, which O'Malley suggested might be considered 'a widely-signed agreement for the transfer of the block'. However, O'Malley also pointed to an earlier deed 'buried among the records of the Colonial Secretaries' office', dated 19 January 1855, which had been signed in Auckland by Te Tirarau and Te Manihera only.[584]

In Johnson's November 1854 report on the purchase negotiations for the Maungatapere block, he estimated that it contained 18,500 acres and that a sum of £1,500 would be required for the purchase. Following a meeting with Te Tirarau at his residence earlier that month, he wrote to McLean that a further condition of purchase was that Te Tirarau should be granted a pre-emptive right to repurchase an area of 1,000 acres at 10 shillings per acre.[585] He also informed McLean of the block's strategic value, with frontage on the Whāngārei Harbour. He considered that the purchase would have a 'moral effect' on other Māori in the district, as a result of

> the example of an influential chief like Tirarau, in conjunction with several others who in the late war in the North fought against us about the sovereignty over the country, now disposing to the Crown for European colonization, a tract situated in the midst of one of their most valuable and cherished localities.[586]

Johnson considered that the ownership of the block was undisputed, 'the family hereditary possession of the Chief Tirarau and the late Iwitahi, father of Te

582. O'Malley, 'Northland Crown Purchases' (doc A6), pp 288.

583. This acreage figure is the Crown's GIS estimate of the area of the block: Rigby, 'Pre-1865 Te Raki Crown Purchase Validation Report' (doc A53), app A, p 6; O'Malley, 'Northland Crown Purchases' (doc A6), pp 289–290.

584. O'Malley, 'Northland Crown Purchases' (doc A6), pp 290–291.

585. Johnson to McLean, 12 November 1854 (O'Malley, supporting papers (doc A6(a)), vol 2, pp 587–589); Johnson to McLean 20 November 1854, AJHR, 1861, C-1, p 62 (O'Malley, supporting papers (doc A6(a)), vol 12, p 3890).

586. Johnson to McLean 20 November 1854, AJHR, 1861, C-1, p 62 (O'Malley, supporting papers (doc A6(a)), vol 12, pp 3890); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 290.

Manihera.'[587] O'Malley described this conclusion that the two rangatira were the sole owners of the block as 'little short of fanciful'.[588] Nonetheless, the proposed purchase was promptly approved in January 1855, and Johnson informed the department that the purchase deed had been signed and Te Tirarau had paid £500 for a selection of 1,000 acres.[589] Johnson's report was dated 20 January 1855 and was not published by the Native Land Purchase Department. However, by this point (prior to the signing of the second deed) Johnson clearly considered that customary title had been extinguished. For, as he reported, 'the purchase of the Maunga Tapere Block has been this day completed', including receipt of the £500 from Te Tirarau, 'which he was authorised to make in the said block conformable to the 15[th] clause of Sir George Grey's land regulation'.[590] This report suggests that Te Tirarau and Te Manihera did receive payment for the block when they signed the deed on 19 January 1855, as Te Tirarau paid over the £500 at once for the land he was repurchasing.

Following Johnson's report, Kemp recorded a minute that Johnson was to return to Whāngārei the following Monday with Te Tirarau, who had remained in Auckland seeking assurance that 'His Excellency had given Instructions in reference to the Survey of the Block he has chosen and paid for'.[591] Kemp made no reference to a second deed, and at this point there is no explanation in the documentary record as to why it was considered necessary to produce two purchase deeds for the same block when payment had already been made. Further confusing the picture is the fact that Kemp waited until 9 April 1855 to forward the deed signed on 19 January by Te Tirarau and Te Manihera to the Colonial Secretary, Andrew Sinclair. Kemp recorded that a sum of '£1500 has been paid into the hands of the Native owners, the two principal Chiefs having signed the Deed of Conveyance to the Government'.[592] However, he added that, 'another deed will be furnished by Mr Johnson on his return to Whāngārei from the Bay of Islands to which the signatures of nearly all the sellers will be attached'.[593] It appears that by this point, the second deed had not yet been received in Auckland, and Kemp viewed the first deed signed by Te Tirarau and Te Manihera as the crucial record of the conveyance

587. Johnson to McLean 20 November 1854, AJHR, 1861, C-1, p 62 (O'Malley, supporting papers (doc A6(a)), vol 12, p 3890); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 290.

588. O'Malley, 'Northland Crown Purchases' (doc A6), p 290.

589. McLean to Johnson, 9 January, AJHR, C-1, p 63 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 290); Johnson to Kemp, 20 January 1855 (O'Malley supporting papers (doc A6(a)), vol 2, p 688).

590. Johnson to Kemp, 20 January 1855 (O'Malley supporting papers (doc A6(a)), vol 2, pp 688–689).

591. Kemp, minute [date illegible, possibly 22] January 1855 (O'Malley supporting papers (doc A6(a)), vol 2, p 690).

592. Kemp to Colonial Secretary, 9 April 1855 (O'Malley supporting papers (doc A6(a)), vol 2, p 612); O'Malley, 'Northland Crown Purchases' (doc A6), pp 290–291.

593. Kemp to Colonial Secretary, 9 April 1855 (O'Malley, supporting papers (doc A6(a)), vol 2, pp 612–613).

as he added that 'there exists no impediment to [the land] being surveyed and laid open for selection.'[594]

The two rangatira signed the 31 January deed in Whāngārei as well, which also records the owners' receipt of £1,500.[595] However, it seems highly unlikely that the Crown made a second payment when the further deed was signed, and we received no evidence on whether the purchase monies were distributed by the rangatira. It is unclear why Kemp waited over three months to forward the first deed signed by Te Tirarau and Te Manihera to the Colonial Secretary's office, especially since it was signed in Auckland. There is evidence, however, that officials began to express concerns about the adequacy of the first deed soon after it was received by the Colonial Secretary in April 1855. A few days later, Sinclair sent it on to the Attorney General and asked that he provide an opinion on whether 'the conveyance from the Natives is sufficient.'[596] In te reo Māori, the first deed recorded,

> He pukapuka tuku whenua tenei . . . Ko te whakaae pono tenei o maua o Te Tirarau raua ko te Manihera, no Ngapuhi, kia tukua rawatia tetahi wahi o to matou whenua ki Whangarei kia te Kuini Wikitoria o Engarangi [*sic*], ki nga Kingi, Kuini ranei i muri i a ia ake tonu atu.[597]

This was translated as:

> This deed of sale of land . . . is the true and faithful consent of us 'Te Tirarau' and 'Manihera', Chiefs of the tribe called Ngapuhi, to sell entirely a portion of our land situated at Whangarei to the Queen Victoria of England, to the Kings or Queens who may succeed her for ever and ever.[598]

Frederick Whitaker, the acting Attorney-General, responded with a minute recorded on the first page of Kemp's letter questioning whether the language in the deed expressed 'a consent to sell and not a transfer.'[599] He noted that deeds should use expressions 'of sale from the natives to the effect that the Land is transferred and conveyed by the Deed itself'.[600] The Colonial Secretary recorded a further minute that 'Mr Kemp instructed accordingly', presumably meaning that Whitaker's concerns about the first deed were passed on to Johnson.[601] These criticisms appear to be unrelated to the Johnson's decision, months earlier, to proceed

594. Kemp to Colonial Secretary, 9 April 1855 (O'Malley, supporting papers (doc A6(a)), vol 2, p 613).
595. Innes, 'Northland Crown Purchase Deeds' (doc A4), pp 280, 282.
596. Andrew Sinclair, minute, 12 April 1855 (O'Malley, supporting papers (doc A6(a)), vol 2, p 611).
597. Maungatapere purchase deed, 19 January 1855 (O'Malley, supporting papers (doc A6(a)), vol 2, p 617).
598. Translation of Maungatapere purchase deed, 19 January 1855 (O'Malley, supporting papers (doc A6(a)), vol 2, p 614).
599. Frederick Whitaker, minute, 14 April 1855 (O'Malley, supporting papers (doc A6(a)), vol 2, p 611).
600. Whitaker, minute, 14 April 1855 (O'Malley, supporting papers (doc A6(a)), vol 2, p 611).
601. Sinclair, minute, 16 April 1855 (O'Malley, supporting papers (doc A6(a)), vol 2, p 611).

to Whāngārei to collect further signatures on the second deed, although we note that the second deed, signed by 114 owners, described the conveyance in more developed terms:

> [K]o te whakaaetanga tenei o matou, mo matou ake, mo a matou whanaunga, mo a matou huanga, mo a matou tamariki, a muri i a matou, kia tukua rawatia tetehi wahi o to matou whenua kia te Kuini Wikitoria o Ingarangi, ki nga Kingi, Kuini ranei a muri ake i a ia ake tonu atu, hei utu mo nga pauna moni ko tahi mano, erima rau £1,500, kua riro mai ki o matou nei ringaringa i a Te Honiana (John Grant Johnson) tetehi kai whakarite whenua mo te Kawanatanga o Nui Tireni, i tenei rangi kua oti te tuhi tuhi nei . . . Koia, matou ka whakarerea, ka tukua rawatia, tenei wahi o to matou whenua ki a te Kuini Wikitoria o Ingarangi, awa, roto, waimaori, tarutaru, rakau, kowhatu, pari, me nga ahatanga katoatanga, ki runga, ki raro o taua whenua.

This was translated as:

> This is our consent, for ourselves, for our relations, for our friends, for our children who may survive us, to finally make over to The Queen Victoria of England, and heirs for ever, a portion of our land in consideration of the sum of One Thousand five hundred pounds which we have this day received at the hands of John Grant Johnson Esquire a Commissioner for the purchase of Land on behalf of the Governor of New Zealand . . . Therefore we have taken leave of, and entirely given up this portion of our Land to the Queen Victoria of England, with all its rivers, lakes, waters, grass, trees, rocks, cliffs, and everything, above and below the said land.[602]

It is unclear when the second deed was sent to Auckland, and as Dr O'Malley points out, if it was signed in January then there is no explanation as to why by April it had still not been received.[603] However, it must have been received by the following September, when Johnson wrote again to McLean regarding a reserve along the bank of the Otaika River which had been included in the second deed, but not the first. Neither deed included a plan, but the second deed identified the Motukiwi wahi tapū, and the cultivations on the bank of the Otaika River as 'exempted from the sale'.[604] Johnson informed McLean in September 1855 that it had been Te Tirarau's intention that this part of the block would be included in the purchase lands, but that these reserves were granted as a temporary measure 'to conciliate the Natives living on the cultivations'. However, he was concerned that '[t]he back country to the Otaika river is of such a nature that it is almost useless without this frontage'. Thus, Johnson had arranged to purchase the reserve for

602. Innes, 'Northland Crown Purchase Deeds' (doc A4), p 279.
603. O'Malley, 'Northland Crown Purchases' (doc A6), p 292.
604. Berghan, supporting papers (doc A39(a)), vol 6, pp 3556–3558; Innes, 'Northland Crown Purchase Deeds' (doc A4), p 280.

£100, as part of his negotiations for the Maungakaramea block, which was adjacent to Maungatapere to the south (see section 8.5.2.1.3.3).[605]

The subsequent inclusion of the reserves identified in the second deed for the purchase of an adjacent block is a further irregular development. O'Malley gave evidence that Johnson's September report could be taken to suggest that a second deed was drawn up following objections from owners who had not signed the original deed, and Johnson 'had sought to assuage the disgruntled claimants by giving up their claims to the lands they occupied in return for part of the payment on the adjacent Maungakaramea block for which he was then in negotiation.'[606] O'Malley pointed out that Johnson's September report came seven months after the official purchase deed was ostensibly signed the previous January, and he wrote 'as if this was all news.'[607] It was his opinion that 'the possibility that the official deed was fraudulent cannot be entirely dismissed.'[608]

In our view, the most likely explanation for these irregularities is that the first deed was signed by the two rangatira in Auckland in secret. The decision to sign the deed in Auckland may have been a pre-emptive move by the rangatira following Te Tirarau's meeting with Johnson in November 1854, to get the transaction under way and to secure the right of repurchase for Te Parawhau. After signing the deed and paying over the purchase money, Johnson proceeded to Whāngārei to acquire further signatures with Te Tirarau's support, though it is not clear from the evidence that he intended to produce a separate deed at this point, and subsequent events are far more opaque. It appears that Johnson may have encountered some opposition in Whāngārei, and the other owners sought to exclude their cultivations and wāhi tapu from the purchase area. It is also plausible that Te Tirarau himself may have sought to hold the issue over so that other owners in Whāngārei could have their say as to where the reserves were to be located (after himself 're'purchasing 1,000 acres).

The exchange between Sinclair and Whitaker also suggests that an internal discussion was taking place between officials at this time about the language used in land purchase deeds. As we discussed in section 8.3.2.6, conveyancing language was also a matter of great concern for McLean, and he had first introduced printed deeds in 1854. While Crown purchasers continued to largely rely on handwritten deeds prior to 1857, from 1855 they had begun to introduce new language into these contracts, including references to the resources and features of the block.[609] In this case, the Maungatapere purchase was a particularly complex transaction.

605. Johnson to McLean, 10 September 1855, AJHR, 1861, C-1, p 66 (O'Malley, supporting papers (doc A6(a)), vol 12, p 3892).

606. O'Malley, 'Northland Crown Purchases' (doc A6), p 293.

607. O'Malley, 'Northland Crown Purchases' (doc A6), p 293.

608. O'Malley, 'Northland Crown Purchases' (doc A6), p 292.

609. See Rigby, 'Pre 1865 Te Raki Crown Purchase Validation Report' (doc A53), app A; See the purchase deeds for the Aotea (Lands at Great Barrier Island), Manaia, Ruaranga, Maungatapere, and Ahuroa and Kourawhero blocks: Craig Innes, 'Northland Crown Purchase Deeds, 1840–1865', resource document commissioned by Crown Forestry Rental Trust, 2006 (doc A4), pp 161–164, 261, 267, 271–272, 285–286.

Te Tirarau had paid a large sum to repurchase some 1,000 acres of land and sought assurances that his selection would be surveyed shortly after making the payment. It is surprising then, that the first Maungatapere deed was not brought to the attention of the Colonial Secretary until months after Johnson submitted it in January.

We can only speculate on Johnson's reasons for producing a second deed, but it seems unlikely that he would have made that decision before the first deed was scrutinised by officials in Auckland. We cannot rule out the possibility that doubts surfaced about this important matter before April, and the official correspondence was staged after a decision was made to produce a separate deed using more robust language. That would explain Johnson's decision to produce a second deed on 31 January 1855, but not why that deed had not yet been received in Auckland until months later. Another possibility is that the deed was backdated after Whitaker and Sinclair's exchange in April; or that both records were fraudulent. Ultimately, the documentary record is silent on Johnson's meeting with the other owners; there is no record of when it actually occurred besides the deed itself. However, in our view, the surrounding circumstances cast considerable doubt on the integrity of the official deed, and the Crown's purchasing processes at this time.

We also lack evidence on whether, or how, the purchase monies were distributed among the wider group of owners. However, as we saw in the Ruakaka and Waipu purchases, and as the following examples also illustrate, Johnson widely relied on private side deals to overcome opposition to land purchases in Whāngārei. Despite the limited evidence available, it is clear that by making a payment to Te Tirarau and Te Manihera before establishing general consent for the purchase, the Crown increased the pressure on the other owners to agree to the transaction in order to receive some of the benefits. In this case, Johnson was forced to agree to the owners' demands for additional reserves. However, as noted, he viewed this as only a temporary arrangement and would acquire the Otaika reserve soon afterwards as part of the Maungakaramea purchase (discussed below).

8.5.2.1.3.3 *The Maungakaramea purchase*

The purchase of the Maungakaramea block (17,462 acres) was another occasion on which Johnson relied heavily on Te Tirarau to complete the transaction. He reported in August 1855 that Te Tirarau had agreed 'to give up a sufficient quantity of land' and had recommended 'the payment of a sum of Two thousand seven hundred pounds, for the Maunga Karamea Block'.[610] O'Malley gave evidence that it was only after consulting Te Tirarau that Johnson sought agreement from the other owners of the land.[611] In September, Johnson also reported that the owners wished to repurchase three reserves (1,220 acres) which he considered 'would

610. Johnson to McLean, 24 August 1855, AJHR, 1861, C-1, p 65; O'Malley, 'Northland Crown Purchases' (doc A6), p 296.

611. Johnson to McLean, 24 August 1855, AJHR, 1861, C-1, p 65; O'Malley, 'Northland Crown Purchases' (doc A6), pp 296–297.

not from their intrinsic worth be purchased by Europeans, but are valued by the Natives . . . so that the public rather profit by the transaction than otherwise.'[612]

On 5 October 1855, a deed of conveyance was signed by Te Tirarau and 18 others for the Maungakaramea block; however, O'Malley noted that Johnson had only paid Te Tirarau £2,000 of the promised £2,800 purchase price.[613] The remaining £800 payment (including the £100 for the Otaika reserve) was initially withheld by Kemp; citing 'repeated applications to the Government of several influential persons of the Ngatiwhatua [*sic*] tribe', he stated that payment should be delayed until these leaders had an opportunity to discuss the transaction with Te Tirarau.[614] Despite the clear existence of other claims, a second deed was signed by Te Tirarau and 16 others on 11 December 1855 when the remaining £800 was paid over.[615] O'Malley gave evidence that the papers published by the Native Land Purchase Department 'provide no reference to any authorisation for this second payment'. He argued that, as with the Maungatapere purchase, the records 'were clearly purged of material deemed particularly sensitive prior to publication in 1861'.[616]

Whatever the Crown's reasons for completing the purchase, it sparked tensions between Ngāti Whātua and Ngāpuhi. An account published in *Te Karere* described a large hui at Mangawhare in December 1855 attended by Ngāti Whātua and Te Tirarau and his allies.[617] *Te Karere* reported that Te Tirarau and Parore Te Awha's supporters attended the meeting armed. Ngāti Whātua alleged a loaded gun had been pointed at their chief, Paikea; however the newspaper asserted this was merely an excuse 'to advance their claims to the land'.[618] Following the hui, Ngāti Whātua proceeded to construct a pā in anticipation of an attack by Te Tirarau. In March 1856 T H Smith, acting Native Secretary, informed Governor Gore Browne:

> the purchase by the Government of the Maunga Karamea Block has indirectly led to the revival of a feud between two tribes both claiming the land in that District. At present it is uncertain whether the endeavour of the Government to mediate in the matter will be successful. Should strife begin and loss of life ensue, it is impossible to say to what extent we may become involved.[619]

On 8 May 1856, Johnson reported that the survey of Maungakaramea had been disrupted by members of Te Uri o Hau (a hapū of Ngāti Whātua) who claimed

612. Johnson to McLean, 10 September 1855, AJHR, 1861, C-1, p 66.
613. O'Malley, 'Northland Crown Purchases' (doc A6), p 297.
614. Kemp to Johnson, 1 November 1855, AJHR, 1861, C-1, p 68.
615. O'Malley, 'Northland Crown Purchases' (doc A6), p 297; Innes, 'Northland Crown Purchase Deeds' (doc A4), pp 271–273.
616. O'Malley, 'Northland Crown Purchases' (doc A6), p 297; land purchase commissioner's reports from this period were presented to Parliament at the Governor's request in 1861: 'Reports of the Land Purchase Department Relative to the Exinguishment of Native Title', 1861, AJHR, 1861, C-1.
617. 'Kaipara', *Maori Messenger/Te Karere Maori*, 31 May 1856, pp 9–12; O'Malley, 'Northland Crown Purchases' (doc A6), p 298.
618. 'Kaipara', *Maori Messenger/Te Karere Maori*, 31 May 1856, pp 9–12; O'Malley, 'Northland Crown Purchases' (doc A6), p 298.
619. O'Malley, 'Northland Crown Purchases' (doc A6), p 298.

ownership interests in the block.[620] In an attempt to exculpate himself, Johnson indicated that Te Uri o Hau's opposition at Maungakaramea spoke to much deeper inter-tribal conflict; 'the present state of the block has arisen from a native quarrel over which I have no control, originating about land in another part of the District'.[621] At the end of May *Te Karere* recorded Fenton as having successfully convinced parties to agree to an arbitration meeting in Auckland with McLean.[622]

The promised mediation finally occurred in late 1856, when McLean sought to 'strike a boundary between the tribes'.[623] Such a boundary would give Te Tirarau rights to sell land north of the Tauraroa River, and Paikea rights to sell south of it. Paul Thomas describes this solution as both simplistic and unrealistic, however, there is little evidence of how rangatira interpreted it.[624] In November 1856, McLean notified Johnson that Te Uri o Hau had disposed of their claims to the land located between the Turaroa and Manganui Rivers, which extended into the back boundary of the Maungakaramea block.[625] However, they declined to accept an additional payment of £100 that McLean had offered them for their interests in the disputed land in the Maungakaramea block 'to remove all future difficulties in connection with that transaction'.[626] He stated:

> [it] appeared to me that they [Te Uri o Hau] felt apprehensive that Tirarau would make it a cause of quarrel with them if they accepted any payment on land sold by him and bordering so close on the Tangihua range, therefore it is perhaps as well that the matter should stand over, leaving Tirarau to adjust it himself.[627]

McLean's solution was to simplify the disputed customary rights of the groups involved, and it was clearly motivated by a desire to facilitate further purchasing in the district. Over the following years, the Crown's failure to adjust its approach to purchasing and continued reliance on Te Tirarau increasingly exacerbated tensions in the area until armed conflict would finally break out in 1862 (see section 8.5.2.1.3.5).

8.5.2.1.3.4 *The Kaiwa purchase*

In the case of the acquisition of the 1,232-acre Kaiwa block, the purchase agreement was signed by Te Tirarau in November 1857 following an earlier failed attempt to survey it in March the same year.[628] The previous April, Johnson reported that the

620. Johnson to McLean, 8 May 1856, AJHR, 1861, C-1, p 73.
621. Johnson to McLean, 8 May 1856, AJHR, 1861, C-1, p 73.
622. 'Kaipara', *Maori Messenger/Te Karere Maori*, 31 May 1856, pp 10–11; Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), pp 166–169.
623. Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), p 168.
624. Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), pp 168–169.
625. Johnson to McLean, 3 November 1856, AJHR, 1861, C-1, p 74.
626. Johnson to McLean, 3 November 1856, AJHR, 1861, C-1, p 74.
627. Johnson to McLean, 3 November 1856, AJHR, 1861, C-1, pp 74–75.
628. Berghan, 'Northland Block Research Narratives' (doc A39(b)), pp 30, 34; Rigby, 'Pre-1865 Te Raki Crown Purchase Validation Report' (doc A53), app A, p 5.

survey had been obstructed by Hamiona Te Hakiro, who had removed the survey pegs and ordered that the survey party 'quit the ground'.[629] Johnson had considered that Te Hakiro had 'a *bonâ fide* claim' in the block, and he could not 'force him to sell his claim against his consent'.[630] The survey was thus discontinued until May 1857, when Johnson reported that he had overcome opposition to the purchase 'by dealing with it in separate portions'.[631] He observed that Hori Kingi Tahua and Te Tirarau had offered the block for purchase, and that he was in 'no doubt of being able to obtain the rest of the block from the Natives of Ngunguru and Pataua, who are now holding back, lest King [*sic*: Tahua] and Tirarau should appropriate too large a share to themselves'.[632]

The Government's original offer of £150 was rejected by Tahua, who requested a purchase price of £300. This news reached McLean privately through Te Tirarau, who was apparently in direct contact with him and had demanded that a further £50 would be required to complete the purchase. McLean wrote to Johnson in September 1857, questioning why the failure of his negotiations had not been reported earlier and to instruct his land purchase commissioner to 'confer with Tirarau and have a conveyance of land in question made without further delay'.[633]

Johnson responded days later and provided an account of the customary interests in the block, observing that the claimants included '[Wiremu Eruera] Pohe's tribe', who owned a large block at Parau Bay, and 'an old Chief named Horuona who resides near it'. Tahua only had a claim to 200 acres on the block, but he had gained the support of the other owners for an extension of the boundaries to an estimated area of 1,372 acres on the basis that they would receive a portion of the payment. Johnson recorded that the other claimants did 'not belong to the tribes of Tirarau and Hori King [*sic*] Tahua', and had warned him that 'if these conditions are not complied with, they will resist the occupation of the land'.[634]

Johnson considered that these conditions could be fulfilled by taking care to obtain the signatures of all the owners concerned before payment was made, 'by which means Tahua will be compelled to share the payment with them'. However, Johnson explained that he had not been aware that 'Tirarau had been moving in the matter', and he considered that his 'having made up his mind to demand £200 changed the state of affairs'.[635] The land purchase commissioner wrote again to McLean on 5 October 1857, this time privately, informing him that Te Tirarau sought immediate payment for the block without any restrictions on himself. The rest of the claimants, including Haimona Te Hakiro, wished to divide the payment amongst the owners 'in the ordinary way'. However, Johnson felt that the opposition to Te Tirarau was 'not strong enough to withstand him', and if paid the full

629. Johnson to McLean, 7 April 1857, AJHR, 1861, C-1, p76.
630. Johnson to McLean, 7 April 1857, AJHR, 1861, C-1, p76.
631. Johnson to McLean, 26 May 1857, AJHR, 1861, C-1, p78.
632. Johnson to McLean, 26 May 1857, AJHR, 1861, C-1, p78.
633. McLean to Johnson, 25 September 1857, AJHR, 1861, C-1, p79.
634. Johnson to McLean, 30 September 1857, AJHR, C-1, p79.
635. Johnson to McLean, 30 September 1857, AJHR, C-1, p79 (Berghan, supporting papers (doc A39(m)), vol 6, p3399).

purchase price, then 'there will be an end of the matter'.[636] He therefore sought authority from McLean to pay Te Tirarau for the lands 'waiving all former precedent – and the rights of the natives'.[637] However, after criticising Johnson for his failure to progress negotiations, McLean went silent and did not respond with official instructions, preferring to work behind the scenes, despite receiving a request from a district commissioner facing a complex situation.

Failing to receive instructions, one month later Johnson once more wrote privately to McLean on 19 November informing him that he had paid Te Tirarau the purchase monies on 6 November after 'a long conference with that Chief'. Te Tirarau had promised Johnson 'to procure the signatures of the other claimants to the Deed, and pay them a share of the money for the land'. In the meantime, Johnson forwarded a purchase deed signed only by Te Tirarau.[638] He noted his discomfort with taking this step not having received McLean's official approval. However, he was concerned that Te Tirarau was 'so impatient of any delay', and it was agreed that the purchase monies would remain untouched in Te Tirarau's possession until McLean approved the matter.[639] As O'Malley observed, the land purchase department's official record provides no further details as to Johnson's decision to proceed with completing the purchase with Te Tirarau alone.[640] However, a further private letter from Johnson to McLean dated 16 November suggests that Johnson was concerned that denying Te Tirarau might have a negative impact on his future purchase operations. Johnson gave the following account:

> Tirarau came over to see me personally last week on the subject – and insisted upon having the money – he was very civil and friendly – for the purpose of attaining his object, and I saw nevertheless that if I withheld it that a rupture of friendly relations between myself and him would be caused which might have very baneful effect in any future operations which I may be engaged in . . . I judged it to be less productive of injurious consequences to pay the money to Tirarau, than it would be to withhold, as he threatened either to tapu the place for ever, or seize upon it and the adjoining country, both of which courses would only have further complicated the question, and I accordingly paid Tirarau on behalf of all parties concerned and took a conveyance from him of the Land.[641]

In his official report on the purchase, Johnson noted that he had paid Te Tirarau alone 'on the recommendation of the Chief Commissioner, who has the

636. Johnson to McLean, 5 October 1857 (O'Malley, supporting papers (doc A6(a)), vol 10, pp 3065, 3067); O'Malley, 'Northland Crown Purchases' (doc A6), pp 309–310.
637. Johnson to McLean, 5 October 1857 (O'Malley, supporting papers (doc A6(a)), vol 10, p 3068); O'Malley, 'Northland Crown Purchases' (doc A6), p 310.
638. Johnson to McLean, 19 November 1857, AJHR, 1861, C-1, p 80.
639. Johnson to McLean, 19 November 1857, AJHR, 1861, C-1, p 80.
640. O'Malley, 'Northland Crown Purchases' (doc A6), p 309.
641. Johnson to McLean, 16 November 1857 (O'Malley, supporting papers (doc, A6(a)) vol 10, pp 3077–3079); O'Malley, 'Northland Crown Purchases' (doc A6), p 311.

confidence in the integrity of that Chief'.[642] O'Malley suggested that the discrepancy between this report and his prior letter indicated that McLean had failed to issue instructions on this point, but 'had a decisive say behind the scenes in approving the deal done'.[643] The Chief Native Land Purchase Commissioner evidently refrained from issuing Johnson official directions that were in conflict with his general instructions.

Another telling feature of Johnson's report was the disclosure that had he not agreed to pay Te Tirarau, it would have endangered the sale of an adjacent block of 16,000 acres, the survey of which he reported as completed and which he feared might be vetoed along with 'all the land in the district'.[644] Dr O'Malley described the transaction as 'one of the most dishonest Crown purchases conducted anywhere in New Zealand in the pre-1865 period'.[645]

In our view, there were clear flaws in the purchase of the Kaiwa block. The Crown was aware of the extent of claims to the land, and Johnson had taken steps to establish an arrangement where the various owners would consent to the sale. However, as Dr O'Malley put it, McLean deliberately overrode the interests of the other claimants to the block, confirming the purchase of Kaiwa with Te Tirarau alone, and 'conducting a truly contemptible retrospective "investigation" into the claims of those previously acknowledged as owners of the block in order to justify their exclusion from the deal'.[646] After refusing the original purchase price of £150, Wiremu Eruera Pohe, Hori Kingi Tahua, and Haimona Te Hakiro were excluded from any opportunity for input into the transaction. In March 1858, Johnson noted that no distribution of the purchase monies had been made to the other owners, and that 'Tirarau has nethier told me or them what he intends to do with it'.[647] Te Hakiro appears to have written to Johnson seeking a portion of the purchase moneis, though there is no evidence of the land purchase commissioner taking any steps to ensure that payments were made. By the following May, Johnson reported that Pohe also still sought payment from Te Tirarau, and though Johnson had previously recognised his claim to a portion of the block, he now dismissed it as 'very vague and uncertain'.[648] In the end, Johnson gave up on acquiring the signatures of the other owners, and abandoned any responsibility for recording their consent to the purchase. After he convinced Pohe to 'consent to the occupation of the Block by the Europeans', despite not yet receiving payment, he considered the matter of the purchase monies as 'entirely a Native one between themselves'.[649]

642. Johnson to McLean, 22 March 1858, AJHR, 1861, C-1, p 86 (O'Malley, supporting papers (doc A6(a)), vol 12, p 3902).
643. O'Malley, 'Northland Crown Purchases' (doc A6), p 313.
644. Johnson to McLean, 22 March 1858, AJHR, 1861, C-1, p 86 (O'Malley, supporting papers (doc A6(a)), vol 12, p 3902).
645. O'Malley, 'Northland Crown Purchases' (doc A6), p 316.
646. O'Malley, 'Northland Crown Purchases' (doc A6), p 472.
647. Johnson to McLean, 22 March 1858, AJHR, C-1, p 86.
648. Johnson to McLean, 17 May 1858, AJHR, C-1, p 86; Johnson to McLean, 30 September 1857, AJHR, C-1, p 79.
649. Johnson to McLean, 29 May 1858, AJHR, C-1, p 87.

Te Tirarau's approach to the negotiations appears to have been that of an intermediary, who acted to finalise the agreement in partnership with McLean. It remains unclear whether he had the support of some of the other owners in taking this step, but clearly the Crown had not established general consent for the purchase or the price; rather, it used Te Tirarau's authority in the district and his desire to strengthen his relationship with the Government as the basis for its unjustifiable decision to exclude the other owners from the final purchase agreement.

8.5.2.1.3.5 *Crown purchasing and the Mangakāhia conflict*

Crown purchasing was the catalyst for armed conflict between Te Tirarau of Te Parawhau and Matiu Te Aranui of Te Uri o Hau hapū of Ngāti Whātua and Te Māhurehure at Waitomotomo in May 1862.[650] Throughout the 1850s and early 1860s, Crown purchase activity in Whāngārei and the river valleys of Wairoa, and Mangākahia had given rise to a number of land disputes between hapū of Ngāpuhi, Ngāti Whātua and their relations, Te Uri o Hau. Armstrong and Subasic observed that 'land disputes were a feature of the history of the region, and continued through the 1850's as the land, and the valuable timber growing upon it, became an increased focus of Crown and settler attentions'.[651] Paul Thomas described the northern Wairoa as a 'border zone' between these groups, who had 'a long history of intermarriage and warfare, and a multi-levelled and fluid system of tribal affiliations'.[652] Te Parawhau had been able to expand their territorial intersts west into Kaipara and Te Roroa territories following the defeat of Ngāti Whātua and Te Uri o Hau at Te Ika a Ranganui in 1825 (we discuss these events and the tribal landscape of this area in chapter 3, see sections 3.3.4.3, 3.3.7.3, and 3.4.1).[653] However, when Te Uri o Hau and Ngāti Whātau returned to Kaipara from their respective exiles, Te Parawhau rangatira Te Tirarau found himself increasingly in competition with his relative Paikea Te Hekeua over authority and territorial interests in the area.[654]

The Crown was aware of these tensions before it set out to begin purchasing in the district. In his initial instructions to Johnson, McLean directed him 'to take an early opportunity to visit the Kaipara district to arrange a dispute between the Ngapuhi and Uriohau [*sic*]'.[655] Crown officials broadly viewed the purchase of Māori land as the best means of resolving inter-tribal disputes, as well as assimilating Māori into the colonial land and legal systems. They also failed to recognise Te

650. Armstrong and Subasic, 'Northland Land and Politics' (doc A12), p 266; closing submissions for Wai 990 (#3.3.274(a)), p 12; closing submissions for Wai 2059 (#3.3.267), p 8.

651. Armstrong and Subasic, 'Northland Land and Politics' (doc A12), p 266.

652. Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), p 16.

653. Mangakahia Taiwhenua claimants, opening statement (doc E54), p 9; Patrick Hilton (doc I1), p 3.

654. Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), p 20; Henare, Petrie, and Puckey, 'He Whenua Rangatira' (doc A37), p 579.

655. McLean to Johnson, 18 May 1854, AJHR, 1861, C-1, p 56. This dispute concerned the Sydney merchant Andrew O'Brien's pre-1840 transaction on the Whakahara block in the Kaipara inquiry district: Waitangi Tribunal, *The Kaipara Report*, Wai 674, pp 101–105.

Raki Māori understandings and expectations of land transactions.[656] As Thomas observed, the Crown's continued reliance on land purchasing as a means of resolving inter-tribal tensions 'was predicated on an assumption that the signing of a land deed extinguished all Maori interests in that land'.[657] However, Te Raki Māori did not widely accept that land transactions had this effect, as McLean himself had acknowledged in 1856. Land transactions instead represented stronger relationships with the Crown and settlers that would bring benefits and enhance the mana of rangatira and their hapū (see section 8.3.2.6). As Thomas put it, 'local tribes viewed them as a method of gaining rather than losing power'.[658] In this way, purchases were thus a further arena for inter-tribal competition, and if carried out without sufficient concern for common consent of all owners, they had the potential to spark or worsen inter-tribal tensions rather than resolving them.

Te Uri o Hau claimed interest in a number of Whāngārei blocks including the Maungakaramea, Maungatapere, Ruakaka and Waipu blocks.[659] Thomas observed that 'the Crown's perceived favouring of Tirarau caused enormous disquiet among the chief's Maori rivals'.[660] As we have discussed, the Maungakaramea purchase had led to an armed confrontation in December 1855 between Te Tirarau and members of Ngāti Whātua and Te Uri o Hau, and disruptions to the survey of the block the following year. In October 1856, McLean sought a mediated solution that would provide a pathway for further purchasing by striking a boundary line between Te Tirarau, and Paikea's lands on either side of Tauraroa River.[661] However, it was clear to McLean that his boundary agreement had done little to resolve the core of the dispute. Only a few weeks later he wrote to Johnson directing him to seek to prevent Te Tirarau from bringing an armed party to harvest timber in a forest near residence of his ally Parore Te Āwha, and within 'the territory now in dispute between him and Paikea'.[662] Johnson responded that 'it has for many years been the practice of the Northern tribes to resort to the Wairoa river for the purposes of squaring spars, and collecting kauri gum'. In a tacit acknowledgment of the continuation of the overlapping resource rights and interests held by Ngāpuhi and Ngāti Whātau rangatira in the area, he suggested that the task of persuading Te Tirarau to relinquish access to the timber resources was probably beyond him.[663]

With matters unresolved, McLean visited Walton's farm in Maungatapere in February 1857, where he treated with Te Tirarau and Parore Te Āwha, and

656. Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), pp 156–157, 160.
657. Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), p 157.
658. Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), p 157.
659. O'Malley 'Northland Crown Purchases' (doc A6), p 299; Armstrong and Subasic, 'Northland Land and Politics' (doc A12), pp 15–16; In his research report produced for the Kaipara district inquiry, Paul Thomas also cited the Crown's attempts to purchase the Whakahara and Tokatoka blocks as contributing to tensions between Te Tirarau and Ngāti Whātua: Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), pp 159–161.
660. Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), pp 159, 171.
661. Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), p 168.
662. McLean to Johnson, 3 November 1856, AJHR, 1861, C-1, p 74.
663. Johnson to McLean, 5 December 1861 [sic: 1856], AJHR, 1861, C-1, p 75.

discussed possible land transactions (including the Tangihua block in the Kaipara district), and the conflict with Ngāti Whātua and Te Uri o Hau. This visit came one month after Matiu Te Aranui had written to the Governor to call his attention to Te Tirarau's plans to sell land to McLean. The land, Te Aranui wrote, did not belong to Tirarau, but to himself and his people. He would not consent to any survey, for it would constitute an 'unlawful taking'of the land.[664] Thomas noted that McLean only issued an invitation to Paikea to meet with him and the other rangatira after journeying with Te Tirarau to the Mangawhare residence of the merchant Hastings Atkins. Paikea was outraged at this slight and declined to attend, interpreting McLean's actions as further evidence of the Government favouring his rivals.[665] Following McLean's visit, William White, a trader with close connections to the Kaipara tribes, wrote to the Governor to convey his great sense of concern about the effect of the Government's actions:

> That the Ngatiewhatua [*sic*] tribes generally, view with the most serious alarm and regret, the extraordinary proceedings of the Land Purchase Department, and point with especial emphasis and significance to Mr Commissioner McLean's late visit to the Kaipara as the climax of a series of transactions which has hastened matters to the very brink of a crisis, which the Ngatiwhatua have most anxiously laboured to avoid.[666]

Thomas observed that White's pleas were met with silence from the Government, despite receiving further reports that 'Maori throughout Kaipara and Wairoa continued their acquisition of firearms and ammunition.'[667] A large hui was held in March 1858 to settle ongoing conflicts about tribal boundaries.[668] Henry Kemp (the Bay of Islands District Land Commissioner) and a number of native assessors attended this meeting and the settler press reported both Matiu Te Aranui and Te Tirarau's ally, Hori Kingi Tahua, had arrived with groups of armed men.[669] It appears that neither Te Tirarau nor Paikea attended. The meeting concluded with the different parties firing their guns as they departed, and Thomas concluded that there did not appear to be a consensus reached on tribal boundaries in Mangakāhia.[670] By late 1858, John Rogan, who had by then replaced Johnson as land purchase commissioner in Whāngārei described his discussions with Māori in the district as like entering the 'midst of the fire.'[671]

664. Tony Walzl, 'Te Tai Tokerau District Māori Council Mana Whenua Report', 2012 (doc E34), p 283.
665. Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), p 171.
666. Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), p 172.
667. Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), pp 173–174.
668. The purchase blocks included Tangihua and Maungaru (in the Kaipara district): Daamen, Rigby, Hamer, *Auckland*, p 181.
669. New Zealaander, 12 May 1858, p 3 (cited in Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), p 175).
670. Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), p 176.
671. Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), p 176.

In an attempt to diffuse tensions, Governor Gore Browne raised the possibility of further mediation in early 1859. Each party indicated their support; however, for reasons that are unclear, the meeting never took place.[672] In 1860, Ngāti Whātua and Ngāpuhi convened their own 'great meeting' in Te Kopuru, highlighting a mutual desire to resolve the disputes. The importance of the meeting was emphasised by Ngāti Whātua's refusal to leave the meeting at Government surveyor, S. Percy Smith's request to defend Auckland against an anticpated attack from tribes of Waikato.[673] Percy Smith remained in attendance at the meeting, reporting that after six days of 'old formality' and 'ceremony' some degree of 'peace was made'.[674]

However, this fragile peace was shortly threatened again as Rogan renewed purchase negotiations in Kaipara in 1860.[675] By early 1861 Te Uri o Hau had renewed their protests that the Crown continued to negotiate purchases with Te Tirarau at Mangakāhia and Wairoa. In February 1861, Matikikuha of Te Uri o Hau wrote to Gore Browne warning that 'the word spoken by us was that te Kopuru be the end. Trouble has now arisen, and it will be very bad'.[676] For their part, Te Tirarau, Parore Te Āwha and Hori Kingi Tahua complained to the Government that Matiu Te Aranui was determined to survey their lands and was preparing for a large scale confrontation. They wrote to the Gore Browne stating 'we are not willing to have the chain dragged over the living and the dead. For this place belonged to our ancestors, descended to our fathers and has come down even to us who now live upon it'.[677] By the end of 1861, Rogan was forced to concede that his purchase negotiations had failed to resolve the dispute, and 'the Wairoa question is now more complicated that heretofore'.[678]

In early 1862, rumours once again spread that the Crown had entered into negotiations with Te Tirarau for land in the disputed Mangakāhia area.[679] Bay of Islands Civil Commissioner George Clarke senior dispatched Resident Magistrate Henry Williams to meet with Matiu Te Aranui to assure him that the Crown had no intention to purchase the disputed land. However, Thomas observed that these appeals would hardly have been credible as '[j]ust the year before, Rogan had been attempting to purchase disputed land in the area'.[680] Apparently in response, Te Aranui had threatened to begin to survey the land at Mangakāhia, which Te Tirarau viewed as a provocation.[681] By April 1862, Te Tirarau and Matiu Te Aranui

672. Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), p 177.
673. Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), p 178.
674. Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), p 178.
675. Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), pp 179–180; Daamen, Hamer, and Rigby, *Auckland*, p 181.
676. Matikikuha to Gore Browne, 19 February 1861 (cited in Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), p 179); Daamen, Hamer, and Rigby, *Auckland*, p 181.
677. Hori Kingi Tahua, Parore, Tirarau, and Hamiora Marupiopio to Gore Brown, 4 April (Walzl, supporting papers (doc E34(a), vol 1), pp 579–580.
678. Rogan to McLean, 31 October 1861 (cited in Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), p 181).
679. Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), p 182.
680. Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), pp 182–183.
681. Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), p 185.

had constructed pā and assembled their forces near Waitomotomo. Serious fighting broke out on 16 May, following several days of skirmishes. Historian Tony Walzl gave evidence that on at least three men on Te Aranui's side were killed and others wounded on 16 May. Two days later, several women on Te Tirarau's side had taken up a canon and exchanged small arms fire, but no one was injured.[682] The reports on the numbers of people killed during this fighting vary.[683]

The conflict continued until June, when a ceasefire was reached. The government-mouthpiece newspaper *Maori Messenger/Te Karere Maori* emphasised Governor Grey's role in securing the peace. However, Thomas argued that 'it would seem that the essential decision to stop the fighting had been agreed to before he had even arrived'.[684] Further arbitration between the rangatira was held in Auckland in early 1863, presided over by F D Bell. Matiu Te Aranui had fallen critically ill and died the previous December, and his case was taken over by the Hokianga rangatira Te Hira Ngaporo. During the mediation Hare Hikairo, who gave evidence in support of Te Hira Ngaporo, set out the core of Matiu Te Aranui's grievance:

> Now this is the real reason why that blood flowed. Matiu and his people were living at Mangakahia – when he heard that Maungatapere had been sold, that Tangihua had been sold, that Maungaru had been sold . . . Matiu thought . . . [that] he would lose the remaining portions of his land which still remained to him; he had never received anything, that was the reason that blood was spilt.[685]

In the end, the arbitration failed to reach a settlement, and it fell to Governor Grey to make a decision. Grey determined that Te Tirarau had an 'overall' right to the land, but if he sold it Matiu Te Aranui's descendants should receive a share of the payment; the Government would determine the relative payments in the event of a dispute over further purchases. Researchers David Armstrong and Evald Subasic observed that

> Grey's decision appears to have been based on his understanding that in Maori customary terms, long and undisturbed possession conferred a good title. But land sales were an innovation unknown to Maori custom. Hence, according to Grey, when land was sold the original owners were entitled to a share.[686]

While this solution was celebrated in the press, Thomas argued that it had the hallmarks of a politically motivated decision designed to facilitate future

682. Walzl, transcript 4.1.11, Korokota Marae, p 166.
683. Armstrong and Subasic, 'Northland Land and Politics' (doc A12), pp 266–267, 269; Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), pp 185–186.
684. Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), pp 186–187; see also Untitled, *Maori Messenger/Te Karere Maori*, 1 July 1862, pp 1–2; Armstrong and Subasic, 'Northland Land and Politics' (doc A12), p 273.
685. 'Arbitration Court', *Te Karere*, 30 March 1863, p 5.
686. Armstrong and Subasic, 'Northland Land and Politics' (doc A12), pp 275–276.

purchases.[687] Armstrong and Subasic similarly thought that Grey's decision 'certainly had the potential to advance settler interests, and that appears to be its underlying *raison d'etre*'.[688] In their view, it was not surprising that 'tensions continued to simmer into the 1870s and there were a number of disputes, complaints and reinterpretations of Grey's award'.[689] Ultimately, this drawn out conflict did not come to an end untill August 1880 during the Native Land Court title determination of the Waitomotomo block where Te Tirarau withdrew his claims to the land, stating,

> Listen to me. My word to you is this. Leave me out of the title. I give all my share to you both (both sides), only let there be no fighting. I am very old, and shall soon die. Let me be sure that when I am dead there shall be peace amongst the young men. Take the land. Let my friend Rogan settle it this day.[690]

Armstrong and Subasic concluded that ultimately it was not Grey's arbitration or the Native Land Court which resolved the underlying source of the tensions between the two groups. Rather, 'peace seems to have been maintained by old Tirarau himself in a selfless gesture which no doubt served to enhance his mana and his standing as a great rangatira.'[691]

8.5.2.1.4 Sketch plans and surveys of boundaries and reserves

The claimants argued that many of the blocks the Crown acquired in Te Raki had uncertain boundaries, and that survey or other plans were often not prepared prior to the completion of those transactions. In such circumstances, they contended, Te Raki Māori consent to alienations could scarcely be considered meaningful.[692] Crown counsel took the opposite view, noting that in December 1856, Johnson had reported that Te Raki Māori were 'much pleased with the system of surveying the land previous to sale'. Counsel also submitted that from 1856 onwards 'there does not appear to have been a general failure to ensure surveys were completed before a deed was signed'.[693] Finally, Crown counsel asserted that he was unaware of evidence that Te Raki Māori were prejudiced in any specific case because of a failure to ensure completion of a survey prior to a deed being signed.[694]

From early on, McLean was certainly aware of the need to undertake surveys as part of the purchasing process. In October 1854, he recorded:

687. Thomas, 'The Crown and Maori in the Northern Wairoa' (doc E40), p 312.
688. Armstrong and Subasic, 'Northland Land and Politics' (doc A12), p 277.
689. Armstrong and Subasic, 'Northland Land and Politics' (doc A12), p 279.
690. Armstrong and Subasic, 'Northland Land and Politics' (doc A12), pp 279–280.
691. Armstrong and Subasic, 'Northland Land and Politics' (doc A12), p 280.
692. See also Ward, *National Overview*, vol 2, p 137.
693. Claimant closing submissions (#3.3.404), p 54; O'Malley, 'Northland Crown Purchases' (doc A6), pp 457–458.
694. Crown closing submissions (#3.3.404), p 54.

> As a general rule when the Natives agree to sell a Block of land the first step is to have its external Boundaries perambulated and surveyed, the Native Sellers themselves pointing out the boundaries of the land they wish to dispose of, the reserves should then be accurately marked off and surveyed, always in the presence of the Natives concerned.[695]

However, McLean's concern for the importance of surveys when purchasing Māori land was not shared by the Surveyor-General, Charles Ligar. As we have discussed, Ligar recorded that it was sufficient for the Crown purchase agent to walk around the boundaries, estimate the area, and supply sketches with deeds. The object, Ligar noted, 'was to acquire one block after another', rendering unnecessary 'a distinct survey of each . . . as it would have only shown the manner in which the whole district had been acquired'.[696] In other words, the Crown expected that it would acquire whole districts, obviating the need to survey constituent blocks, even though large districts almost certainly would have included lands owned by several hapū, and surveys were intended, in part, to ascertain whether there was opposition on the ground.

Therefore, prior to 1856, surveys of purchased blocks were to be conducted after deeds had been signed. However, the absence of pre-purchase surveys created substantial challenges when the lands were to be on-sold to settlers by the Auckland Waste Lands Board. In September 1855, surveyor C P O'Rafferty pointed out that the sketch plan attached to the purchase deed for the Ruakaka block was 'valueless to either the seller or buyer of any part of the block'.[697] Similarly, he noted that the Ahuroa and Kourawhero blocks were represented on a sketch with 'four ruled lines enclosing the words "not yet explored". This is all I know, or can learn here about it.'[698] After receiving further appeals from Charles Taylor, the Chief Commissioner of Waste Lands, Ligar agreed that the Government would undertake to satisfactorily define the boundaries of the blocks purchased to date, stating that 'although it will entail a heavy expense, I do not see how it can be avoided'.[699] As O'Malley noted, 'while it was considered perfectly acceptable to purchase lands from Māori without surveys, it was unthinkable that they should be sold to settlers on the same basis'.[700]

In his evidence to the 1856 Board of Inquiry on Native Affairs, McLean highlighted the delays in completing purchases caused by deficiencies in survey. He

695. McLean, memorandum, 30 October 1854 (O'Malley, supporting papers (doc A6(a)), vol 2, pp 603–604).

696. Ligar, Memorandum, September 1855 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 454.).

697. C P O'Rafferty, Memorandum, September 1855 (O'Malley, supporting papers (doc A6(a)), vol 2, p 716).

698. O'Rafferty, Memorandum, September 1855 (O'Malley, supporting papers (doc A6(a)), vol 2, p 717).

699. Ligar, Memorandum, September 1855 (O'Malley, supporting papers (doc A6(a)), vol 2, pp 721–722).

700. O'Malley, 'Northland Crown Purchases' (doc A6), p 454.

noted his directions 'that the external boundaries of each block should be perambulated in the presence of the native owners; [and] that the reserves for their own use should be carefully surveyed'. However, he remarked, '[a]s yet no provision has been made for effecting these surveys, although they form an indispensable part of the purchasing operations'.[701] O'Malley gave evidence that McLean's 1856 appeals finally secured him the funding for two surveyors to support land purchasing in Te Raki.[702] In September 1856, McLean advised Kemp and Johnson that surveys would now be conducted prior to purchase and plans attached to deeds of sale.[703] A few weeks later, he reminded Kemp that 'all boundaries should be distinctly defined previous to any payment being made to the Natives'.[704]

Kemp appears to have found the direction irksome. In May 1858, he proposed what he termed 'the simplest form of survey'; that is, fixing the principal points and estimating the area of land involved which, he suggested, 'would be effectual and binding upon the Natives where purchases become connected'.[705] McLean rejected the idea, insisting that the Government was 'most anxious to adopt the most economical system; provided always that such surveys are so clear and distinct that no question can afterwards arise respecting the boundaries'. All transactions with Māori, he informed Kemp,

> should be so clear, distinct, and well understood, that no possibility of a question arising in consequence of insufficient surveys should ever exist. The subsequent evils resulting from undefined boundaries are often much greater than the first expense of an accurate survey.[706]

In May 1861, McLean found it necessary to remind his district land purchase commissioners that all reserves 'should be defined and marked off before the final payment is made for the block of land of which they may form a part', and that before any block was handed over to the commissioner of Crown lands of the province within which it was located, a plan of the block 'with all the Reserves specified, duly certified by you or a Surveyor authorised by you, should be furnished to the Provincial Land Office'.[707]

Whether McLean adhered to his insistence that the boundaries of a proposed purchase should be walked by all involved, and whether all district land purchase commissioners complied, is less clear. Dr Rigby's list of pre-1865 Te Raki Crown purchases identified the deeds that were accompanied by a plan or a sketch plan. Of 101 purchases, 46 were listed as containing plans, and 26 as containing

701. McLean to Private Secretary, 4 June 1856, BPP, vol 10, p 580 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 456).
702. O'Malley, 'Northland Crown Purchases' (doc A6), p 456.
703. McLean to Kemp, 8 September 1856, AJHR, 1861, C-1, p 11; and McLean to Johnson, 9 September 1856, AJHR, 1861, C-1, p 73.
704. McLean to Kemp, 24 October 1856, AJHR, 1861, C-1, p 14.
705. Kemp to McLean, 29 May 1858, AJHR, 1861, C-1, p 26.
706. McLean to Kemp, 28 June 1858, AJHR, 1861, C-1, p 28.
707. McLean to Land Purchase Commissioners, 3 May 1861, AJHR, 1861, C-8, p 2.

sketch plans, while 29 were listed as having none.[708] Of those 29 deeds listed as having neither plans nor sketch plans, 11 involved transactions completed from 1857 onwards. This evidence does not entirely support the Crown's contention that, after 1856, surveys were generally completed prior to deeds being signed.

As we have noted, Government officials considered that the sketch plans produced before 1856 were highly questionable. Evidently, these issues remained unresolved in some cases, particularly if the purchased lands were not to be immediately on-sold to settlers. In his report on Waimate North Māori lands, historian Craig Innes noted that the February 1856 Wiroa and Omawhake purchase deed included a sketch plan that specifically included the 'proposed location of a township', which could have had a substantial and positive economic impact. He also mentioned the use of a 'semi circle of stones' to specify the location of a wāhi tapu site on the land being purchased, and this was included on the sketch plan. However, according to Innes, the plan was so roughly drawn that 'it would have been impossible to directly relate the sketch to the extent of the purchase on the ground'. As a result, it was later necessary to rely on the written descriptions of the boundaries as evidence of 'the extent of the purchase and therefore the area of land later available for determination by the Native Land Court'.[709]

Furthermore, there is evidence that the plans produced after 1856 remained flawed records of the lands that had been transacted. In the case of the Matawherohia block in Whangaroa, the purchase deed referred to a sketch plan although no such plan was attached.[710] In October 1858, Kemp reported that the block was likely to be purchased for £250 and estimated its area to be 8,000 acres. By January 1859, the block had been surveyed, and the actual area ascertained was 3,200 acres. This discrepancy was pointed out by the office of the Chief Native Land Purchase Commissioner, and it was further noted that this had 'the effect of nearly trebling the price per acre', as compared with Kemp's original estimate.[711] O'Malley notes that Kemp's response was not included in the correspondence published by the Land Purchase Department, but 'it was evidently deemed satisfactory, since in June 1859 the purchase of the block at the price of £250 was completed'.[712]

Overall, McLean's instructions regarding surveys notwithstanding, a certain amount of laxity crept in. This was notable in some of Kemp's purchases, including that of the 12,390 acre Kawakawa block (completed in May 1859) for which no plan was attached to the deed. In this case, Kemp had arranged the survey of a much larger block, which he estimated to be 50,000 acres and included both the Ruapekapeka and Kawakawa purchase blocks.[713] However, when Maihi Paraone

708. Rigby, 'Pre-1865 Te Raki Crown Purchase Validation Report (doc A53), app A.

709. Craig Innes, 'The History of Mangataraire, Rangaunu, Tapapanui, Toukauri, Wiroa and Whakataha 1–3 blocks, 1865–2015' (commissioned research report, Wellington: Waitangi Tribunal, 2016) (doc A69), pp 95–97, 99.

710. O'Malley, 'Northland Crown Purchases' (doc A6), p 265.

711. See Kemp to McLean, 16 October 1858, AJHR, 1861, C-1, p 31; Smith (for McLean) to Kemp, 4 March 1859, AJHR, 1861, C-1, p 35; O'Malley, 'Northland Crown Purchases' (doc A6), p 265.

712. O'Malley, 'Northland Crown Purchases' (doc A6), p 265.

713. O'Malley, 'Northland Crown Purchases' (doc A6), pp 348–351.

Kawiti rejected the proposed purchase price of £2,000, Kemp was forced to accept the purchase of only the northern portion (the Kawakawa block), from Tamati Pukututu and 26 others for £1,000.[714] He apparently did not consider it necessary to provide a plan for the smaller block prior to completing the purchase, and the block was not surveyed until the following August.[715] It is also unclear why the survey plans were not attached to the June 1859 Matawherohia purchase deed. However, in a further unexplained development, Kemp recorded a larger area of 3,746 acres for the block in October 1859, casting some doubt on the status of the original survey and the information it had ascertained about the purchase area.[716] In the end, O'Malley commented that 'no one knew quite exactly what was being transacted, no plan was attached to the deed despite reference in the text to one, and (as usual) no reserves were set aside for Māori occupation and use'.[717] Though it might seem that the Crown lost out in this purchase by reason of its miscalculation, the purchase price for the reduced area remained low, at only 1s 6d per acre.

In March 1859, McLean again found it necessary to remind Kemp that 'In every instance, the surveys of external boundaries should precede the purchase of any Blocks of land that may be offered for sale by the Natives, in order to avoid dispute and misunderstanding relative thereto.'[718] In 1858, John Rogan, a surveyor by training, criticised Johnson's sketch plans as well, describing them as 'daubs that look as if a quantity of bullock's blood has dropped accidentally on a sheet of cartridge paper and bespattered it all over'.[719]

The claim that Te Raki Māori were not prejudiced by lack of survey in any specific case is also contradicted by the evidence. The area of Te Whakapaku (purchased in 1856), for example, was estimated at 2,688 acres, and the Crown payed £200 or almost 1s 6d per acre. After purchase, on survey, the block was found to contain 12,332 acres, representing a huge discrepancy. No adjustment in the purchase price appears to have been made, meaning that the Crown acquired the land at the rate of just under fourpence per acre.[720] The Muriwhenua Land Tribunal, in whose district Te Whakapaku largely sits, described the transaction as 'a paper thing without any obvious reality'.[721] The story was repeated elsewhere in our inquiry district. Kemp estimated the area of Te Wiroa and Parangiora at 1,000 to 1,500 acres; the owners were paid £200 or 2s 8d per acre for 1,500 acres. The block's area was subsequently established as 2,550 acres, so that the owners received only

714. The southern portion, the 29,812-acre Ruapekapeka block would be purchased in 1864 for £3,800 after coal deposits were discovered on the block: O'Malley, 'Northland Crown Purchases' (doc A6), pp 357–358.

715. O'Malley, 'Northland Crown Purchases' (doc A6), p 352.

716. Kemp to McLean, 26 October 1859, AJHR, 1861, C-1, p 39 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 265).

717. O'Malley, 'Northland Crown Purchases' (doc A6), p 265; Kemp to McLean, 26 October 1859, AJHR, 1861, C-1, p 39 (O'Malley, supporting papers (doc A6(a)), vol 12), p 3878).

718. Smith (for McLean) to Kemp, 7 March 1859, AJHR, 1861, C-1, p 35.

719. Rogan to McLean, 12 January 1858 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 460).

720. O'Malley, 'Northland Crown Purchases' (doc A6), p 263.

721. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 244.

1s 7d per acre. Similarly, Kemp estimated the area of Kaipataki at 1,200 to 1,800 acres and paid £1s 7d for 1,263 acres. The block in fact had an area of 2,650 acres, so that in effect the Crown secured an additional 1,387 acres at no cost.[722]

8.5.2.2 *Prices*

On the matter of the price paid by the Crown for the large tracts of land that it acquired from Te Raki Māori during the period from 1840 to 1865, claimant counsel distinguished between the moneys paid by the Crown and the collateral benefits Te Raki Māori were assured would accompany Pākehā settlement and economic development. The claimants' central allegation was that, even when the promised collateral benefits are considered, the prices were 'inadequate'. The claimants contended that the Crown's control of land purchasing allowed and encouraged the transfer of wealth in the form of the colony's key natural resources from its customary owners to settlers, and that such transfer had major implications for their capacity to participate in and contribute to the development and expansion of the colonial economy. Several other common allegations supported that core contention:

- The Crown failed to establish accurately the areas that it acquired.
- The Crown failed to factor in the value of standing timber.
- Independent valuations were never sought.
- The Crown instead set the maximum prices it would pay.
- No provision existed for independent arbitration when prices were disputed.
- The Crown foreclosed alternatives, such as leasing and licensing of timber-felling, by unilaterally extending its pre-emptive powers.
- The promised collateral benefits did not materialise.[723]

Crown counsel acknowledged that the prices paid for land acquired from Māori were generally low but argued that it was difficult to establish what constituted a fair or reasonable price, given that land values varied according to such factors as quality and location. Counsel then added that the real price was not the main consideration so much as the collateral benefits that would flow from settlement and development – provided Māori retained sufficient land.[724] We discuss the issue of collateral benefits and whether the Crown delivered on its promises to Te Raki Māori in the next section.

In this section, we consider what factors drove the prices the Crown paid for land during this period, and whether they were fair in the context of the Crown's asserted right of pre-emption over land purchases.

As we discussed in section 8.3.2.5.1, a key premise of the land fund model for colonisation was that Māori land could be purchased for nominal value, and that as settlement proceeded along with development in the district, Māori would participate in its benefits so long as they retained sufficient reserves. Crown officials were aware of the implications for the Government's plans when Māori began to

722. O'Malley, 'Northland Crown Purchases' (doc A6), pp 337–338.
723. Claimant closing submissions (#3.3.208(a)), pp 11–13, 26–27.
724. Crown closing submissions (#3.3.404), pp 41–43.

appreciate the monetary value Pākehā placed on land. It was an ongoing anxiety for officials. FitzRoy commented on it, as did Grey.[725] For example, in 1848 Governor Grey observed that Māori were

> becoming aware of the value that had been given to their lands, and actuated by motives of self-interest, refused to part with them for a nominal consideration, but insisted upon receiving a price bearing some slight relation to the actual value of the lands at the time the purchase was completed.[726]

During the 1850s, the Government set the price its land purchasers could offer for land in Te Raki. For instance, in January 1854 Johnson was advised by the Colonial Secretary that he could offer for large blocks, 'including all lands', not more than sixpence per acre, and up to one shilling per acre for smaller, desirable blocks 'which may prove available at once, and likely to be soon required'.[727] Consideration of price was one reason for pursuing the purchase of large blocks; as McLean advised Johnson in November 1857, the practice of acquiring small blocks meant that the prices were 'much larger than the average agreed upon by other Commissioners'.[728] Similarly, when Kemp proposed to purchase the 3,576-acre Taraire block for £400, McLean responded by criticising the 'excessively high' suggested price.[729] This appears to be one of the few areas where McLean was willing to rebuke his agents.

The 1856 Board of Inquiry on Native Affairs also discussed the matter of price. It lamented the decision of many Māori to retain large tracts of land 'which the European settlements have enhanced in value', and restated a familiar argument that the difficulties being experienced (presumably the higher prices being sought) would not have arisen had 'all the land' been acquired upon the establishment of the colony.[730] It further argued that the longer the purchase of land was delayed, the greater would be the cost of purchase. 'If this is not done', the board concluded, 'every piece of land which is fenced in, and reclaimed, every road which is made, and every European settler, who arrives in the country, only serves to give a value to the unimproved tracts of native land which surround the settlements'. Offering higher prices was not deemed necessary. 'The price with them is a secondary consideration', it claimed. According to the board, '[m]ore or less, every transfer of land may be looked upon as a national compact, and regarded as binding both parties to mutual good offices'. It then proposed that prices should be negotiated,

725. FitzRoy to Stanley, 16 May 1843, BPP, vol 2, p 387.
726. Grey to Grey, 15 May 1848, BPP, vol 6, p 24.
727. Sinclair to Johnson, 22 January 1854, AJHR, 1861, C-1, p 47.
728. McLean to Johnson, 24 November 1857, AJHR, 1861, C-1, p 81.
729. McLean to Kemp, 3 October 1856, AJHR, 1861, C-1, p 12 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 485); Rigby, 'Pre-1865 Te Raki Crown Purchase Validation Report' (doc A53), app A.
730. 'Report', AJHR, 1856, p 4.

under pre-emption as favoured by Māori (it claimed).[731] In effect, the existing system of pricing and purchasing would remain, but the board wanted the process expedited.

Crown officials justified low prices for large tracts on the grounds that they included lands of varying quality and utility. When giving evidence much later before the 1891 Commission into the Native Land Laws, Rogan, the former Kaipara and Whāngārei district land purchase commissioner, explained that his response to Māori challenges about the low prices paid was that the blocks acquired included both 'the good as well as the bad, and that this 6d an acre is paid for those sandhills which are being blown away, as well as for the good land. The private purchasers would not do that.' He recorded Māori as intimating that they would 'keep the sandhills if you will allow us to sell to any man we like'.[732] It was an incisive and deft response to which Rogan appeared to have had no answer.

On the other hand, the Crown refused to recognise the value of the resources on the land it sought to purchase. In mid-1859, Rogan suggested to McLean that the Crown had obtained the 38,000-acre Pakiri block 'at a ridiculously low price'.[733] Acquired in March 1858, the Crown paid £1,070 or 6.75d per acre for the block; its kauri alone was recognised at the time as being worth 20 times the sum paid.[734] Similarly, O'Malley argued that the Crown's purchase of the 19,592-acre Pupuke block in Whangaroa for £1,273 was 'strategic and resource based'.[735] This block would connect the Crown and settler lands in the Bay of Islands with those in Mangonui, and it was apparent that it contained extensive kauri reserves. Though Kemp had been required to pay an increased per-acre rate (2s 6d per acre) to secure this favourably positioned tract, with its outlet to the Whangaroa harbour, he 'evidently did not consider that the value of the timber on the block should be appraised and factored into the price paid'.[736] O'Malley also gave evidence that the timber was eventually sold to Europeans for a shilling per 100 feet of timber in the 1880s, and was valued at six shillings per 100 feet by the 1920s. Assuming 10,000 feet of timber per square acre, O'Malley considered that 'the Crown's purchase money paid for Pupuke and other Northland land blocks containing extensive timber reserves was easily recouped many times over'.[737]

731. 'Report', AJHR, 1856, pp 4–8. It is interesting to note that in 1859 Governor Gore Browne, in a despatch to the Secretary of State for the Colonies, acknowledged that large tracts of land had been acquired in the North Island at prices ranging from a farthing to sixpence per acre, but that 'there still remain many millions of acres we now vainly desire to acquire, which might in those days [1840s] have been bought at a cost too insignificant to be calculated by the acre'. See Browne to Secretary of State for the Colonies, 20 September 1859, AJHR, 1860, E-6A, p 3.

732. AJHR, 1891, Session II, G-1, p 60.

733. Rogan to McLean, 24 June 1859 (cited in Daamen, Hamer, and Rigby, *Auckland*, p 194).

734. Rogan to McLean, 24 June 1859 (cited in Daamen, Hamer, and Rigby, *Auckland*, p 194).

735. O'Malley, 'Northland Crown Purchases' (doc A6), pp 273–274.

736. O'Malley, 'Northland Crown Purchases' (doc A6), p 274; Kemp had previously reported that the price had been fixed at 1s 3d: Kemp to McLean, 8 July 1863 (Turton, *Epitome*, C, p 15).

737. O'Malley, 'Northland Crown Purchases' (doc A6), pp 274–275.

There is little doubt that the Crown thought it was acquiring land at a good price. Johnson suggested to McLean that although the Kaurihohore block had cost £550, it would realise over £3,000 on re-sale as it contained excellent agricultural land and was easily accessible, being immediately adjacent to Whāngārei.[738] Kemp also noted that he had secured the 4,554-acre Okaihau 1 block – 'thought by good judges to be worth at least £5,000' – for £450.[739]

In a limited number of cases, rangatira were able to negotiate higher prices, though only within the terms set by the land purchase department. For instance, in regard to the 1856 purchase of the Omawake block, Kemp recorded that he had offered the rangatira concerned the sum of £300, while suggesting that 'should the Chiefs not accede to these terms, an additional hundred might be offered'.[740] The offer was accepted, and this block was subsequentally purchased for £400.[741] We have also discussed Te Tirarau's demands for further payment from Johnson for his interests in the Ruakaka and Waipu purchases.[742]

Such concessions to Māori demands were rare, and the evidence points towards widespread dissatisfaction about the prices the Crown paid. One of the only instances of Crown consultation with Te Raki Māori about prices during this period occurred at the Kohimarama Rūnanga of 1860 (discussed in chapter 7 section 7.4). There, Māori speakers both lamented their lack of bargaining power and decried the prices offered by the Crown for land. In his address to the assembled rangatira, McLean acknowledged that the low prices were a source of dissatisfaction, as was 'the fact that the land is sold at a higher rate when it comes into the possession of the Government'.[743] McLean then simply restated the Crown's position and implied that development was solely contingent on European settlement and investment.[744] He reasoned that the discrepancy in price was justified by the Crown's investment in the survey of the land and the construction of bridges and roads 'by means of which the produce of the land may with facility be conveyed to the towns for sale'. He explained that land could only become productive after it was surveyed, and it was the 'improvement consequent on European settlement which really enhances the value'.[745]

As we noted in chapter 7, Te Raki rangatira were muted in their response to McLean's statements and his proposals concerning land. However, as Daamen,

738. Johnson to McLean, 8 June 1857 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 462); Johnson to McLean, 11 February 1858, AJHR, 1861, C-1, p 83.

739. Kemp to McLean, 17 March 1858, AJHR, 1861, C-1, p 25; see also O'Malley, 'Northland Crown Purchases' (doc A6), p 462.

740. Kemp to McLean, 5 August 1855, AJHR, 1861, C-1, p 3.

741. Kemp to McLean, 28 February 1856, AJHR, 1861, C-1, p 4.

742. AUC 310, LINZ (O'Malley, supporting papers (doc A6(a)), vol 22, pp 7428–7434).

743. 'Proceedings of the Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 3 August 1860, p 2.

744. 'Proceedings of the Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 3 August 1860, p 2.

745. 'Proceedings of the Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 3 August 1860, p 2.

Hamer, and Rigby observed, '[w]hen Maori began to speak at Kohimarama on 11 July 1860, they lost no time in denouncing Crown offers of sixpence an acre'.[746] Te Keene of Ngāti Whātua stated that he had asked the Crown for five shillings an acre, but was only paid sixpence. His grievance was that the Crown's refusal to negotiate over price undermined his authority. As he put it, 'Na, kahore he ture i a hau. Na konei a hau i pouri ai. Ko te ahau kau o te ture kei au (Therefore I have no law. On this account am I grieved. Only the shadow of the Law belongs to me)'.[747] In his written response for Te Parawhau, Wiremu Pohe also submitted that 'In selling land, we receive but a small price per acre, namely two shillings per acre for the good portions, and six pence per acre for the inferior. This causes dissatisfaction. The heart is not content with that price.'[748]

The sense of grievance expressed in these statements suggests that the Crown's refusal to negotiate on the matter of price was viewed both as unfair and as an encroachment on the authority of rangatira. In June 1861, almost a year after the Kohimarama Rūnanga, Kemp acknowledged that opposition to Crown purchasing was increasing among Te Raki Māori. He had found that resistance to Crown land purchase in Taranaki, where war had broken out in March 1860, was 'the permanent subject of discussion with the natives here'. He claimed that it had been suggested to Māori – by whom he did not say – that:

> the present system of purchase has been but part of a scheme under which to dispossess them of their lands, (the price given for below its real value,) and eventually to confirm their own claims to certain limited spots; the residue to become unconditionally the property of the Crown.

Kemp added that, in his view, Māori would be glad to see

> some modification in the present mode of extinguishing Native Title – at present, their confused notions of the real value of land, make it sometimes very difficult to convince them, that the price paid per acre by the Government for Waste Lands is generally speaking fair and reasonable.[749]

Kemp did not explore those 'confused notions' nor did he specify the 'modifications' that he may have had in mind. Yet his comments were offered at a time when Crown purchases in Te Raki had contracted sharply and when Ngāpuhi and other Te Raki Māori were closely watching developments in Taranaki and in the Waikato.

746. Daamen, Hamer, and Rigby, *Auckland*, p 195.

747. 'The Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 14 July 1860, p 24.

748. 'Proceedings of the Kohimarama Conference', *Maori Messenger/Te Karere Maori*, 30 November 1860, pp 1–2 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12(a)), vol 1, p 1:129).

749. Kemp to McLean, 7 June 1861, AJHR, 1861, C-1, p 44.

8.5.2.3 *The Mokau block*

The Mokau block straddled the rohe of multiple Whangaroa, Bay of Islands, and Hokianga hapū, including Ngāi Te Whiu, as well as Ngāti Tautahi, Ngāi Tāwake, Ngāti Whakaeke, and Ngāti Uru of Whangaroa.[750] The 1859 purchase of this block exemplifies a number of issues arising from the Crown's purchasing practices. Land purchase commissioner Kemp purported to purchase the 7,224-acre block from the rangatira Wī (Wiremu) Hau and nine other members of Ngāi Te Whiu in January 1859 for the sum of £240. However, Kemp failed to record the basis on which he had deemed Wī (Wiremu) Hau, Ranga, Wiremu Kauea, Hongi, Hone Taua (Na Hone Poti), Hare Napia (Charles Napier), Tau, Winiata Tutahi, Kira Kingi Wiremu, and Hamiora Hau to be valid owners of the entire block.[751] Nor did he demonstrate that he had otherwise probed the extent of any further customary interests in the land, or investigated whom the named sellers claimed to be representing.[752] A further problematic feature of the transaction was the reference to both the Mokau and Manginangina blocks in the title of the deed, which would later prompt disputes about what land had been alienated.[753]

Ngāi Tūpango claimants stated that most of the owners of the block were not aware of the 'purported sale' and remained living on this land throughout the second half of the nineteenth century.[754] Te Waimate Taiāmai hapū claimant John Rameka Alexander affirmed this, noting multiple accounts of Māori continuing to occupy Mokau and utilise its resources for 50 years after the 1859 transaction.[755] Claimants from Ngā Uri o Te Aho noted that members of their hapū at Mokau had subsequently 'petitioned against the inadequate detailing, the price paid for the blocks, and most significantly against the failure by the Crown to inquire into customary rights prior to the deed being signed'.[756] Moreover, claimants from the Ngāti Rēhia hapū stated that 'the Crown acted for the benefit of settlers to the detriment of Ngāti Rēhia' in its acquisition of the block, as the Crown came under increased pressure to provide land to settlers in Te Raki.[757] The claimants' submissions also discussed the inadequacy of the payments for the Mokau block. Counsel for Ngāi Tūpango claimants noted that Kemp, who had purchased the block for

750. O'Malley, 'Northland Crown Purchases' (doc A6), p 408; John Alexander (doc H7), p 37.

751. Five of the owners did not sign the deed but had their names signed by someone on their behalf. The deed provides their signatures in this way: 'Ranga (Na Hone Tana), Wiremu Kauea (Na te Honiana), Hongi (Na Tamhihana Paru), Hone Taua (Na Hone Poti) . . . Tau (Na te Honiana)': Innes, 'Northland Crown Purchase Deeds' (doc A4), p 42.

752. O'Malley, 'Northland Crown Purchases' (doc A6), pp 372–373.

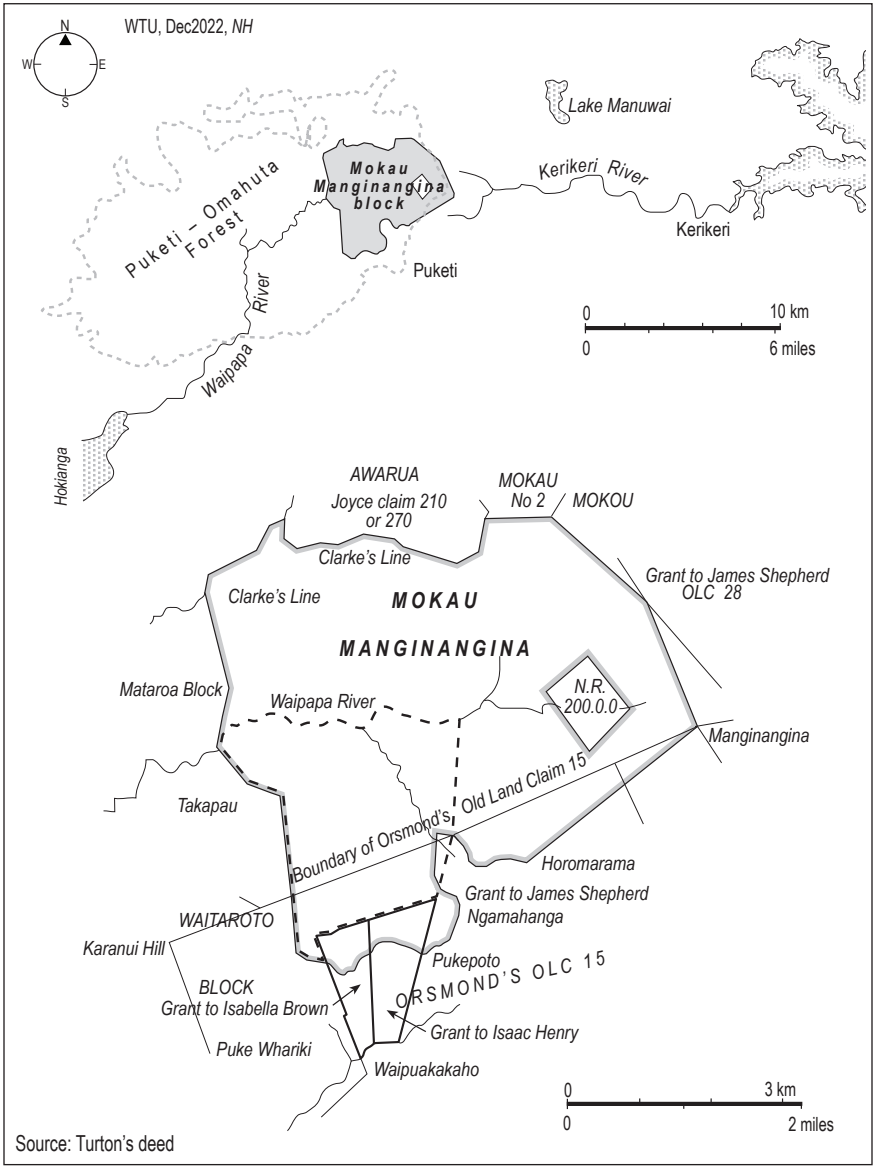
753. Innes, 'Northland Crown Purchase Deeds' (doc A4), p 41.

754. Claimant closing submissions (#3.3.390), pp 23–24; see also Peter McBurney, 'Northland: Public Works & Other Takings: c 1871–1993' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2007) (doc A13), pp 509–511.

755. John Alexander (doc H7), pp 34–35.

756. Closing submissions for Wai 179, Wai 1524, Wai 1537, Wai 1541, Wai 1681, Wai 620, Wai 1673, Wai 1917, and Wai 1918 (#3.3.393), p 177; see also Popi Tahere (doc N23), p 9.

757. Closing submissions for Wai 1341 (#3.3.377), p 41.



Map 8.6: The Mokau block.

£240, had himself described that sum as being 'as low as could be made'.[758] In the claimants' view, the Mokau purchase demonstrated the Crown's 'disregard for its

758. Claimant closing submissions (#3.3.390), p 23; see also McBurney, 'Northland' (doc A13), p 509.

obligation to protect tangata whenua in the exercise of authority over their lands and dominions'.[759]

The Crown did not accept that any aspect of the sale was untoward. Crown counsel acknowledged two different responses to the complaints about Mokau. The first was the assessment of Judge Frank Acheson in 1939. The judge concluded that, although the records were silent as to whether District Land Purchase Commissioner Kemp had undertaken due diligence to ensure that he was dealing with the sole and rightful owners, it is unlikely he consulted all of those with an interest in the block. Crown counsel argued, however, that Judge Acheson's conclusions were based on unfounded assumptions. Counsel preferred the conclusions reached by the Myers commission in 1948, which found that there was no basis on which to conclude that Kemp had dealt with the wrong people. Counsel concluded, therefore, that Mokau 'is not a case where customary interests in land were sold without the consent of rights holders'.[760] The Crown further endorsed the Myers commission's findings that the price that the Crown paid for the block was fair when compared with similar kauri-forested blocks sold around the same time.[761]

O'Malley gave evidence that for 40 years after the transaction, local Māori, both those who had and had not been party to the sale, 'continued to freely occupy and utilise the resources of the block for birding, pig-hunting, gum-digging and other purposes, seemingly without impediment from Crown officials'.[762] He considered that they likely did not become aware of the land passing out of their ownership until around 1902, when a forest ranger was appointed to prevent trespass in Puketī Forest, which had been transferred to the New Zealand Government Railways department for milling. At that time, some owners who had not been involved in the sale had apparently lodged a petition with Parliament, O'Malley submitted; however, there is no official record of this petition. In its 1948 report, the Myers commission noted that the petition was said to have been made by Hōne Heke Ngāpua (then MHR Northern Māori). But the report dismissed this on the basis that the petition could not have been made before an earlier commission, the Stout–Ngata commission (officially known as the Royal Commission Appointed on Native Lands and Native-Land Tenure), had sat in the district.[763] We note that the Crown has made the same argument in our inquiry, that '[h]ad Māori complained about the sale to the Stout–Ngata Commission, the Commission would have referred to that complaint in their report, but the Commission made no such reference'.[764] Ultimately, we do not have sufficient evidence to reach a conclusion on this matter.

759. Claimant closing submissions (# 3.3.390), p 23.
760. Crown closing submissions (#3.3.404), pp 39–41.
761. Crown closing submissions (#3.3.404), pp 36, 39–40.
762. O'Malley, 'Northland Crown Purchases' (doc A6), p 375.
763. 'Report of Royal Commission appointed to Inquire into and Report upon Claims preferred by certain Maori Claimants concnering the Mokau (Manginangina) Block', AJHR, 1948, G-2, p 14.
764. Crown closing submissions (#3.3.404), p 32.

Whatever may have been the case in 1902, the issue was picked up again a generation later when a number of petitions were made to Parliament. In August 1926, a petition was presented by Hohaia Patuone seeking 'inquiry into the alleged wrongful taking of the Puketi [Mokau] Block'.[765] However, as Drs Henare, Petrie, and Puckey noted, this 'was neither considered nor commented on'.[766] It appears that a further two petitions concerning the block were made in 1935.[767] Dr O'Malley argued that one sent by Hemi Riwhi 'was not formally addressed to Parliament [which] allowed officials to ignore the complaints'.[768] A further petition made by Hone Rameka and 25 others was more difficult to ignore. The petitioners sought an investigation into the 'unjust act' by which their lands known as Takapau had been included in the Mokau block. They definitively stated that 'this land was not sold by our parents or elders'.[769] Despite the efforts of the Survey Department to prove the claims to be 'without any merit', the Native Affairs Committee referred this petition to the Government for inquiry in October 1936.[770]

After the Native Under-Secretary recommended that no action be taken on the matter, some of the Mokau owners met with the Prime Minister Michael J Savage in Auckland in February 1937. The following September, Napia and Wi Anaru Heketerai also filed a petition on behalf of a committee 'representing the owners' of the Manginangina block seeking a 'judicial inquiry into their claims on the block'.[771] Their petition included new complaints that the area of land known as Manginangina and Takapau had been included within the boundaries of the Mokau purchase block. The petitioners' lawyer Hall Skelton noted that '[t]he Manginangina and Takapau blocks contain one of the largest Kauri forests in New Zealand', and contended that the price of £240 'was in any case quite unconscionable at the time'.[772] This petition and that of Hone Rameka were both subsequently referred to Judge Acheson of the Native Land Court under section 16 of the Native Purposes Act 1937, which limited the inquiry to issuing recommendations on the merits of the claim and did not provide for any title determination to be made.[773]

Two groups presented evidence before the Court: one led by Tamati Arena Napia, who represented some of the descendants of those who had been involved in the original transaction, and the other by Hone Rameka, representing those

765. 'Petition of Patu Hohaia and Another', 11 August 1926, AJHR, 1926, I-3, p 6.

766. Manuka Henare, Hazel Petrie, and Adrienne Puckey, 'Oral and Traditional History Report: Te Waimate-Taiamai Alliance', 2009 (doc E33), p 371.

767. O'Malley, 'Northland Crown Purchases' (doc A6), p 384.

768. O'Malley, 'Northland Crown Purchases' (doc A6), p 384.

769. Petition no 158/1935 (O'Malley, supporting papers (doc A6(a)), vol 7, pp 2368–2369); cited in O'Malley, 'Northland Crown Purchases' (doc A6), pp 384–385.

770. O'Malley, 'Northland Crown Purchases' (doc A6), p 385; Chief Surveyor, memorandum, 2 June 1936 (O'Malley, supporting papers (doc A6(a)), vol 8, pp 2677–2680).

771. John Alexander (doc H7), p 36; O'Malley, 'Northland Crown Purchases' (doc A6), pp 385–386; see also Ani Taniwha (doc O14), pp 22–23; Popi Tahere (doc N23), pp 9–10.

772. Hall Skelton for T A Napia and Wi Anaru Hekeretai to Savage, 3 September 1936 (O'Malley, supporting papers (doc A6(a)), vol 8, p 2665).

773. O'Malley, 'Northland Crown Purchases' (doc A6), p 387.

who had not.[774] Both groups challenged its legitimacy, arguing that the deed was not properly executed and that the owners who had signed it did not represent all those with rights in the land. They further contended that the owners who had signed the deed had intended to sell their interests in the Mokau block, not Manginangina, which had been included in the deed without their knowledge. They also challenged the fairness of the purchase price, which they contended did not sufficiently account for the value of the timber on the block.[775]

In his report (which was undated but released to the Native Minister in 1941), Judge Acheson concluded that Wī Hau and the other vendors would never have presumed to part with anything but those specific areas of the block they controlled and that, as a result, other groups with interests in the land would not have believed their own portions to have been included in the sale.[776] However, the judge found that the petitioners' case was seriously prejudiced by the 80-year delay in bringing the claim.[777] While he agreed that execution and witnessing of the deed 'were certainly irregular and even seriously defective according to conveyancing standards in force at the time', he rejected this aspect of the petitioners' grievances; he deemed it 'far too late now to raise any questions as to the method of execution of the Deed'.[778] He concluded that the purchase price was 'the crux of the whole question'.[779] The payment of £240, especially given that the block was one of rich kauri forest, was described by Judge Acheson as 'unconscionable and even outrageous'.[780] His words were damning. In his report, he concluded:

> The protection guaranteed by the Treaty of Waitangi to Maori tribes, chiefs, families and individuals in respect of their lands seems to have been overlooked by the Crown's officers participating in the negotiations for the purchase of the land in question. An otherwise praiseworthy zeal to protect the Queen's and the Nation's Purse seems to have thrown into the background and even entirely submerged the Crown officers' collateral duty to protect the Queen's and the Nation's Honour. So 7224 acres comprising probably the lordliest Kauri Forest . . . in New Zealand was bought for a

774. O'Malley, 'Northland Crown Purchases' (doc A6), p 387.

775. 'Report and Recommendation on Petition No 158 of 1935, of Hone Rameka and Others Relative to the Takapau Block (Makau-Manginangina)' (O'Malley, supporting papers (doc A6(a)), vol 8, pp 2467–2468).

776. O'Malley, supporting papers (doc A6(a)), vol 8, p 2470.

777. 'Report and Recommendation on Petition No 158 of 1935, of Hone Rameka and Others' (O'Malley, supporting papers (doc A6(a)), vol 8, p 2472).

778. 'Report and Recommendation on Petition No 158 of 1935, of Hone Rameka and Others' (O'Malley, supporting papers (doc A6(a)), vol 8, p 2472).

779. 'Report and Recommendation on Petition No 158 of 1935, of Hone Rameka and Others' (O'Malley, supporting papers (doc A6(a)), vol 8, p 2473).

780. 'Report and Recommendation on Petition No 158 of 1935, of Hone Rameka and Others' (O'Malley, supporting papers (doc A6(a)), vol 8, p 2473; see also O'Malley, 'Northland Crown Purchases' (doc A6), p 393.

pittance (£240, or 8d an acre) from a few chiefs who by no stretch of the imagination could, in Maori custom, have been the sole and true owners.[781]

In his covering letter to Acheson's report, Chief Judge G P Shepherd took a contrary view and made no recommendations on the matter. He was concerned that if the Mokau purchase was found to be flawed, this would encourage Māori to pursue further 'fruitless and abortive proceedings' to overturn 'contracts anciently entered into'.[782] Shepherd's dismissal of Acheson's conclusions would provide the Native Affairs Committee with grounds to take no action on the 1935 petition for a number of years. Nonetheless, 'Acheson's report had provided enough grounds for the claimants to hope that their complaints in relation to Mokau might eventually be addressed by the Crown', as Dr O'Malley observed.[783]

In 1943, Tamati Napia and 48 others filed a further petition repeating some of Judge Acheson's findings. The Native Affairs Committee took no action on the matter until another petition to Parliament was made by Tamati Mahia and 140 others in 1944, challenging Shepherd's rejection of their claims and asserting that he had dismissed them 'against the weight of evidence'.[784] This time, the Native Affairs Committee referred the petition to the Government for consideration, and in 1947 the matter was referred to a royal commission of inquiry headed by Sir Michael Myers. The commission was appointed to inquire into claims 'Preferred by Members of the Maori Race Touching Certain Lands Known as Surplus Lands of the Crown' in Northland (we discuss the Myers commission in more detail in chapter 6).[785]

The Myers commission considered that Acheson had employed 'very exaggerated language'.[786] The commission considered that, in valuing the block, Acheson had based his judgment on what it considered to be the contemporary value of the timber on the land rather than on its value in 1859. In any case, the block had not been purchased as 'forest reserve' but for settlement purposes, the implication being that the value of the kauri on the block, despite its contemporary monetary worth as a marketable commodity and despite the acknowledged skills of Māori as loggers, was not relevant to the matter of the purchase price. The commission compared the price paid with those for other blocks carrying large stands of timber and concluded that 8d per acre, while low, was 'not unreasonably low', and

781. 'Report and Recommendation on Petition No 158 of 1935, of Hone Rameka and Others' (O'Malley, supporting papers (doc A6(a)), vol 8, p 2467).

782. Shepherd to Native Minister, 1941 (O'Malley, supporting papers (doc A6(a)), vol 8, pp 2464–2465).

783. O'Malley, 'Northland Crown Purchases' (doc A6), p 396.

784. Petition no 107/1944 (O'Malley, supporting papers (doc A6(a)), vol 8, p 2610).

785. The commission consisted of Sir Michael Myers, Hānara Tangiāwhā Reedy, and Albert Moeller Samuel: 'Report of Royal Commission Appointed to Inquire into and Report upon Claims Preferred by Certain Maori Claimants concerning the Mokau (Manginangina) Block', AJHR, 1948, G-2; 'Royal Commission to Inquire into and Report upon Claims Preferred by Members of the Maori Race Touching Certain Lands Known as Surplus Lands of the Crown', AJHR, 1948, G-8, p 1.

786. 'Report of Royal Commission Appointed to Inquire into and Report upon Claims Preferred by Certain Maori Claimants Concerning the Mokau (Manginangina) Block', AJHR, 1948, G-2, p 22.

certainly not 'unconscionable'. That the value of timber on all blocks that it cited may have been similarly discounted appears not to have occurred to the commission. Its conclusions were based, in part, on modern evidence as to the extent and accessibility of the kauri stands, and no reference was made to the fate of the timber; that is, whether it was simply destroyed, or whether the Crown first secured timber royalties before opening the land for selection.[787]

In our inquiry, the Crown argued in closing submissions that there was 'no basis . . . to reach findings that are different to the finding of the Myers Commission'. According to the Crown, 'the Myers Commission report is a careful and thorough examination of all the claims regarding the sale of Mokau . . . [which] . . . found there was nothing untoward with the sale'. The Crown disputed Acheson's findings about the value of timber and agreed with the commission 'that there was limited to no value in the timber in that region in 1859' and that timber prices on this block of land only became 'commercially viable' in the early twentieth century. Additionally, the Crown shared the Myers commission's view that Acheson had assessed the value of this timber in accordance with its worth at the time of his own inquiry and had failed to take into consideration the additional 80 years of growth that had taken place.[788]

It is not at all clear that the conclusion of the Myers commission that timber was not considered to have been of value in 1859 was justified. Crown counsel cross-examined Dr O'Malley about the Mokau block, including whether the timber was accessible by road at this time. O'Malley responded that, as Acheson had explained in his decision, the Crown was 'well aware' of the kauri on Mokau, and that there had been 'road access' to the timber.[789] Kemp had reported in July 1858, for example, that 'there was already "an available road" connecting Mokau with elsewhere'. Similarly, evidence presented to the Myers commission suggested that 'far from being isolated, roads or trails connecting [the block] with Whangaroa and Hokianga ran through or very close to the block' at the time it was purchased.[790]

Moreover, Roderick Campbell, a retired Conservator of Forests in Auckland, gave evidence before the Myers commission that the trees on the block would have been able to have been harvested and removed by floating them downriver (the primary means of transporting timber during this period). He further conceded that the price paid for Mokau was similar to that for blocks which only contained small quantities of timber.[791] It is clear to us that the Crown was aware of the value

787. 'Report', AJHR, 1948, G-2, p 24; see also Crown closing submissions (#3.3.404), pp 35–36, and O'Malley, 'Northland Crown Purchases' (doc A6), pp 417–418.

788. Crown closing submissions (#3.3.404), p 40. This block was only one of two blocks to be specifically mentioned in the Crown's closing submissions; the other (the Ruakaka block) is discussed in more detail later in this chapter.

789. Vincent O'Malley, transcript 4.1.17, Akerama Marae, pp 507–509.

790. O'Malley, 'Northland Crown Purchases' (doc A6), p 418.

791. Report of Proceedings before the Royal Commission on the Mokau Block, 9 October 1947 (O'Malley, supporting papers (doc A6(a)), vol 7, pp 2442–2443); O'Malley, 'Northland Crown Purchases' (doc A6), pp 419–420.

of the timber in 1859 and, consistent with its general policy, did not account for this in the purchase price (see section 8.4.3.2).

We think it significant that the injustice of the purchase price was not raised by any petitioners until Napia's 1936 petition. In our view, their complaint and Judge Acheson's conclusions support the likelihood that the signatories, Wiremu Hau and the nine others, believed they were transacting only that small portion of the block where Ngāi Te Whiu had interests, rather than the entire area. The Crown considered it had bought an extensive tract of land that local Māori knew as Manginangina and Takapau, and which occupied an important strategic position as a watershed between the Bay of Islands, Taiāmai, Hokianga, and Whangaroa. However, the vendors thought they had alienated a much smaller area called Mōkau, which lay to the north-east, as well as a small part of the Puketī area.[792] Acheson was not willing to question the boundaries of the block 80 years after the fact but he did think it 'incredible that Wi Hau and other Ngatiwhiu chiefs should have seriously claimed the right to name and to sell the portions on the other three sides of the watershed'. It was more likely, in his view, that,

> Under these circumstances, the name 'Mokau' would convey nothing to the other sub-tribes interested in the 7224 acres. 'Mokau' would be Ngatiwhiu's land. If Wi Hau and others sold Ngatiwhiu's land called 'Mokau', that would be their concern. To this extent therefore, the name 'Mokau' must have been quite misleading to others than Ngatiwhiu. It could have given them no warning of the sale of their portions to the Crown.[793]

Acheson considered that the Crown's looseness in applying names to purchase blocks likely explained 'the great interest displayed by all Ngapuhi in this Inquiry'.[794] Dr O'Malley agreed with this assessment, and so do we. Mokau was a large block where a number of hapū had interests, and O'Malley highlighted Acheson's view that Kemp's investigation of the issue appeared to have been limited.[795] The evidence available indicates that the Crown was motivated to purchase the block because of its position and timber resources, and had expended little effort in ascertaining the nature of its customary ownership. Instead, it was content to pay a small number of owners a low price for their interests without adequately defining what was actually transacted. In our view, the Crown's purchase of the Mokau block clearly failed to meet its own standards and left even those owners who had been involved in the 1859 transaction aggrieved. We do not accept the Crown's further contention that the lack of Māori protest against the transaction in the decades after 1859 undermines claimant allegations that their

792. John Alexander (doc H7), pp 33, 37–38.
793. 'Report and Recommendation on Petition No 158 of 1935, of Hone Rameka and others' (O'Malley, supporting papers (doc A6(a)), vol 8, p 2470.).
794. 'Report and Recommendation on Petition No 158 of 1935, of Hone Rameka and others' (O'Malley, supporting papers (doc A6(a)), vol 8, p 2470).
795. O'Malley, 'Northland Crown Purchases' (doc A6), pp 391–392.

tūpuna never intended to sell these lands.[796] Since Māori continued to occupy and use the land long after the sale – while, conversely, the Crown remained absent – the hapū involved in the transaction with the Crown, and those uninvolved, were untroubled by any Crown assertion of right to the larger block. In our view, it was only when Māori became aware of the extent of the purchase through the Crown's assertion of ownership and exclusion of them from the land in the early twentieth century that petitions began to be lodged and other calls for investigations into their own rights were made.

8.5.2.4 *'Real payment' or 'collateral benefits'*

As we outlined earlier, many Te Raki hapū and iwi still understood land transactions in customary terms, and that such transactions would form the basis for ongoing and mutually beneficial relationships between iwi, hapū, and the Crown. Therefore, their 'willingness' to transact land was likely influenced by their understanding of what land sales entailed and a continued desire to strengthen their relationship with the Crown. No doubt indebtedness, on the one hand, and the wish, on the other, to raise capital for goods and investment also played their part. Other important factors were the Crown's repeated references to and promises in respect of the material benefits that would flow from land sales.[797] As noted by O'Malley, Wiremu Hau (in common with other northern rangatira at the time) 'sold' land to the Crown at 'a discounted rate in the expectation of receiving various long-term benefits from the Crown's promised investment in the north through the Bay of Islands Settlement Act of 1858 and other related developments'.[798]

This expectation was reinforced by the promises made by prominent Crown officials throughout this period. During his first term as Governor, Grey acknowledged that he directed land purchase commissioners 'to impress upon the mind of the natives that the money consideration was not the only nor the principal consideration they were to receive', adding that 'those were the instructions I always gave . . . I explained to them that the payment made to them in money was not really the true payment at all'.[799] We have already noted McLean's 1858 acknowledgement that Māori, for the most part, did not ascribe 'so much importance to the pecuniary consideration received' for communally held land 'as to the future consequences resulting from its alienation'.[800] When Governor Gore Browne visited Te Raki in January 1858, he made promises that the Crown would invest in 'developing the economy and infrastructure of the region'. As we discussed in

796. Crown closing submissions (#3.3.404), p 37.
797. Claimant closing submissions (#3.3.208), pp 12–14, 20.
798. O'Malley, 'Northland Crown Purchases' (doc A6), p 394.
799. O'Malley, 'Northland Crown Purchases' (doc A6), p 55. Referring to Grey's general explanation about 'real payment', Kemp acknowledged as much, recording that he had been instructed 'to take care to explain to the natives that in selling . . . there was a promise of settlement . . . that in ceding the . . . [land] they would derive very great advantage from these people coming to settle on the land': Kemp, evidence to Smith-Nairn commission, 1879 (cited in Armstrong, 'A Sure and Certain Possession', p 35).
800. Memorandum by Native Secretary, 25 June 1858, AJHR, 1860, E-1, p 15.

chapter 7 (see section 7.5.2.3), Grey made similar promises again when he visited the district in 1861 to urge Te Raki Māori to adopt his new rūnanga system.[801]

The negotiations for new townships in this inquiry district demonstrate the importance Māori placed on receiving promised future benefits of land sales. Despite plans for a new township at Kerikeri foundering in 1847 and then again in 1851 (in part due to Heke's opposition to this location for a township), by the mid-1850s 'northern tribes were willing to transact lands with the Crown in return for new townships in their midst'.[802] In 1855, C O Davis (a government interpreter) wrote that he had heard multiple appeals for a township when he was touring the Hokianga district. In one speech, reported Davis, it was stated:

> During former years even until this time, we have been exclaiming, 'Alas! there is no town! alas! there is no town!' We are impoverished and neglected as you now see us. We know that love is in your heart towards us, therefore we wish you to carry with you our thoughts, and lay them before the Governor, in order that something may be devised to remedy the present state of things.
>
> I ara tau tuku iho ki enei wahi, e karanga tonu ana matou, 'Aue! kahore he taone! Aue! kahore he taone!' E rawakore nei matou, e kitea nei e koe. E matau ana matou he aroha kei roto kei tou ngakau, no konei matou i mea ai kia kawea atu o matou whakaaro ki a te Kawana, me kore ra nei e rapua tetahi tikanga hei whakaora i a matou.[803]

There was also specific provision made early in the period for some of the revenue created by the on-sale of land to be dedicated to providing services and benefits to Māori communities. In January 1841, Lord Normanby's successor Lord Russell stipulated:

> As often as any sale shall hereafter be effected in the colony of lands acquired by purchase from the aborigines, there must be carried to the credit of the department of the protector of aborigines, a sum amounting to not less than 15, nor more than 20 per cent in the purchase-money, which sum will constitute a fund for defraying the charge of the protector's establishment, and for defraying all other charges which, on the recommendation of the protector, the governor and executive council may have authorized for promoting the health, civilization, education and spiritual care of the natives.[804]

After the protectorate was abolished in 1846, Grey adopted a similar proposal in 1851 that once the costs of surveying and administration had been met, a set

801. O'Malley, 'Northland Crown Purchases' (doc A6), p 466; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 172.

802. O'Malley, 'Northland Crown Purchases' (doc A6), pp 11, 102–103.

803. 'Report of Mr Interpreter Davis's visit to Hokianga', *Maori Messenger/Te Karere Maori*, 1 November 1855, p 6; see also O'Malley, 'Northland Crown Purchases' (doc A6), p 108.

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

portion of the profits from on-selling land should be spent on Māori purposes: specifically, building schools and hospitals to which Māori would have the same access as Pākehā; funding resident magistrates, Native magistrates, and Native police; rewarding chiefs for services rendered; and 'such other purposes as may tend to promote the prosperity and happiness of the native race, and their advancement in Christianity and civilization.'[805] A few weeks later, Grey asserted that he retained the right to appropriate up to 15 per cent of the land fund for Māori purposes, recording that

> the Natives have been given to understand, on many occasions, in disposing of their land, that the proportion of the land fund . . . would if necessary be expended in promoting their welfare; and as it has also been frequently explained to them that such expenditure of part of the land fund, rather forms the real payments for their lands than the sums in the first instance given to them by the Government.[806]

Grey's proposal to spend 15 per cent of the profits from on-selling land on Māori purposes was an explicit commitment to Māori when negotiating for their lands that the Crown had regard for their welfare and that they would be directly compensated for accepting low prices. It should be noted here that this percentage was not the only money at the time being spent on Māori affairs: a yearly sum of £7,000 for 'Maori purposes' was included in the provisions of the 1852 Constitution Act, most of it earmarked for 'Maori education by religious bodies.'[807]

Grey was evidently keen, as he prepared to leave New Zealand, to give the promise of collateral benefits practical form. In August 1853, he authorised the Civil Secretary to direct the commissioner of Crown lands in Auckland to pay

> one fifteenth [*sic*] . . . of the proceeds of the sales of any lands purchased from the aborigines previously to this date, into the general treasury in order that such amounts may be devoted to the object for the benefit of the Native Race, in accordance with agreements entered into with the owners at the time of the purchase of those lands.[808]

The initial instructions issued to District Land Purchase Commissioner Johnson in November 1853 included a directive that 'a clause will be inserted in the deed of purchase reserving for native purposes ten per cent of the future proceeds which may be realised from the sale of the land.'[809] How one-fifteenth became 10 per cent

805. Grey to Grey, 30 August 1851, BPP, vol 8, p 32.
806. Grey to Wynyard, 2 September 1852 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 50).
807. Donald Loveridge, 'The Development and Introduction of Institutions for the Governance of Maori, 1852–1865' (commissioned research report, Wellington: Crown Law Office, 2007) (doc E38), pp 16, 76.
808. Domett to McLean, 8 August 1853 (cited in Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 103); see also Wood to Sinclair, 3 April 1854 (Turton, *Epitome*, E, p 1).
809. Sinclair to Johnson, 7 November 1853 (Turton, *Epitome*, C, p 55).

is unclear, while it is of interest to note that the koha clause included in many of the Wairarapa deeds of sale specified five rather than 10 per cent.[810]

According to the Commissioner of Native Reserves, Charles Heaphy, in 1874, per cent clauses were inserted into seven purchase deeds in the Province of Auckland.[811] Out of these, the 1854 Ruakaka and the 1862 Hikurangi purchase were in the Te Raki district, and both in the Whāngārei taiwhenua.[812] Notably, the deed for the Hikurangi block does not include a per cent clause;[813] however, it is included in Heaphy's report on what he collectively termed the 'Auckland Ten Per cents'. Heaphy reproduced the clause in full:

> It is further agreed to by the Queen of England, on her part, that there shall be paid for the following purposes, that is to say, for the founding of schools in which persons of our race may be taught, for the construction of hospitals in which persons of our race may be tended, for the payment of medical attendance for us, for annuities for our chiefs, or for other purposes of a like nature in which the Natives of this country have an interest, 10 per cent., or ten pounds out of every hundred pounds, out of moneys from time to time received for land when it is re-sold.[814]

This was a formal promise by the Crown that the 'real payment' for the land with which they had parted for nominal sums would indeed materialise in the form of schools and hospitals and the inauguration of a mutually beneficial relationship with the Government.[815] Although the intention had been to extend the policy throughout the colony, in May 1854 McLean directed Johnson 'not to insert any clause for additional per centage being paid to the Natives' until definite instructions had been issued on the matter.[816] We consider the specific case of the Ruakaka percentage clause in the following section.

The available evidence suggests that it was not until the mid-1850s that Māori began to express some scepticism over promises of 'collateral benefits'. Ngāti Whātua rangatira Pāora Tūhaere, in the evidence that he tendered to the 1856 Board of Inquiry on Native Affairs, claimed that

> The natives have heard of the Government buying at a cheap and selling at a dear rate. They do not like it. The natives do not know what is being done with the money. I have heard that it is spread out upon the roads, and a part upon schools. The natives

810. Grey authorised the insertion of a koha or 'per cents' clause into 12 purchase deeds in Wairarapa during the 1850s, the Crown having indicated to Māori that they would 'derive an ongoing benefit from a fund into which the Crown would put 5 percent of the returns from on-sale of their land': Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 388.

811. Charles Heaphy to Native Under-Secretary, 29 May 1874, AJHR, 1874, G-4A, p 1.

812. Heaphy to Native Under-Secretary, 29 May 1874, AJHR, 1874, G-4A, p 1.

813. Innes, 'Northland Crown Purchase Deeds' (doc A4), pp 187–188.

814. Heaphy to Native Under-Secretary, 29 May 1874, AJHR, 1874, G-4A, p 1; Innes, 'Northland Crown Purchase Deeds' (doc A4), pp 300–303.

815. See, for example, O'Malley, 'Treaty-Making in Early Colonial New Zealand', NZJH, vol 33, no 2 (1999), pp 137–154.

816. McLean to Johnson, 18 May 1854, AJHR, 1861, C-1, p 53.

are suspicious, and say that this statement is only put forth in order to get the land at a cheap rate from the natives.[817]

It appears that some Māori, at least, had concluded that promises of future benefits constituted little more than an inducement to sell. The subsequent contraction in the rate at which the Crown acquired lands in Te Raki may have owed a great deal to the same sort of scepticism as that expressed by Pāora Tūhaere. Accordingly, McLean, reporting on a visit to Kaipara and Whāngārei in 1857, proposed to Governor Gore Browne that in order to facilitate land purchase, the Government should 'expend a certain definite proportion (and that no inconsiderable one) of the moneys realized by the waste-land sales on roads and other improvements exclusively within those districts from which they have accrued'. He again predicted that the development of roads and other improvements would 'do away with present or future dissatisfaction on the part of the Native sellers at the price they receive for their land as compared with the value it acquires when in the hands of the Government.'[818]

However, the overwhelming evidence in our inquiry is that these promises were not kept (at least not during this period) and the benefits of the proposed township at Kerikeri were also slow to materialise. Likewise, schooling was a benefit that was supposed to be provided to Māori following the sale of land, and yet the Crown's funding of schools in the north before 1867 'was limited to subsidies to missionary schools';[819] meanwhile, Māori had to gift land to the Government for Native schools.[820] There was some limited medical funding.[821] These are matters that will be discussed in the subsequent volumes of our stage 2 part 2 report; for now, we note that Te Raki Māori often expressed disappointment at the level of Crown investment and of settlement.

8.5.2.5 *Ruakaka and the percentage clauses*

The deed of purchase for the Ruakaka block (dated 16 February 1854) included an abbreviated version of the 10 per cent clause. This version specified that 'Ten per

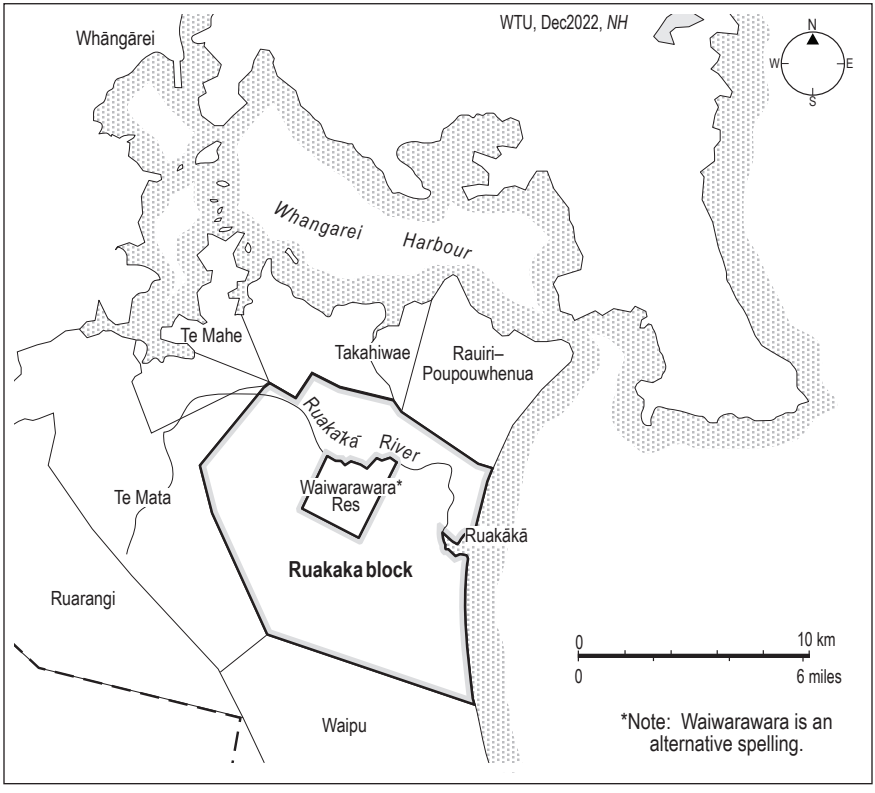
817. Paora, 14 April 1856, BPP, vol 10, p 555.

818. McLean to Browne, 20 March 1857 (Turton, *Epitome*, A1, p 57); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 129.

819. O'Malley, 'Northland Crown Purchases' (doc A6), p 466; see also John Barrington, 'Northland Language, Culture and Education: Part One: Education' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2005) (doc A2), pp 23–24, 26–31.

820. Barrington, 'Northland Language, Culture and Education' (doc A2), pp 72–73, 76, 83–84; see also Mary Gillingham and Suzanne Woodley, 'Northland: Gifting of Lands' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2007) (doc A8). We will discuss the gifting of land for schools in the next part of our report.

821. Derek Dow, *Maori Health and Government Policy 1840–1940* (Wellington: Victoria University Press, 1999), pp 19–20, 26, 41; see also 'Return of Expenditure for Native Purposes, under "Native Purposes Appropriation Act, 1862"', AJHR, 1863, E-8, p 2, for figures expended on medical attendance of Māori in New Zealand, including Bay of Islands (£203 0s 6d), Mangonui (£73 0s 7d), Whāngārei and Kaipara (£93 19s) for 1862 to 1863.



Map 8.7: The Ruakaka block.

cent of the proceeds of the sale of this land [are] to be expended for the benefit of the Aborigines.'[822] What part, if any, that clause played in inducing the owners of Ruakākā to accept the Crown's offer is not clear, but it is likely to have been considerable. The sixpence per acre paid by the Crown for the 14,087-acre block was even less than the less-than-eightpence per acre paid for the Mangawhai block, and rather more was paid for other blocks in the adjacent Kaipara inquiry district, suggesting that the low price for Mangawhai may have been acceptable to Māori because of the 10 per cent provision.[823] The Crown's promises that 10 per cent of the proceeds from the sale of the Ruakaka block would be expended for the benefit of Māori were slow to be implemented and only partially kept.

In 1874, Heaphy was charged with distributing the Auckland and Wairarapa funds, a task he carried out on a block-by-block basis. In his report, he listed seven blocks in the Auckland Province and recorded that the 'ten per cents' amounted to

822. Innes, 'Northland Crown Purchase Deeds' (doc A4) p 242.
823. Waitangi Tribunal, *The Kaipara Report*, Wai 674, p 136.

£5,827 1d, while the total payments (mostly for construction of the Ōrākei bridge) amounted to just over £1,145.[824] With respect to the Ruakaka block, he recorded that the sum of £473 16s 10d had accrued.[825] However, this amount was only an estimate of what might be due, as detailed revenue records were not kept.[826] Without offering any specifics, Heaphy recorded that of the nearly £474, £237 was appropriated for 'education and hospitals'; this was received by Taurau, representing the vendors. Heaphy recorded that £16 of the total was appropriated for administrative costs, and that £220 remained to be distributed 'amongst the Native sellers'. That distribution hardly seemed consistent with the clause included in the deed and instead was more in keeping with the apparent desire of the Government to dispose of the funds and any further claims the vendors might have. In the end, Heaphy failed to convene a meeting of a sufficient number of sellers to distribute the funds. He recorded making payments 'to the extent of £35, but found it necessary to leave with Mr Robert Mair, at Whangarei, and the Rev Mr Gittos, at Kaipara, blank receipt forms to be signed by certain indicated Natives'. In Heaphy's view, the sellers of the block had 'entirely forgotten the stipulation relating to the 10-per-cents.'[827]

No further funds were paid out after 1874. Meanwhile, further amounts for survey, administration, travel, and other costs were deducted.[828] In 1878 a sum was transferred to the Public Trustee: the balance sheet for 1878 to 1879 recorded a 'Native 10 per cents., Auckland' account that held £1,445 on 30 June 1879. This is considerably less than the £4,682 that Heaphy retained in 1874.[829] By the end of March 1899, the account held £2,542, and those moneys were subsequently transferred to the Consolidated Fund.[830]

Heaphy was apparently mistaken in his assumption that Māori had forgotten about the percentage clauses. O'Malley noted that 'from the late nineteenth century northern Māori interested in the tenths blocks began petitioning and appealing for the payment of the money owed them by the Crown.'[831] From 1899, numerous petitions were made to Parliament, and in 1920 the Department of Lands and Survey was finally induced to try to establish what the course of land sales had

824. 'Auckland Ten Per Cents', AJHR, 1874, G-4A, p 1. Turton listed nine blocks (Turton, *Epitome*, E, p 3).

825. Heaphy to Native Under-Secretary, 29 May 1874 (Turton, *Epitome*, E, p 9); O'Malley, 'Northland Crown Purchases' (doc A6), pp 509–510.

826. Heaphy to Native Under-Secretary, 29 May 1874 (Turton, *Epitome*, E, pp 9–10); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 509.

827. Heaphy to Native Under-Secretary, 29 May 1874 (Turton, *Epitome*, E, pp 9–11); O'Malley, 'Northland Crown Purchases' (doc A6), p 509.

828. O'Malley, 'Northland Crown Purchases' (doc A6), pp 509–510.

829. 'Balance-Sheet of the Public Trust Office for the Year ended 30th June, 1879', 21 July 1879, AJHR, 1879, B-4, p 2; see also 'Balance-Sheet of the Public Trust Office for the Year ended 30th June, 1880', 28 July 1880, AJHR, 1881, B-15A, p 1. The moneys appear to have been invested and earning interest.

830. AJHR, 1899, B-9, p 2; Waitangi Tribunal, *The Kaipara Report*, Wai 674, p 128.

831. O'Malley, 'Northland Crown Purchases' (doc A6), p 510.

been in the 10 per cent blocks.[832] This reconstruction was such a challenge that in 1924, the Native Department Under-Secretary advised his Minister that '[a]pparently, it was either considered unnecessary to keep proper records or the matter of keeping accounts was overlooked.'[833] In short, the Crown failed to establish separate block accounts. Heaphy's earlier investigations indicated that the Crown failed to define a policy for the allocation and management of the funds involved, failed to consult the original owners of the blocks concerned, and had failed for 20 years to recognise the need for or to take any remedial action. In 1925, the Under-Secretary of Lands and Survey proposed that 'the whole of the liability' should be liquidated through payment to the Native Trustee of a sum to be determined (presumably by the Crown) 'to be dealt with in a manner consistent with the aims and objects covered by the clauses in the various purchase deeds'.[834] Ultimately, the issue of the 10 per cent blocks would be resolved by the Royal Commission on Confiscated Lands and Other Grievances (the Sim commission).

In 1925, Maki Pirihi, the son of Wiki Te Pirihi (whose father had received £50 for extinguishing his claim to the Ruakaka block), along with 60 others, submitted a petition asking for the Ruakaka 10 per cents to be paid to those who were legally entitled to them. This was one of the petitions directed to the Sim commission in 1926. The commission accepted the Crown's estimate that the sales of land in the Auckland 10 per cent blocks had yielded a total of £89,827. Of the £8,982 generated as a result, Heaphy distributed just £1,678, leaving a balance of £7,304 owing to Māori.[835] O'Malley observed that total revenue on Ruakaka alone was estimated at £10,770, meaning that the payments made by Heaphy in 1874 were only just over one-fifth of the total amount they might have expected to receive by the time of the Sim Commission inquiries'.[836] However, the Sim commission recorded that the Crown had expended over £2,000,000 on education and health services for Māori. Its conclusion, on which the Crown relied, was that such expenditure should 'be treated as a performance of the obligation created by the covenants'.[837]

It does not appear that any consideration was given to how much of this expenditure had benefited the vendors. *The Wairarapa ki Tararua Report* dealt with a similar five per cent proceeds clause and found that fund expenditure should not have included services 'for which the Crown should anyway have been liable', and that the execution of these payments was inadequate.[838] In that report, the Tribunal offered some searching criticisms of the concept, in particular raising questions as to whether what it termed 'the funding trajectory' (declining income as land was sold) of the 'koha/five percents' was ever explained to or understood by Māori.

832. Waitangi Tribunal, *The Kaipara Report*, Wai 674, p 128.
833. R N Jones to Native Minister, 25 June 1925 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 510).
834. Cited in Waitangi Tribunal, *The Kaipara Report*, Wai 674, p 129.
835. O'Malley, 'Northland Crown Purchases' (doc A6), pp 511–12.
836. O'Malley, 'Northland Crown Purchases' (doc A6), p 12.
837. 'Confiscated Native Lands and Other Grievances', AJHR, 1928, G-7, p 33.
838. Claimant closing submissions (#3.3.288), pp 43–45; see also Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, pp 374, 388–389.

It found the following: access to the fund was limited to those whose purchase deeds contained the relevant clause; the Crown used the funds to finance projects that had been separately promised; the Crown was 'never really committed to the koha/five percents as a means of delivering a social endowment'; and it failed 'to develop a clear and coherent policy for the purpose and use of the five percents.'[839] The Tribunal concluded,

> In both process and substance, the Crown breached the Treaty in its interpretation and management of the koha/five percent clauses and the fund, as described here. It breached the contracts it entered into in the deeds, breached article 3 by using fund moneys to pay for services to which Māori were entitled as citizens, and also signally failed to protect Māori interests actively.[840]

In *The Kaipara Report*, the Tribunal found that the prices paid for the Mangawhai block 'would have been fair if the 10 per cent provision in the deed had been fully implemented', and that

> The Māori vendors had reason to expect that they, their hapū, or their descendants (or all of them) would receive an identifiable benefit from this provision. However, the Crown failed to keep adequate records after 1874 and failed to act in good faith by not continuing to implement this provision.[841]

We endorse these general conclusions.

The 10 per cent clause was not inserted in deeds of purchase after February 1854, and thus its use was not a feature in most Crown transactions in our district inquiry. According to the Sim commission, Attorney-General Swainson, realising the (unspecified) 'difficulties' that this policy created, directed its discontinuance.[842] Whether Māori were consulted over or advised of that decision and whether they were offered any compensating assurances is not known. As noted by Dr O'Malley, the total revenue for the Ruakaka block was estimated at £10,770, which meant that the payments made by Heaphy were slightly over one-fifth of the total that the vendors 'might have expected to receive by the time of the Royal Commission on the Confiscation of Native Lands and Other Grievances (the Sim commission) inquiries.'[843] In our view, these failures constituted a breach of good faith.

8.5.2.6 *'Sufficiency' of land retained by Te Raki Māori communities*

The extent of the Crown's land purchases during this period raises the question of how Māori land was to be protected for hapū occupation, development, and

839. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 389.
840. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 391.
841. Waitangi Tribunal, *The Kaipara Report*, Wai 674, p 139.
842. 'Confiscated Native Lands and Other Grievances', AJHR, 1928, G-7, p 33.
843. O'Malley, 'Northland Crown Purchases' (doc A6), p 512; claimant closing submissions (#3.3.288), p 45.

their mana and well-being. There are, it seems to us, two measures of whether the Crown made sufficient provision for the present requirements and development opportunities of Te Raki communities: the extent to which it monitored land purchase from those communities and reduced purchasing activity where this was warranted by prior alienations; and the provision and protection of reserves. While these matters were often linked in the claims before us, they are examined separately in the discussion that follows. We first consider whether the Crown monitored whether Te Raki Māori retained a sufficiency of land during the period under consideration.

The Crown accepted that it was obliged under the treaty to ensure that Māori retained 'a sufficiency of lands'. It also claimed that, at 1865, Te Raki Māori did retain a 'sufficiency' – that is, some 65 per cent (1.387 million acres) of the total area of the Te Raki inquiry district – for their existing and future needs in the form of lands that they had excluded from sale as well as reserves created by the Crown from lands it had acquired. At the same time, Crown counsel claimed that Māori did not always require land to be set aside as reserves, nor was the Crown obliged to do so in respect of every purchase.[844] The Crown subsequently indicated that it had employed the term 'sufficiency' according to section 24 of the Native Land Act 1873: that section specified that the Crown was obliged to set aside in any district 'a sufficient quantity of land . . . for the benefit of the Natives of the district' being defined in the Act as not less than 50 acres per person.[845] The Crown went on to argue that the 1.387 million acres in the Te Raki district would have supported 27,736 individuals, a number that greatly exceeded the estimated Māori population in the period under consideration.[846]

The Chief Protector of Aborigines, George Clarke, turned his attention to the question of northern Māori land retention as early as 1843, assessing this in terms of hapū requirements. Clarke calculated that in 'the northern district', that is, the area between Otou/North Cape and Te Whara/Bream Head, there resided at least 100 hapū, 'embracing a population of about 20,000'. Of an estimated area of about 5,000 square miles, a maximum of 1,500 square miles could be available for agriculture; that is, some 10,000 acres of available land for each hapū. But, Clarke noted, in addition to land for cultivation, hapū required 'a large piece . . . for pig runs', leaving 'but a small block of desirable land eligible for disposal to [the] Government'. He recorded that 'as their independence is only to be maintained by holding possession of their land, I think it would not only be difficult, but very injurious to them to purchase large blocks of country, even if offered'. Clarke concluded by suggesting that '[t]hey can dispose of small portions of land without embroiling themselves with their neighbours, and with manifest advantage, but in

844. Crown closing submissions (#3.3.404), pp 5–11.
845. Crown memorandum (#3.2.2677), p 19.
846. Crown memorandum (#3.2.2677), pp 19–21.

attempting to dispose of large tracts of land they are certain either to injure themselves or to come into collision with others.'[847]

But this early warning was ignored or forgotten. In the years that followed, the Crown gave little thought to what would constitute a sufficiency of land or how such sufficiency might be measured; nor did it contemplate halting its land operations. By default, sufficiency was conceived of in terms of the area of land necessary to provide for the existing subsistence needs of iwi and hapū.[848] The Government did not possess or endeavour to acquire a reasonably accurate estimate of the size of the Te Raki Māori population on which to base an assessment of likely Māori subsistence and commercial land needs. Donald McLean, in March 1857, acknowledged that '[n]o correct return of [the] Native population of this Northern peninsula has yet been taken', while offering his own estimate of 8,000.[849] Moreover, the Crown did not always possess a clear understanding of the ownership of the lands that it sought to purchase or even, in the absence of surveys, the area of the blocks it had acquired.

In the absence of this information, it is difficult to see how the Crown could have arrived at a reasonably accurate assessment of the landholdings and needs of individual hapū communities, even had it attempted to do so – but it did not. In short, it failed to establish the basis on which 'sufficiency' could have been assessed, though Clarke had provided strong indications of the sort of approach that should be taken. No discussion appears to have taken place after 1854 as to what sufficiency for subsistence and maintenance meant in practice. Rather, the assumption was that Te Raki Māori, given their apparently declining numbers, would require little more than the existing areas they occupied and cultivated, with some allowance for grazing and food-gathering purposes. The Crown's land purchase agents were not offered any specific instructions or guidelines by which they were to approach and assess all matters relating to sufficiency, even for the purposes of subsistence and maintenance. In summary, there is little evidence that the Crown monitored, or even considered monitoring, the consequences of land alienation for hapū communities, or even for Te Raki Māori overall, despite the many statements acknowledging the importance of Māori not being entirely dispossessed of their land.

8.5.2.7 *Reserves*

With respect to reserves, the claimants broadly advanced a number of allegations:

847. Clarke to Colonial Secretary, 1 November 1843 (Turton, *Epitome*, c, p 154); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 439. Modern estimates indicate that the land required for subsistence agriculture ranges from 0.25 to 10.00 acres per person according to the system of farming, the practices employed, the length of the growing season, and the quality of the soil: 'Subsistence Farming', New World Encyclopedia, https://www.newworldencyclopedia.org/p/index.php?title=Subsistence_farming&oldid=683457, accessed 13 March 2022.

848. See O'Malley, 'Northland Crown Purchases' (doc A6), pp 440–441, which discusses how Johnson's purchasing instructions changed from having no reference to sufficiency in November 1853 to ensuring that Māori retained sufficient land 'for their own welfare' in May 1854.

849. McLean to Browne, 20 March 1857, AJHR, 1862, C-1, p 356.

- A key component of the 'real payment' under the land fund model was that Māori would retain strategically located reserves that would increase in value, thereby off-setting or compensating for the nominal prices the Crown was prepared to pay for land.
- Such reserves were intended to ensure Māori retained adequate land for their existing and future needs and thus constituted one of the most important protective mechanisms that the Crown could have adopted.
- While 57 reserves were created between 1840 and 1865, their acreage totalled just 13,940 acres, and almost 80 per cent of Northland land purchase deeds contained no reserve provisions at all.[850]
- With respect to setting aside reserves, the Crown failed to exercise any initiative befitting its duty to actively protect Māori interests. Those reserves set aside were established at the request of the Māori vendors, and in some instances the Crown rejected or modified their requests.[851]

Moreover, claimants contended that such 'reserves' as were established carried no formal status but rather constituted exclusions from the blocks acquired by the Crown. As such, they remained vulnerable to purchase, and in fact there were a number of cases in this inquiry district where reserves established from earlier Crown purchases were subsequently acquired by the Crown prior to 1865.[852] Finally, Te Raki Māori claim that the Crown assumed that the eventual extinction of Māori would render reserves unnecessary or that, in order to avoid such fate, they would 'assimilate'.[853]

The Crown acknowledged that where it did not reserve sufficient land for the present and future needs of iwi and hapū when purchasing land prior to 1865, it failed to uphold its duty to actively protect their interests.[854] However the Crown rejected the contention advanced by claimants that the reservation of 13,940 acres clearly indicated that insufficient land was set apart. Crown counsel argued instead that the reserves created were in addition to the lands excluded from sale to the Crown, and that reserves were not required where the lands excluded from sale constituted a 'sufficiency'.[855] Counsel cited Governor Grey to the effect that 'Areas of land sufficient to meet the future needs of Māori would be reserved from such purchases'. The Crown also recorded that McLean, as Chief Native Land Purchase Commissioner, 'continued Grey's policy of buying all interests in large areas except for reserves, which were to be confirmed to Māori under Crown grants'. Crown counsel also quoted McLean, who stated that the reserves consisted of:

850. Claimant closing submissions (#3.3.208(a)), pp 23–24. The data are from Rigby, 'Pre 1865 Te Raki Crown Purchase Validation Report' (doc A53), app B, p 8.

851. O'Malley, 'Northland Crown Purchases' (doc A6), p 442; claimant closing submissions (#3.3.208(a)), p 24.

852. Claimant closing submissions (#3.3.208(a)) pp 24, 26; O'Malley, 'Northland Crown Purchases' (doc A6), p 438.

853. Claimant closing submissions (#3.3.208(a)), pp 25–26.

854. Crown closing submissions (#3.3.404), pp 2–3.

855. Crown closing submissions (#3.3.404), pp 8–11; see also Vincent O'Malley, transcript 4.1.17, Akerama Marae, p 513.

> blocks of land excepted by the Natives, for their own use and subsistence, within the tracts of lands they have ceded to the Crown for colonization . . . Those lands are in general cultivated and occupied by the Natives, and in most instances the reserves are sufficiently extensive to provide for their present and future wants.[856]

Additionally, Crown counsel cited *The Kaipara Report*, which noted that 'these ideas continued to underpin the Crown's purchasing policy for the remainder of its pre-emption period.'[857] The Crown concluded that land purchase commissioners were instructed to ensure that Māori did not sell more than they required for their own needs.[858]

In brief, the claimants view the Crown as failing to take active measures to ensure sufficient land was reserved for both the subsistence and commercial needs of Te Raki Māori, and they argue that the Crown therefore failed to discharge its obligation to protect their interests. The Crown's position, on the other hand, was that the small number of reserves showed that most hapū retained sufficient other land, obviating any need to set aside land for their protection.

In previous reports, the Tribunal has found that the Crown failed to develop and implement a carefully considered policy on reserves in this period. The *Muriwhenua Land Report* criticised Crown reserve policy, concluding that 'reserves' were ephemeral creations, 'provided for one day, and then purchased the next.'[859] The Tribunal emphasised the lack of planning on the part of the Crown, arguing that

> The whole business of colonisation was about providing for the future. Thus the large land acquisitions, even before the settlers arrived. The entire [colonisation] scheme was future-driven and the problem was simply double standards: there was one standard in securing land for European settlers, and another in reserving land for Maori. Reserves were not created as they should have been, those that were created were not protected, and as a result Maori were denied the single most important obvious opportunity they had to share in the economic development of the country.[860]

The Tribunal agreed in *The Wairarapa ki Tararua Report*, that the reserve policy was 'flawed from the start – contradictory, vacillating, and . . . limited in nature.'[861] The Crown largely focused on the reservation of intensively used sites such as kāinga, māra, pā, urupā, and fishing sites. These sites were required for subsistence agriculture, to provide access to particularly valued resources, and to furnish rangatira with small holdings as a reward for cooperation over land purchases.

856. McLean to Colonial Secretary, 29 July 1854, *Epitome*, D, p 21; Crown closing submissions (#3.3.404), pp 12–13.
857. Crown closing submissions (#3.3.404), p 12; Waitangi Tribunal, *The Kaipara Report*, Wai 674, p 51.
858. Crown closing submissions (#3.3.404) p 17.
859. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 281.
860. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, p 208.
861. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, pp 258–259.

Reserves in that district were thus not intended to ensure that Māori retained land for commercial purposes; they had little bearing on the wider matter of sufficiency. Further, the Tribunal considered that the colonial Government considered reserves to be a 'temporary measure' for a people whose eventual fate appears to have been either extinction or assimilation.[862] In that inquiry, the Tribunal concluded that 'the Crown's policy and practice as regards reserves had serious problems. Reserves were created erratically, their purpose was muddled, and their size varied (although they were mostly small and limited to land that Māori were using intensively) . . . [and] they were not well protected'.[863]

In *Te Mana Whatu Ahuru*, the Tribunal noted that there was a distinction between reserves that were understood as 'native reserves', and those that were simply excepted from purchase lands. The Tribunal described native reserves as 'areas that should be specifically protected, including by the issuing of a separate Crown grant to the beneficiaries named in the purchase deed'. Lands excluded from sale were 'treated as ordinary Māori customary land, with title to be determined by the Native Land Court'. However, the Tribunal noted that 'the Crown and the court often confused these categories, and any measures intended to specifically protect reserve lands were at best unevenly applied'.[864] Another form of reserve the Tribunal identified was 'repurchased reserves', which we discussed in section 8.4.2.4.[865]

We see the same range of serious deficiencies as to the protections provided by reserves made in Te Raki. Despite directions to his officers in the field stressing the importance of setting aside lands for the future welfare of Māori, McLean did not provide a definition of the term 'ample'. This phrase was not used for very long, and McLean's injunction to use 'your own discretion' clearly implied that it would be the Crown, and not Te Raki Māori, who made final decisions regarding the size and location of reserves. The only clear instructions issued by McLean were that wherever possible natural boundaries should be chosen and that they should be defined and marked off before final payment was made.[866] Such instructions were intended to protect the Crown's interest against unexpected claims, minimise survey costs, and preclude disputes between Māori and settlers over stock trespass. They were aimed, McLean noted, at 'preventing differences from the unalterable nature of such boundaries'.[867] It was the same approach that he had employed in his earlier purchase negotiations elsewhere in the colony.

There is little doubt that district purchase commissioners exercised the 'judgment and discretion' that McLean granted them, and that they were quite prepared, in the interests of facilitating settlement, to restrict the area of lands that Māori wished to exclude from sale. The majority of reserves were small to average

862. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 223.
863. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 235.
864. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pts 1–2, p 276.
865. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pts 1–2, p 276.
866. See 'Circular instructions issued by Chief Land Purchase Commissioner to District Commissioners', 3 May 1861, AJHR, 1861, C-8.
867. McLean to Kemp, 17 November 1855, AJHR, 1861, C-1, p 4.

size, and were associated with a small number of Crown purchases. According to the data for our inquiry district compiled by Dr Barry Rigby, the 57 reserves established before 1865 ranged in area from four to 2,510 acres; while the average was 244.6 acres, 25 were of less than 50 acres. The average size of the 53 reserves of less than 1,000 acres was 143.1 acres. The 57 reserves were associated with 17 Crown purchases, including six with the 4,554-acre Okaihau purchase of 1858, 12 with the 12,500-acre Kawakawa purchase of 1859, and 14 with the 24,150-acre Ruapekapeka purchase of 1864. Thus 32 were associated with just three blocks in the Bay of Islands. In the remaining 71 Crown purchase blocks, no reserves were set aside for Māori.[868]

The available evidence suggests that they likely involved land already intensively used – māra, bird reserves, landing places, fisheries, and wāhi tapu, including urupā and burial caves. The only formal native reserve within Mahurangi, Te Waimai a Tumu, which had been set aside for Hauraki Māori, was purchased by the Crown within three years of it having been created.[869] Over the following two decades, the Crown appeared to recognise a number of informal reserves throughout the Mahurangi block (that is, 'reserves' for which there were no legal restrictions on alienation),[870] including those of Te Hemara Tauhia at Waiwera–Puhoi and Parihoro at Matakana-Tawharanui. Yet it failed to define them adequately by survey or provide secure titles. Furthermore, as Dr Rigby noted, with no record of the Māori population of Mahurangi at this time, it is difficult to determine whether these reserves could be considered 'sufficient' even on a per capita basis.[871]

In the case of the 16,524-acre Ruakākā block, the deed plan included a 'native reserve' of 1,227 acres labelled 'Waiwarawara.'[872] Johnson's opinion was that the valley could not be settled 'unless the natives could be confined to a limited reserve'. Johnson reported that the Māori owners had 'insisted on keeping the most valuable tract back for themselves, to which I could not consent'. He went on to note that 'After much discussion . . . the natives acceded to my idea of the quantity they required for their use', and agreement over the location of a reserve was finally reached.[873] For his part, Johnson was evidently persuaded that Māori were doomed to extinction and so deemed it unnecessary to reserve land for them, least

868. Rigby, 'Pre-1865 Te Raki Crown Purchase Validation Report' (doc A53), apps A–B.
869. O'Malley, 'Northland Crown Purchases' (doc A6), p 195.
870. See Barry Rigby, transcript 4.1.12, North Harbour Stadium, p 210.
871. Rigby, 'The Crown, Maori, and Mahurangi' (doc E18), pp 50–52. One reserve the details of which survive was Te Hemara's Reserve, which stretched from the south shore of Te Pukapuka to Waiwera and inland to the western boundary of the Mahurangi block: McBurney, 'Traditional History Overview' (doc A36), pp 391. Arapeta Hamilton suggests that Te Kawerau Māori in southern Mahurangi were not given sufficient reserves to live on: Arapeta Hamilton, transcript 4.1.12, North Harbour Stadium, p 282.
872. Claimant closing submissions (#3.3.288), p 38; Guy Gudex (doc 114), pp 13, 16; Rigby, 'Pre-1865 Te Raki Crown Purchase Validation Report' (doc A53), app A, p 5.
873. Johnson to Colonial Secretary, 6 January 1854 (Turton, *Epitome*, C, p 57); O'Malley, 'Northland Crown Purchases' (doc A6), pp 278–279 .

of all the superior lands otherwise required for settlement.[874] He wrote privately to McLean in 1857 that

> the good Land ought in my opinion to be obtained and a liberal price paid for it – its value will increase the longer time it remains in the hands of the Natives – in this part the bad Land – does not afford pasturage like the stony plains and ranges of the south, but is utterly worthless, and before the country is sufficiently peopled for it to be required, the Native race will have died out, and the Govt will have the Land for nothing.[875]

Such private comments suggest Johnson viewed reserves to be as much about controlling as they were about providing for Māori, and evidence strongly suggests that hapū were encouraged to accept that they should retain only the land required for subsistence and maintenance.

As we have discussed, the reserve policy Grey established in 1848 was that Māori would be 'furnished with plans of these reserves, and with a certified statement that they were reserved for their use, which documents are *somewhat in the nature of a Crown title*' (emphasis in original).[876] But it was not intended that a Crown title would be issued. The historian Janet Murray explains that land purchase commissioners were instructed by the Government to provide plans of reserve land once it was surveyed, and the 'registration of the reserves . . . was intended to serve as a form of a Domesday Book'.[877] However, this policy does not seem to have been implemented in Te Raki, at least at first. In November 1854, almost a year after Johnson had begun purchase negotiations in the Whāngārei district, Surveyor-General Ligar, responding to a request from the House of Representatives, recorded that there were 'no Native Reserves' in the province of Auckland. He explained that the Government had allowed Māori to retain enough land for 'their own use and occupation', land that remained in customary Māori title.[878] These reserves 'remain as regards their title, precisely in the same state as the bulk of the Native land which has not yet been disposed of by the Natives to the Crown'.[879] That same year, in correspondence to the Colonial Secretary, McLean similarly referred to the reserves as 'blocks of land excepted by Natives, for their own use and subsistence'.[880] Thus there was no register of reserves.

874. See, for example, Johnson to McLean, 5 October 1857 (cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 443).

875. Johnson to McLean, 5 October 1857 (O'Malley, supporting papers (doc A6(a)), vol 10, pp 3073–3074); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 443.

876. Grey to Grey, 15 May 1848, BPP, vol 6, p 23.

877. J E Murray, *Crown Policy on Maori Reserved Lands, 1840 to 1865, and Lands Restricted from Alienation, 1865 to 1900*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997), p 6.

878. Ligar to Colonial Secretary, 10 November 1854 (O'Malley, supporting papers (doc A6(a)), vol 2, pp 681–682); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 446.

879. Ligar to Colonial Secretary, 10 November 1854 (O'Malley, supporting papers (doc A6(a)), vol 2, p 682); cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 446.

880. McLean to Colonial Secretary, 29 July 1854 (Turton, *Epitome*, D, p 21).

The 1856 Board of Inquiry on Native Affairs also addressed the status of reserves, stating 'wherever the Natives make reserves within the Block, they should be set out and surveyed before the completion of the purchase of the surrounding land.'[881] The board's more general conclusion was that Crown-granted individual titles should be issued to Māori.[882] McLean agreed with the board on 'the advantages that would flow from such a system'. He informed the Private Secretary that he had directed that reserves 'should be carefully surveyed'.[883] However, as we have discussed, McLean's preference was that Māori should repurchase land that had already been transacted and receive individual Crown grants (see section 8.4.2.4). He had been promoting the repurchase policy since 1854 as a development of the reserve policy established by Grey. For McLean, repurchase and Crown grants offered an opportunity to break up 'tribal confederacies'. Conversely, reserves held in common would obstruct that end.[884] Small reserves afforded the Crown an opportunity of confining Māori to particular areas and of limiting their migratory habits.[885] Nor would Māori be able 'in the capacity of large landed proprietors', as land purchase commissioner Mantell expressed it, 'to continue to live in their old barbarism on the rents of an uselessly extensive domain'.[886]

Throughout this period, McLean's instructions to his land purchase commissioners emphasised his preference that Te Raki Māori should receive individual Crown grants for the sections they would repurchase (see section 8.4.2.5). Johnson advised McLean, in June 1854, that he had 'endeavoured strenuously to . . . induce the Natives to re-purchase from the Crown any land they may wish to retain in the blocks for themselves'. He went on to state that encouraging repurchase (at the Crown's ruling price for 'waste lands') was of great importance in a district 'where the sellers of land are so fond of making reserves, which are very inconvenient to the settlers, when they can do so without paying for them'; in our view, an extraordinary and telling comment.[887] Johnson continued to act on McLean's advice, noting, in September 1855, that he had encouraged rangatira to exercise a pre-emptive right to purchase at 10 shillings per acre, with the cost being deducted from purchase moneys.[888] In other words, Māori vendors collectively would meet the cost of having lands 'reserved' in the legal ownership of just a few of their number. However, in Te Raki, McLean's repurchase policy appears to have largely failed to achieve his grand aims.

A small number of the 'reserves' made in Te Raki were in fact areas set apart for repurchase from the Crown predominantly in the Whāngārei taiwhenua, as we have mentioned. One example where this did occur in Te Raki was in 1861 when Te Tirarau, Te Ahiterenga, Eruera Toenga, Hemi Pea, and other vendors of

881. AJHR, 1856, B-3, p 9.
882. Browne to Labouchere, 23 July 1856, BPP, vol 10, pp 512–513.
883. McLean to Private Secretary, 4 June 1856, BPP, vol 10, pp 580–581.
884. McLean to Private Secretary, 4 June 1856, BPP, vol 10, p 581.
885. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 223.
886. Walter Mantell to Grey, 13 March 1851, AJHR, 1858, C-3, p 12.
887. Johnson to McLean, 22 June 1854, AJHR, 1861, C-1, p 57.
888. Johnson to McLean, 5 September 1855, AJHR, 1861, C-1, p 65.

the Maungakaramea block repurchased 516 acres of 'reserves', as Johnson called them, for 10 shillings per acre.[889] We also referred earlier to Te Tirarau's repurchase of 1,000 acres out of the Maungatapere block in 1855.[890] An 1861 return of Crown grants issued to Māori revealed that the grants for these two blocks had been issued to Te Tirarau alone.[891] Before 1865, it appears that only two further repurchase reserves were created subsequently. In the case of the 140-acre Onerahi block (purchased by the Crown in 1863 for a very high £500 or some £3 12s per acre), no reserves were specified, yet 20 one-quarter-acre repurchase reserves were 'promised' to the sole vendor, Te Tirarau.[892] The deed for the 1864 Matapouri purchase recorded that two reserves had been made: one was an urupā, and the second a 're-purchase reserve' that appears to have comprised the vendors' 'Plantation at Tokoroa'.[893] We did not receive evidence as to whether Crown grants were issued in these cases.

The evidence suggests that very few among Te Raki Māori were inclined to repurchase their own land, whether under the regulations or otherwise.[894] Claimant Titewhai Harawira (Ngāti Hau) gave evidence that illustrated how repurchasing was viewed by Te Raki Māori:

> The Crown had an agenda in the restriction of our reserves. It was clearly intended to force us to purchase back our land at ten times more than what we were paid for it. Crown officials were aware of the profit being made. The Crown was paying us low purchase prices. These prices weren't accepted out of greed, they were accepted because the alternative was we would lose our whenua and receive nothing. We were coerced into these arrangements.[895]

Nor was there a consistent practice during this period for the recording of repurchased sections. For instance, the Maungakaramea and Maungatapere deeds do not mention the 'reserves' repurchased by Te Tirarau; rather, they are recorded in the published papers of the Native Land Purchase Department.[896] By contrast, the deed for the 1854 Ahuroa and Kourawhero purchase recorded that Te Kiri would return payment of £20 to Johnson 'for forty acres – a sacred p[l]ace which is not included in this sale of land'. First, we note that this was a high price to pay for the protection of wāhi tapu. Furthermore, Johnson's reference to the land

889. Johnson to McLean, 8 May 1856, AJHR, 1861, C-1, p73; Johnson to McLean, 10 September 1855, AJHR, 1861, C-1, p66.

890. McLean for Kemp to Colonial Secretary, 30 January 1855, AJHR, 1861, C-1, p64.

891. 'Return of all Crown Grants issued, or in course of preparation, to native subjects of Her Majesty', 3 July 1861, AJHR, 1861, E-6, p1; cited in O'Malley, 'Northland Crown Purchases' (doc A6), p448.

892. Innes, 'Northland Crown Purchase Deeds' (doc A4), p196; O'Malley, 'Northland Crown Purchases' (doc A6), p324.

893. Innes, 'Northland Crown Purchase Deeds' (doc A4), p213.

894. O'Malley, 'Northland Crown Purchases' (doc A6), p445.

895. Titewhai Harawira, doc I30(a), p7.

896. McLean for Kemp to Colonial Secretary, 30 January 1855, AJHR, 1861, C-1, p64; Johnson to McLean, 10 September 1855, AJHR, 1861, C-1, p66.

being excluded from the sale casts some doubt on whether the reserve was in fact 'repurchased' under Grey's regulations for the sale of Crown lands, or whether it was merely a private arrangement with Johnson that excluded a portion of the block from the sale.[897] That this reserve was not included in the 1861 return suggests that the Crown grant was not in fact issued.

Other than in this handful of cases where Te Raki Māori, largely in Whāngārei, were willing to repurchase their lands, Crown officials were apparently reluctant to offer any substantive official recognition for the need for reserves. As Dr O'Malley observed, 'Crown purchase officials in the north proved unwilling to allow Māori "free" reserves that might have undermined the already failed policy [of repurchase].'[898] As a result, he found, the remainder of the reserves created during this period 'carried no official status as such, but were simply deemed to be exclusions from the transactions, rather than permanent tribal endowments.'[899] This was consistent with how reserves were treated in other parts of New Zealand during this period. Murray noted that most of the reserve land 'continued under customary title until the Native Land Court was established.'[900]

An inspection of the Crown's purchase deeds also raises further questions about the status of the reserves that were set aside for Māori use. Craig Innes explained the scope of the problem in his evidence in our inquiry:

> Of all the problems associated with the Northland Crown purchases the issue of the reserves has been one of the most confusing. A large number of the reserves were not named in the deed text. In many cases the area of the land to be reserved was not indicated. In addition a number of reserves are sometimes shown on a plan which are not referred to in the deed text. A number of plans show cadastral lines without any explanation of what the lines are supposed to indicate. Because many of the transactions in the Northland area overlapped it would not be safe to assume that every reserve within the area transacted by a conveyance owed its existence to that transaction.[901]

Despite McLean's instruction that reserves be carefully surveyed, this was not carried out with any consistency, even after additional provision was made for surveyors to be appointed by the land purchase department in 1856.[902] Government surveyor, Andrew Sinclair, commented on this very issue in 1862 when preparing a 'Return of Native Reserves Made in the Cession of Native Territory to the Crown'. He found that the Crown's purchase deeds were 'incomplete'. In order to compile his return, he was required:

897. Innes, 'Northland Crown Purchase Deeds' (doc A4), pp 285–286.
898. O'Malley, 'Northland Crown Purchases' (doc A6), p 445.
899. O'Malley, 'Northland Crown Purchases' (doc A6), p 438.
900. Murray, *Crown Policy on Maori Reserved Lands*, p 6.
901. Innes, 'Northland Crown Purchase Deeds' (doc A4), p 7.
902. McLean to Private Secretary, 4 June 1856, BPP, vol 10, p 580; cited in O'Malley, 'Northland Crown Purchases' (doc A6), p 456.

> to examine the whole of the maps in this and the Crown Lands Office, to search for information in the Waste Lands and other Offices, to read over nearly the whole of the correspondence of the Native Department relating to this subject, and to consult every other available authority: which has been a work of considerable magnitude.[903]

In the absence of clear plans marking the boundaries of reserves, and secure titles, we consider Māori were offered little certainty and very few protections indeed. The lack of secure titles for reserves reflected the absence of any statutory provision for their protection during this period. In his report on Māori reserves, Ralph Johnson referred to the Court of Appeal's 1873 decision in the *Regina v FitzHerbert* case which considered an application for the repeal of the 1851 Crown grants for New Zealand Company lands in Wellington vested in the Crown. In its judgment the Court observed that 'it appears . . . that the creation of Native reserves was not one of the objects especially provided for in the statutes, charters, instructions, and ordinances by or under which the management or disposal of the demesne lands of the Crown was regulated'.[904]

The New Zealand Native Reserves Act 1856 provided Māori with the opportunity to obtain Crown grants for their reserves if they agreed to hand over their administration to a Commissioner of Native Reserves. However, under section 15 of the Act the commissioner would be empowered to alienate their lands by sale or lease 'either for or without valuable consideration, and either absolutely or subject to such conditions as the said Commissioners may think fit'.[905] We received no evidence that this option was ever considered by Te Raki Māori during this period. As the Act did not provide for Māori control of their reserve lands, we consider that it would likely hold little appeal, even if they were aware of it. In the absence of any other statutory provision for the recognition of their native reserves, Te Raki Māori were thus called upon to trust an informal undertaking offered by the Crown. At best, the Crown's policy amounted to one of neglect.

8.5.3 Conclusions and treaty findings

8.5.3.1 *The purchasing process*

As the Crown embarked upon its major land purchasing effort in Te Raki in the early 1850s, McLean initially emphasised the importance of purchase through open negotiation with all claimants to a particular block, securing the consent of all rightful owners, the creation of permanent and inalienable reserves, and the public payment of purchase moneys to hapū leaders.[906] However, we found no evidence that McLean took any steps to enforce the purchasing standards that he had articulated or those which had been previously identified by Crown officials.

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903. Andrew Sinclair, 12 February 1862, AJHR, 1862, E-10, p 3.
904. 'Regina v. Fitzherbert and others', AJHR, 1873, G-2C, p 3.
905. New Zealand Native Reserves Act 1856, s 15; Murray, *Crown Policy on Maori Reserved Lands*, p 14.
906. McLean's 1849 purchase of the Rangitikei–Turakina block demonstrated well McLean's early approach to Crown purchasing.

McLean's district land purchase commissioners employed a range of tactics intended to circumvent opposition to the Crown's land purchasing programme. These included initiating negotiations without first attempting to settle any disputes between hapū and iwi; negotiating with those seen to be willing to sell, irrespective of whether they were principal, secondary, or remote claimants (notably in the case of Mahurangi); paying instalments before consent for the purchase had been obtained; offering inducements in the form of Crown grants for land retained; covertly purchasing land from those willing to take the first payments without the knowledge or consent of others or their hapū; concluding deeds of sale with few signatories; placing great emphasis on the collateral benefits that would follow alienation though the Crown did little to ensure that this happened; failing to allow sufficient time for all claimants to come forward; and failing to keep adequate records of negotiations, purchase transactions, and reserves.

The absence of official oversight within the Native Land Purchase Department is particularly notable in Whāngārei. At Ruakākā and Waipū, Johnson openly admitted that he avoided calling meetings of owners, in order to target owners he called 'willing sellers'.[907] O'Malley considered that his dependence on Te Tirarau to obtain large tracts of land at Kaiwa and Maungatapere was 'both a mark of just how little influence or authority the Crown was able to exert in the region and, in some instances, a measure of the willingness of officials to sacrifice appropriate standards in favour of short-term gains'.[908] Any instance of entering into secret deals with particular owners, and excluding other owners, had the potential to damage relationships between hapū, and between hapū and their rangatira. Furthermore, the existence of multiple deeds for a number of Crown purchases (notably the Maungatapere block) casts significant doubt on the legitimacy of the transactions negotiated during this period. As the Crown conceded, Mahurangi Māori were significantly impacted by the shortcomings in the Crown's purchasing practices – in that case, signing a deed in Auckland without any prior inquiry into the customary ownership of the vast block being transacted.

With regard to Mokau in particular, it is not sufficient for the Crown to surmise from the silence in Kemp's records that, as land purchase commissioner, he must have conducted an adequate investigation into customary interests in the block. As we have observed, the Mokau block straddled the rohe of multiple hapū, many of whose rangatira had never agreed to sell areas within which they claimed interests. In our view, as a treaty partner bound by the article 2 guarantee of tino rangatiratanga and te mātāpono o te kāwanatanga, the Crown should have positively demonstrated that it conducted such an investigation and recorded the results. Indeed, this requirement was embodied in the Crown's own purchasing guidelines. It is not incumbent on Māori to prove, in the absence of any systematic Crown records, that the purchase had been improperly conducted when it was subsequently disputed, and when Māori can demonstrate deficiencies in the Crown's

907. Johnson to Colonial Secretary, 20 March 1854, AJHR, 1861, C-1, p 48.
908. O'Malley, 'Northland Crown Purchases' (doc A6), p 277.

record-keeping itself. Further, in this instance subsequent investigation identified serious flaws in the transaction, including the failure to identify all owners.

Accordingly, we find that:

- By employing land purchasing tactics that prioritised the interests of settlers and colonial development above the interests of Te Raki hapū and iwi, the Crown acted inconsistently with its duty to act in good faith towards its treaty partner, in breach of te mātāpono o te houruatanga/the principle of partnership and te mātāpono o te mana taurite/the principle of equity.

Our more specific findings on Crown purchasing follow.

8.5.3.2 *Prices*

In *The Wairarapa ki Tararua Report*, the Tribunal accepted that 'if the Crown was to take an active role in promoting orderly settlement it had to purchase some land for resale at a profit'. However, this premise left unanswered how much profit the Crown needed to sustain the land fund, and what payment and proportion of the land's value Māori should immediately receive. The Tribunal concluded that, having asserted a monopoly on purchase, the Crown had an 'obligation to deal fairly with Māori'.[909] It cited *The Ngai Tahu Report 1991*, which stated: 'With the tribe unable to find alternative buyers, the Crown was under a strong obligation to deal with the utmost good faith in such matters as the quantity of land purchased and the price paid.'[910]

We agree with these assessments. The Crown had an obligation (which it had recognised at the outset) to ensure that its purchases did not compromise the economic well-being of hapū and iwi and ability to provide for their future development. It was also unable to impose purchase prices on Māori that were not agreed beforehand, as was plainly stated in both the Māori and English texts of article 2 of the treaty.[911] Thus, prices should have been subject to negotiation, and the Crown was obliged to listen to, recognise, and respect Te Raki Māori views about the value of their lands, and bargain in good faith. If agreement on price was not possible, then the article 2 guarantee would protect the right of Te Raki Māori to retain their lands until a compromise could be reached. However, we received no evidence that the Crown systematically sought to establish an agreed approach to prices with Te Raki Māori during this period. Instead, the Crown set the maximum price it would pay for Māori land without consultation. One of McLean's

909. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 191.

910. Waitangi Tribunal, *The Ngai Tahu Report 1991*, Wai 27, vol 2, p 277.

911. The Māori text of te Tiriti stated: 'Otiia ko nga Rangatira o te Wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua-ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona'; the English text of the Treaty stated: but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf: Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 346–347.

clearest instructions to his land purchase commissioners was that they should purchase land at low prices.

Some Te Raki rangatira saw the Crown's unwillingness to negotiate on the prices paid for their land as an offence to their authority. When they raised these concerns at the Kohimarama Rūnanga in 1860, McLean dismissed their worries, repeating the Crown's view that their land had only nominal value under customary title. The Crown instead employed a number of other tactics intended to sustain the low prices it offered, notably purchasing large tracts of land well in advance of demand, purchasing tracts that embraced land of varying quality as a justification for those prices, and promising Te Raki Māori that 'real payment' in the form of infrastructure and economic opportunities would follow the sale of their lands. As we have noted, there is little evidence of the Crown attempting to ensure that such commitments were kept.

Accordingly, we find that:

- By not dealing with Te Raki Māori in good faith with regard to price-setting for their land, and utilising its monopoly advantage to insist on the low maximum prices it would pay, the Crown breached te mātāpono o te houruatanga/the principle of partnership.
- By paying nominal prices which reduced the ability of hapū to develop their remaining land if they so wished and enter the economy on an equal footing with settlers, the Crown breached te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development, te mātāpono o te mana taurite/the principle of equity, and te mātāpono o te tino rangatiratanga.

8.5.3.3 *'Real payments' or 'collateral benefits'*

What began as a loosely worded notion, the 'benefits' that would accrue to Māori following the introduction of settlers and capital into New Zealand gradually evolved into explicit assurances over 'real payments'. As a matter of course, 'collateral benefits' were held out to and, it was said, accepted by Māori as the 'real payment' for their land. The promise of collateral benefits was evidently intended to convey an assurance that the Crown was committed to conserving and advancing the interests of Māori. These undertakings were inserted into a small number of purchase deeds as per cent clauses, but were more widely promised by Governors Grey and Gore Browne, and land purchase commissioners.

The 10 per cent clauses were intended to fulfil the promises made in respect of collateral benefits. As inserted in some purchase deeds, the clause constituted a commitment that the Crown was obliged to honour. It was intended to provide owners of a block with a share in the rising value of their land when it was on-sold; to that extent it had a commendable objective. Yet the 10 per cent scheme was utilised only in three cases in Te Raki and was terminated prematurely for reasons that had little to do with its intrinsic merits or flaws – seldom has a policy been more half-hearted. Successive Governments also failed to administer the truncated scheme in a manner that was fair to those who, partly on the strength of the clause, had sold their lands to the Crown. The Crown also failed to develop

an alternative policy to honour the promises freely made to Māori that collateral benefits would follow land sales.

There were serious shortcomings in the Crown's carrying out of its obligations in respect of the Ruakaka purchase. In 1874, Heaphy distributed £237 to Taurau and those present in Whāngārei for the purpose of 'education and hospitals' and made further payments of £35 to other unidentified owners. The 1927 Sim commission's conclusion was that the Crown's obligations to the sellers were otherwise discharged, based on its general expenditure on Māori education and health services prior to 1925. No explanation was offered as to why the proceeds from the on-sale of land in those few blocks were expected to fund the provision of certain services to all Māori, or how the clause could be held to compensate the vendors for the low prices they had received for their lands. The conclusion reached by the Sim commission (and maintained by the Crown) was inconsistent with the manner in which Heaphy approached his task, preparing detailed accounts for each block and distributing moneys to former owners.[912] In our view, the Sim commission failed to appreciate the basic obligation into which the Crown had entered. For the Crown, the commission's finding in this matter was politically expedient rather than a reflection of the promises made to the Ruakākā people or in the treaty in general.

It is evident that the Crown made more general promises to Te Raki Māori of collateral benefits – including towns, public works, public services, the rising value of land retained, and commercial opportunities – not as an affirmation of partnership but as an indeterminate assurance intended to facilitate the implementation of its plans for a settler-dominated society and economy. Promises of 'real payments' in the form of rising land values consequent upon the building of roads, schools, hospitals, and so forth constituted a clear and unambiguous inducement to sell to the Crown which then it did little to put into actual effect. This was exemplified in the Bay of Islands Settlement Act 1858, and its fate. When Governor Gore Browne visited Te Raki in January 1858, and Governor Grey in 1861, Bay of Islands Māori had been promised a township and the associated investment in the economy and infrastructure. However, after the outbreak of war in Taranaki and Waikato, the proposed township was forgotten by Crown officials, and large areas of purchased land were held by the Crown unsettled for many years. In the absence of any Crown delivery on the promised opportunities and benefits that would accompany land sales, O'Malley argued, the 'real payment' Te Raki Māori received was only the sum of money and goods that the Crown paid at the time of the deed signings.[913]

Acccordingly, we find that:

- By failing to adequately implement its 10 per cent commitment to Te Raki Māori as recorded in certain purchase deeds, the Crown breached te

912. See also 'Report of Commissioner of Native Reserves', 31 May 1876, AJHR, 1876, G-3, p 1, in which Heaphy, with reference to the Hunua block, noted that moneys were made 'available for certain beneficial purposes in connection with the people who had originally sold that land'.

913. O'Malley, 'Northland Crown Purchases' (doc A6(a)), p 466.

mātāpono o te houruatanga/the principle of partnership, and te mātāpono o te kāwanatanga.

- By failing to take timely steps to meet its commitment to ensure that Te Raki Māori would receive collateral benefits they were promised, the Crown breached te mātāpono o te whaihua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development.

8.5.3.4 *'Sufficiency' of land and reserves*

In previous reports, the Tribunal has found that the Crown, at an early stage, recognised that it was obliged to ensure that Māori retained sufficient land for their subsistence and maintenance *and* for development opportunities. Such recognition was implicit in Normanby's 1839 instructions: if Māori were to retain enough land for their present and future needs and to benefit from the increasing value of their lands, as Normanby envisaged, then they would have to retain a good deal more land than was required for bare subsistence purposes.[914] The Tribunal has also recognised that the Crown played a major, if not central, role in shaping the colonial society and economy. Through the redistribution of land once owned by Māori, it enabled settlers of modest means to invest labour, skills, and capital in transforming natural resources into sources of output – a transformation that lay at the heart of colonial economic development. The ownership of land was, from the outset of colonisation, regarded as the key to material prosperity, and a core role of the Crown was to ensure what was regarded as reasonable equality of opportunity.[915]

The conclusions reached by the Tribunal in other inquiries on the 'sufficiency' of reserves and land retained by Māori are based on two major premises: namely, that Māori sought to contribute to and benefit from the colonial economy, and that the Crown, through its duty of active protection, was obliged to encourage, support, and assist Māori to do so. In the *Muriwhenua Land Report*, for example, the Tribunal concluded that 'a settlement plan that was sensitive to Maori people was needed if Maori interests were to be provided for'.[916] In *The Ngai Tahu Report 1991*, the Tribunal recorded that the Crown's 'duty was to ensure that Ngai Tahu were left with sufficient lands for their present and future needs'. It went on to observe that '[s]ufficient land would need to be left with Ngai Tahu to enable them to engage on an equal basis with European settlers in pastoral and other farming activities.'[917] In *The Hauraki Report*, the Tribunal, while acknowledging that 'historical contexts' could not be ignored, nevertheless concluded 'that governments could have fostered a wider Maori involvement in the new economy',

914. See, for example, Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 357.
915. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, pp 363–364.
916. Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45, pp 357–358.
917. Waitangi Tribunal, *The Ngai Tahu Report 1991*, Wai 27, vol 2, pp 239–240. The Tribunal listed eight factors relevant to defining 'sufficiency': namely, the population of the tribe, the land occupied by iwi or hapū or both over which they had rights, principal food sources and their location, location of wāhi tapu, the likely impact of European farming practices, the tribe's needs at the time, the tribe's reasonably foreseeable future needs, and the need for land to comprise contiguous blocks.

but that the Crown had failed to ensure Māori retained sufficient land for earning income.[918] In *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (2004), the Tribunal reached similar conclusions, while also noting that the Crown's responsibility to undertake positive action was explicit in Normanby's instructions, and in both the preamble and article 3 of the treaty.[919]

The Tribunal examined the matter of sufficiency at some length in the *Wairarapa ki Tararua* report, concluding that '[t]he assurance to Māori that they would retain adequate land for their future welfare, and in the fullness of time would be in a position to reap the benefits of British settlement, was fundamental to the relationship between Crown and Māori'.[920]

Thus, so they could engage in new commercial activities and in order to meet their cultural and resource needs, Wairarapa Māori needed to retain sufficient land to be able 'to benefit from its increase in value to make up for what they sold at low prices'. The Tribunal went on to suggest that these were not modern notions of sufficiency, but ideas that were articulated by colonial law makers.[921] It concluded that

> in nineteenth-century New Zealand, land ownership and the control of resources associated with it were widely perceived as important ways to derive wealth from the new opportunities expected to arise with settlement. From the beginnings of settlement, it was also understood that protecting the right amount of land for Māori would be important in ensuring their capacity to participate in these opportunities.

This, it added, 'was a key message in the assurances which persuaded Māori to part with their land'.[922]

These are important conclusions about Government obligations and policy which we endorse and accept in our inquiry.

By contrast, the fundamental premise on which the Crown prepared to embark upon an extensive land-purchasing programme was that Te Raki Māori would remain in an essentially marginal position in the colonial economy. The Crown therefore assumed that Māori would require land only for the purposes of subsistence and maintenance of their population which was considered to be dwindling, and further, that they required little more than the lands they already occupied and cultivated. It failed to heed the import of Clarke's early conclusion that Te Raki hapū could not afford to alienate more land, and it failed to test his conclusion. No evidence emerged that indicates the Crown carried out any investigations that might have assisted it to establish a basis on which to assess the land needs of each Te Raki hapū community or, indeed, to monitor the implications and consequences of its purchases for those hapū. In short, the Crown adopted a very narrow concept and definition of sufficiency that served its interests rather

918. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 3, pp 1218–1222.
919. Waitangi Tribunal, *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims*, Wai 215 (Wellington: Legislation Direct, 2004), p 23.
920. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 258.
921. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 2, p 561.
922. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 2, pp 592–593.

than those of Te Raki hapū and iwi. By so doing, the Crown once again exposed an unresolved tension between its treaty obligations to Te Raki Māori and its desire to promote immigration and the development of the colonial economy through small-farm settlement by immigrants.

We accept claimant counsel's conclusions that the Crown had a duty to 'ensure that Te Raki Māori retain and retained their lands, estates, forests, fisheries, other properties and taonga as long as it was in their desire to do so', as well as actively protecting them from 'the loss of their land and economic resources . . . to ensure that [they] retained a sufficient land and resource base for their effective participation in the colonial economy'.[923] The Crown conceded that 'it had a responsibility to ensure that the alienation of land, including Northland lands, did not render the alienors impoverished'.[924]

We conclude that, in pursuing its purchase objectives, the Crown acted inconsistently with that duty. The Crown failed to develop, either independently or in consultation with Te Raki Māori, a robust policy concerning land retention and reserves, including matters such as economic usefulness; suitability for hapū purposes; size, quality, and location; alienability; nature of ownership; and legal status. Whereas McLean had early in his land purchasing career placed considerable store on creating large, permanent, inalienable, and collectively owned reserves, as the head of the Native Land Purchase Department he instructed his district land purchase commissioners to use their own discretion on the matter. There is evidence from this period that where reserves were granted, land purchase commissioners sought to restrict them to less valuable portions of blocks. For instance, Johnson wrote to McLean that he 'could not consent' to Ruakaka Māori retaining a 'valuable tract' of land.[925] There is also evidence that Johnson on occasion viewed reserves as an inconvenience to settlers.[926] However, McLean neither questioned nor raised any objections to the apparent aversion on the part of his purchasing agents to ensure that reserves were set aside for those hapū who chose to transact their land. McLean endeavoured to limit demand for reserves by encouraging Māori vendors to repurchase at a substantial price land that they just transacted. This policy meant that Māori were obliged to use the proceeds of the transaction to retain a portion of their own land and receive Crown grants for it at a much greater price than they had received – a step towards the 'individualisation' of land tenure that would dominate the Crown's approach to Māori-owned land for over the next 100 years. It also meant that those proceeds were then unavailable for the acquisition of whānau economic assets.

Between 1840 and 1865, the Crown established 57 reserves with an aggregate area of 13,940 acres, out of the 482,115 acres that it acquired during this period.[927] In our view, this small amount of land was not enough to support hapū well-being

923. Claimant closing submissions (#3.3.216), pp 11–13, 29–33; see also claimant closing submissions (#3.3.216(a)), pp 4–6.
924. Draft Crown statement of position and concessions (#1.3.1), p 186.
925. Johnson to Sinclair, 6 January 1854 (Turton, *Epitome*, c, p 57).
926. Johnson to McLean, 22 June 1854, AJHR, 1861, c-1, p 57.
927. Rigby, 'Pre-1865 Te Raki Crown Purchase Validation Report' (doc A53), apps A–B.

and development. Such reserves as were created focused on sites occupied and cultivated or employed for mahinga kai, landing places, and places of particular importance to Te Raki Māori; an approach fully consistent with the Crown's cornerstone commitment to the protection of 'occupied' lands, perceived to be the areas that Maori really 'owned' – and to a concept of sufficiency based on adequacy for short-term subsistence. The Crown's failure to set apart substantial reserves of good-quality land meant that Te Raki hapū would never receive a key component of the promised 'real payment'; that is, the rising value of the reserved lands they retained.

With the exception of a small number of repurchase reserves, the reserves that were made in Te Raki during this period did not receive secure titles, and many were not surveyed until much later. Without any statutory recognition for native reserves, the Crown's promises that reserved lands would be protected and would remain in Māori ownership to support hapū communities had little substance and were made in bad faith. As Dr O'Malley argued, Te Raki Crown purchase reserves 'were left bereft of any protection from alienation by the Crown and later subjected to the operations of the Native Land Court'.[928] In the end, the small number of native reserves allocated for Te Raki Māori during this period, but not titled, was an insecure and insufficient tribal estate for their immediate needs and future development.

Accordingly, we find that:

- By failing to ensure that hapū communities each retained a land and resource base to meet their present and future requirements for sustenance and fulfilment of cultural obligations, to provide opportunities for development, and to enable them to participate in the national economy, the Crown breached te mātāpono o te whaihua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development and te mātāpono o te matapopore moroki/the principle of active protection. It also breached te mātāpono o te tino rangatiratanga.
- By failing to make adequate statutory provision for the creation of secure titles for native reserves for hapū, and by failing to ensure that reserves were surveyed and their boundaries clearly marked, the Crown breached te mātāpono o te houruatanga/the principle of partnership, te mātāpono o te kāwanatanga, and te mātāpono o te tino rangatiratanga.

8.5.3.5 *Overall finding on the Crown's purchasing practices*

It is clear to us that Ngāpuhi and Te Raki Māori hapū and iwi entered into negotiations over land expecting to implement the partnership embodied in the treaty. Equally, Lord Normanby's 1839 instructions to Hobson established early on that the Crown had an obligation to act in good faith towards Māori, and to recognise their interests and rights. However, alongside these early statements of protective intent was the further imperative on Crown officials to acquire large tracts of land at low cost to sustain the colony's land-fund.

928. O'Malley, 'Northland Crown Purchases' (doc A6), p 450.

The manner in which land was to be acquired for settlement was of great importance to Te Raki Māori and the Crown, and had implications for both their spheres of authority as recognised in te Tiriti. However, as we concluded in sections 8.3.3 and 8.4.3, the Crown failed to engage with Te Raki Māori in an appropriate, meaningful, and good faith manner, and neither sought, nor secured, their full and informed consent and support for key aspects of its purchasing policy. In our view, the Crown had many opportunities to reach this kind of negotiated agreement on land purchase and settlement. After signing te Tiriti Te Raki hapū and iwi were interested in transacting their land, maintaining a connection with it and settlers in their midst, and sought an economic partnership with the Crown. However, Crown officials did not try to understand Te Raki Māori aspirations. Nor is it clear that they made any real effort to ensure that Te Raki Māori would thrive socially, politically, and economically alongside the colonists. Despite its rhetoric, the Crown showed little interest in policies that would build a society in which both Māori and Pākehā participated and contributed, as the treaty had contemplated and guaranteed. Māori were incentivised to transact their lands by promises of future benefits. However, by 1865 it was not clear that these would eventuate.

The design of the Crown's purchasing programme was intrinsic to and reflected this failure. As envisaged by officials such as McLean, the Crown's purchasing programme sought to acquire entire districts, and confine Māori communities to small reserves for their occupation and subsistence only. Almost immediately after signing the treaty, the Crown disregarded the guarantees it had made to Te Raki Māori that their tino rangatiratanga would be protected, and that the settlement and development of the colony would be the subject of negotiated agreement. Instead, the Crown pursued a policy of extinguishing customary title through the purchase of large tracts of land at low prices. Privileging the interests of settlers, the Crown targeted the best agricultural and commercial land in the district and sought to restrict Te Raki Māori to reserves that would provide for their subsistence only. As Crown counsel acknowledged, the purchasing programme imposed a process by means of which the alienation of Te Raki hapū land directly funded the development of the colony.[929] Settler society benefited from this development, at the expense of Te Raki Māori.

In pursuing this policy, Crown agents negotiated purchases with owners wanting to access new goods, technology, and beneficial relationships. They often disregarded or circumvented the objections of owners who wished to hold their territories intact. They failed to investigate the full range of customary interests in lands before purchasing them; took other corner-cutting measures (such as dealing with only handfuls of owners, staged payments by instalment, and failing to walk the boundaries) to ensure the swift purchase from Māori of land they sought for re-sale and settlement; and subsequently failed to ensure the realisation of promised collateral benefits. The Crown failed to devise and implement a robust

929. Crown closing submissions (#3.3.404), p 46.

policy to ensure Māori retained sufficient land for their present and future well-being, and economic and social development.

In light of these overall shortcomings of the Crown's purchasing regime, we find that:

- By failing to act reasonably, honourably, and in good faith, to engage with its treaty partner, and involve Te Raki Maori in decision-making about the alienation and settlement of their lands, the design and implementation of its land purchasing programme and its policy for colonial development in the inquiry district in the period 1840 to 1865, the Crown breached te mātāpono o te houruatanga/the principle of partnership, te mātāpono o te tino rangatiratanga, as well as te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect
- By failing to uphold its own standards clearly articulated at the time and prioritising the purchase of large areas of land at low cost in order to serve the interests of settlers over respect for and recognition of Te Raki Māori interests, the Crown breached te mātāpono o te tino rangatiratanga, te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development, te mātāpono o te mana taurite/the principle of equity and te mātāpono o te matapopore moroki/the principle of active protection

8.6 Whakarāpopototanga o ngā Whakataunga / Summary of Findings

In respect of the development of the Crown's purchasing policy, we find that:

- The Crown failed to engage with Te Raki Māori in developing its purchasing and settlement policy during the 1840s, and prioritised its political and economic objectives at the expense of Māori interests and treaty-protected rights in breach of te mātāpono o te tino rangatiratanga, and te mātāpono o te houruatanga/the principle of partnership.
- By denigrating the validity of Te Raki Māori rights in land and accepting the principle that those rights could be extinguished over large tracts of land at low cost, while hapū and iwi could be confined to small reserves for cultivation and occupation, Crown policy breached te mātāpono o te houruatanga/the principle of partnership, te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development, and te mātāpono o te matapopore moroki/the principle of active protection.

In respect of the Crown's implementation of its purchasing policy, we find that:

- By limiting the ability of Māori to exercise all the rights of ownership through failing to provide legal recognition for existing lease arrangements in an attempt to induce Māori to part with their land, the Crown breached te mātāpono o te tino rangatiratanga and te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development.

- By not adequately considering Te Raki Māori views and interests and by implementing a land purchase policy after 1848 that favoured the interests of settlers, and sought to bring Te Raki Māori communities under the control of British institutions and laws through assimilationist policies, the Crown breached te mātāpono o te houruatanga/the principle of partnership, te mātāpono o te tino rangatiratanga, and te mātāpono o te mana taurite/the principle of equity.

In respect of the Crown's purchasing practices on the ground, we find that:

- By employing land purchasing tactics that prioritised the interests of settlers and colonial development above the interests of Te Raki hapū and iwi, the Crown acted inconsistently with its duty to act in good faith towards its treaty partner, in breach of te mātāpono o te houruatanga/the principle of partnership and te mātāpono o te mana taurite/the principle of equity.
- By not dealing with Te Raki Māori in good faith with regard to price-setting for their land, and utilising its monopoly advantage to insist on the low maximum prices it would pay, the Crown breached te mātāpono o te houruatanga/the principle of partnership.
- By paying nominal prices which reduced the ability of hapū to develop their remaining land if they so wished and enter the economy on an equal footing with settlers, the Crown breached te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development, te mātāpono o te mana taurite/the principle of equity, and te mātāpono o te tino rangatiratanga.
- By failing to adequately implement its 10 per cent commitment to Te Raki Māori as recorded in certain purchase deeds, the Crown breached te mātāpono o te houruatanga/the principle of partnership, and te mātāpono o te kāwanatanga.
- By failing to take timely steps to meet its commitment to ensure that Te Raki Māori would receive collateral benefits they were promised, the Crown breached te mātāpono o te whaihua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development.
- By failing to ensure that hapū communities each retained a land and resource base to meet their present and future requirements for sustenance and fulfilment of cultural obligations, to provide opportunities for development, and to enable them to participate in the national economy, the Crown breached te mātāpono o te whaihua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development and te mātāpono o te matapopore moroki/the principle of active protection. It also breached te mātāpono o te tino rangatiratanga.
- By failing to make adequate statutory provision for the creation of secure titles for native reserves for hapū, and by failing to ensure that reserves were surveyed and their boundaries clearly marked, the Crown breached te mātāpono o te houruatanga/the principle of partnership, te mātāpono o te kāwanatanga, and te mātāpono o te tino rangatiratanga.

- By failing to act reasonably, honourably, and in good faith, to engage with its treaty partner, and involve Te Raki Maori in decision-making about the alienation and settlement of their lands, the design and implementation of its land purchasing programme and its policy for colonial development in the inquiry district in the period 1840 to 1865, the Crown breached te mātāpono o te houruatanga/the principle of partnership, te mātāpono o te tino rangatiratanga, as well as te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect.
- By failing to uphold its own standards clearly articulated at the time and prioritising the purchase of large areas of land at low cost in order to serve the interests of settlers over respect for and recognition of Te Raki Māori interests, the Crown breached te mātāpono o te tino rangatiratanga, te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development, te mātāpono o te mana taurite/the principle of equity and te mātāpono o te matapopore moroki/the principle of active protection.

8.7 Ngā Whakahāweatanga / Prejudice

The Crown directly purchased approximately 23 per cent of land in Te Raki hapū and iwi customary ownership between 1840 and 1865. The Crown's purchases included approximately 95,000 acres (23 per cent) of the Bay of Islands and Te Waimate Taiāmai taiwhenua, 36,000 acres (15 per cent) of the Whangaroa taiwhenua, 205,000 acres (30 per cent) of the Whāngārei and Mangakāhia taiwhenua, and 148,000 acres (28 per cent) of the Mahurangi and Gulf Islands taiwhenua.[930] Overall, Crown purchasing in the Te Raki district during this period amounted to some 482,000 acres, with the loss from old land claims and pre-emptive waiver transactions accounting for a further 274,600 acres.[931] By 1865, over 34 per cent of Te Raki Māori land had been alienated. Te Raki Māori were fundamentally prejudiced by such a significant transfer of their tribal estate out of their control at an early stage of the developing treaty relationship and their engagement with the colonial economy.

During this period, the protection of the landholdings of hapū communities was far from a key concern of the Crown's purchase agents. The Crown did not seek to understand how various communities were coping with its purchasing drive, nor how much land and resources these communities retained for themselves. Instead, it prioritised the acquisition of large blocks as the most efficient means of extinguishing native title and consolidating Crown control over the district. These actions contrasted sharply with the Crown's expressions of concern for

930. Crown closing submissions (#3.3.404), pp 5–6.

931. The Crown gives a purchasing total of 482,115 acres, while technical witness Dr Rigby offered a total of 482,524 acres; see Rigby, corrections requested by Crown counsel (doc A048(e)), p 7; see chapter 6 for our figures concerning losses related to old land claims and pre-emptive waiver transactions.

Māori land loss and welfare before the treaty was signed, and had highly prejudicial consequences for Te Raki Māori. As Marina Fletcher (Te Parawhau) stated, her hapū '[went] from having large tracts of cultivations . . . plentiful stores of food and an abundance of resources, estates, kainga and people' before the treaty, to 'a marked decline in [their] population, health, wealth and general prosperity'.[932]

Johnson's operation in the Whāngārei district epitomised the Crown's reckless approach to land acquisition. Between 1854 and 1858, he purchased some 99,000 acres, all surrounding Whāngārei Harbour.[933] Not included in this figure are Johnson's 1854 purchases of the Ruakaka and Waipu blocks, to the south of the harbour on the east coast, which represent a further loss of 46,359 acres for the local hapū.[934] Through this wave of purchases, the Crown gained control of the valuable harbour frontage, while 'Whangarei Māori were gradually . . . pushed back into the hills', as O'Malley put it.[935] The remainder of the Crown's Whāngārei purchasing was completed after Johnson left the land purchase department, and involved agricultural lands adjacent to the harbour.[936] Despite having retained land in the interior, Whāngārei hapū had lost much of the most valuable land in the district by 1865.

The purchase of the Mahurangi–Omaha block from 1841 is a particularly notable example of the Crown's treaty breaches contributing to long-lasting prejudice. The Mahurangi–Omaha purchase purported to alienate around 220,000 acres of land from the hapū of the district, including Ngāti Rongo ki Mahurangi, Ngāti Maraeariki, Ngāti Manu, Te Uri Karaka, and other Maki-nui descendants.[937] Counsel for the Crown acknowledged that by the 1850s, when it had begun to purchase the interests of the owners not involved in the original purchase,

> European settlement of these lands had begun and Māori were obliged to accept the Crown's position that the sale would not be revisited in any substantial way. All that was left to those who had not already agreed to the transaction was to choose to accept a payment and attempt to have reserves set aside.[938]

The impact of losing this land is an enduring grievance for these hapū and was addressed by multiple claimants in our inquiry. Arapeta Hamilton (Ngāti Rongo), for example, told us:

932. Marina Fletcher (doc AA126(b)), p 63.
933. The purchase blocks included Te Kamo, Te Whauwhau, Te Mahe, Tamaterau, Parahaki, Takahiwai, Kaiwa, Whareroa, Kaurihohore, Manaia, Maungakaramea, Ruarangi, Te Mata, Te Tupua, Maungatapare, and Poupouwhenua: Rigby, 'Pre-1865 Te Raki Crown Purchase Validation Report' (doc A53), app A, pp 4–6.
934. Rigby, 'Pre-1865 Te Raki Crown Purchase Validation Report' (doc A53), app A, pp 4–6.
935. O'Malley, 'Northland Crown Purchases' (doc A6), p 296.
936. O'Malley, 'Northland Crown Purchases' (doc A6), p 333.
937. O'Malley, 'Northland Crown Purchases' (doc A6), p 186.
938. Crown closing submissions (#3.3.404), p 8.

> The Purchase of Mahurangi by the Crown has been seen as being very complex and difficult but for the Mana Whenua the process has been devastating. The process of land acquisition by the Crown has been aggressive and the colonisation has been fast, furious and deadly. To be basically landless within your own Rohe in such a short period of time is horrific.[939]

Claimant Michael Beazley (Ngāti Maraeariki) also described the enduring impact of the limited reserves set aside from the Mahurangi–Omaha purchase on his hapū:

> As a result of the Mahurangi Purchase, the Te Kawerau people who had occupied that area for over 200 years were dispossessed and ultimately marginalised on to reserves that represented a fraction of their original holdings. . . . Our loss of land has made us nearly invisible in our own rohe. We have little say on matters of kaitiakitanga . . . Ngāti Maraeariki do not have a marae. We do not have land upon which to create a reserve and build a marae.[940]

Even in the taiwhenua where Crown purchasing activity was comparably less extensive, the impact on Māori communities could be dire, especially if it removed access to key resources or trading opportunities. For instance, in the Bay of Islands the cumulative effect of Crown purchasing, coupled with the losses Te Raki Māori suffered through the ratification of old land claim transactions and the Crown's taking of the 'surplus', was particularly felt by the 1860s. The Crown had purchased another 95,305 acres by 1865 (approximately a further 23 per cent of the district).[941] In their overview report on the Auckland Province, Rigby, Daamen, and Hamer observed that what was retained was the least valuable land.[942]

In Whangaroa, the Crown's purchase of the large Pupuke and Mokau blocks removed the Māori owners' access to substantial kauri and timber resources.[943] Claimant Rowan Tautari pointed out, with reference to the Mokau purchase, that the impact encompassed more than the loss of a landbase:

> The biggest loss to Te Whiu is probably measured in its inability to use the resources growing on such land. Te Whiu were denied vast tracts of kauri forest with a commercial timber value, as well as sources for gum. From another perspective, such sales must have raised emotions of distrust, suspicion and frustration between Maori.[944]

Dr O'Malley observed that, over time, the disparity in the price Māori received for the land and the value of the timber would only increase. By 1948, the price

939. Arapeta Hamilton (doc K7(b)), p 19.
940. Beazley (doc K8), pp 65–66.
941. Crown closing submissions (#3.3.404), p 5.
942. Daamen, Hamer, and Rigby, *Auckland*, p 146.
943. O'Malley, 'Northland Crown Purchases' (doc A6), p 274.
944. Rowan Tautari, 'Report on Land Previously Owned by Te Whiu Hapu' (commissioned research report, Wellington: Waitangi Tribunal, 1999) (doc E6), p 61.

of one tree on the Mokau block was considered to be worth more than what had been received for the block 90 years earlier.[945] Erimana Taniora (Ngātiuru and Te Whānaupani) described the impact that losing the opportunity to receive the economic value of their resources has had on their community:

> Land loss has affected Ngātiuru in a number of ways, the issues go deeper than just the loss of the land. The loss of the land has resulted in a much smaller economic base for our people and the loss of resources . . . The loss of lands has also meant that Ngātiuru lacks an economic base here in Whangaroa . . . We have lost many economic opportunities. And this has probably resulted in the current social and economic deprivation in Whangaroa.[946]

Overall, the Crown's land policies and their implementation during this period failed to ensure that Te Raki Māori were able to maintain key cultural practices or secure a sound and sustainable footing in the regional economy. As we have noted, only 57 reserves were established during this period, covering 13,940 acres. In our view, this was a woefully inadequate estate to provide for the present and future requirements of Te Raki Māori, especially when considered in the context of the 482,000 acres that the Crown acquired during the period.[947]

Moreover, the limited protection the reserves provided was further reduced by the fact that the majority of the reserves entered on purchase deeds received no legal titles and often were not surveyed until much later. The absence of surveys, or else substandard surveying, made it difficult for Te Raki hapū to know what land had been sold and what remained in Māori ownership. The only means they had to secure Crown grants for their reserves was to repurchase lands out of the proceeds they had received from the Crown. Unsurprisingly, the option to repurchase a portion of their land at the same price settlers would pay for Crown lands was not taken up by Te Raki Māori, except in a few cases. As a consequence, most of the reserve lands remained under customary title, would later come before the Native Land Court, and could then be purchased (as we discuss in the following chapters). For instance, Ruapekapeka Māori reserved 745 acres from sale, but the Crown acquired 486 acres of that area in June 1865 for £1,106.[948] As previously outlined, when the Crown purchased the Ruakaka block, the 1,227-acre Waiwerawera block was set aside as a 'Native Reserve' and labelled as such on the deed plan. However, when the title for this reserve was investigated in November 1873, it was awarded to only five Māori owners (Hona Te Horo, Horomona Te Hana, Parata Te Rata Pou, Ihapera Pomare, and Hira Te Taka), upon which it was promptly purchased by Thomas Henry, a settler.[949]

945. O'Malley, 'Northland Crown Purchases' (doc A6), p 465.
946. Erimana Taniora (doc G1), pp 123–124.
947. Rigby, 'Pre-1865 Te Raki Crown Purchase Validation Report' (doc A53), app A.
948. O'Malley, 'Northland Crown Purchases' (doc A6), p 359.
949. This reserve is distinct from that offered to Te Hemara in April 1841: Claimant closing submissions (#3.3.288), p 38; Guy Gudex (doc 114), pp 13, 16; Sinclair, 17 June 1862, AJHR, 1862, E-10, p 4.

While we did receive some evidence of contemporary consequences for Te Raki hapū and iwi of the Crown's land purchasing policies, establishing clear causal connections between land loss and socio-economic disadvantage or marginalisation is difficult. Typically, many years elapse before disadvantages become fully manifest. For the period 1840 to 1865, we lack the kind of information on which to base a comprehensive assessment of the nature and extent of the injury that the Crown's actions may have caused Te Raki hapū and iwi. In previous inquiries, the Tribunal has confronted similar difficulties but nevertheless considered it could reach two major conclusions: first, that the loss of land was a major contributor to the adverse social and economic conditions that had emerged in most Māori communities by 1900, and which assumed acute form during the first three decades of the twentieth century; and secondly, that the Crown was responsible, directly and indirectly, for the greater part of the land loss that those communities sustained.[950]

Overall, we think these conclusions apply with equal force to the experiences of Te Raki Māori communities. In fact, while Te Raki Māori had arguably benefited from the early commercial economy, particularly through their interface with the whaling trade, this economy had taken a great hit in the 1840s. As we discussed in chapter 4, the Crown had relocated the capital to Auckland in 1841, and the Bay of Islands was no longer a favoured destination of whaling ships. The Northern War had further depressed local economic activity. Te Raki Māori then had to start again, with many settlers in the district having left during the war or having accepted attractive scrip offers from the Government. If they were to thrive, Māori needed their lands and opportunities to develop them, encourage settlement (on their own terms), and adapt to the new economic circumstances and benefit from them. When it came to potential participation in the new settler economy, the early and extensive nature of land losses in Whāngārei and Mahurangi, in particular, placed Māori in those districts in an extremely disadvantaged position that would develop over subsequent decades.

There is evidence that Te Raki Māori considered that leasing offered them a better means of participating in the colonial economy, and that they continued to enter into informal lease agreements even after penalties were introduced in 1846. However, the Crown's refusal to provide any formal recognition for leases of Māori land ultimately left hapū few options other than accepting the Crown's offers to purchase their lands at nominal prices. The large-scale alienation of land that resulted early in the development of the colony, coupled with the tardy development of infrastructure that Māori had been promised, meant that Te Raki hapū had little opportunity to participate on an equitable footing.

Indeed, it seems likely that the Crown's purchasing conduct between 1840 and 1865, which significantly reduced the landholding and resource base of Te Raki Māori communities, contributed to a longer-term decline in their socio-economic

950. See Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, Wai 201, vol 2, p 679; Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 3, pp 1229–1230; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, Wai 785, vol 2, pp 1025–1027; Waitangi Tribunal, *Te Urewera*, Wai 894, 8 vols (Wellington: Legislation Direct, 2017), vol 8, pp 3761–3763.

circumstances. Although the Chief Protector of Aborigines had recognised as early as 1843 that northern Māori could not afford to dispose of large areas of land, his advice and the implicit warning were ignored. In 1857, McLean advised Gore Browne that he was confident that if northern Māori were persuaded 'that the aim and object of the Government [was] to promote impartially the permanent advancement of both races of Her Majesty's subjects', they would respond, adapt, and flourish.[951] His solution to the economic malaise that he clearly recognised gripped Te Raki Māori was the transfer of further land out of Māori ownership: 'The North of New Zealand', he wrote in his journal in December 1858, 'requires the infusion of a colonising spirit; the purchase of land from the natives, and the earnest co-operation of the Government, to give it a start'.[952] Yet by 1865, the land loss suffered by Te Raki Māori as a result of Crown legislation and policy set in motion a process of social and economic marginalisation that would gather strength as settler numbers swelled; more land was then alienated after 1865, and collateral benefits failed to materialise.

It was significant that the Crown's purchasing agenda for Te Raki did not contemplate assisting hapū to re-engage in the commercial economy in ways that allowed them to retain, as they wished, traditional structures and modes of management. Crown agents purchased land from small groups of owners who appeared willing to sell, without properly identifying or consulting with all owners prior to completing transactions. This undermined established hapū authority and greatly inhibited the ability of Te Raki Māori to exercise tino rangatiratanga within their communities. There were instances where these tactics led to conflict and armed dispute between hapū, such as in the Mangakāhia conflict in 1862.

The conduct of the Crown in land purchases in the period after the signing of the treaty damaged its relationship with hapū. Between 1840 and 1865, a number of factors contributed to a growing loss of confidence in the Crown's objectives, governance and institutions, and processes: the Crown's failure to conduct its purchasing negotiations openly; to systematically review and assess its purchasing programme; to recognise and respect the efforts made by Te Raki hapū to define ownership; to pay fair prices; and to agree with them on the allocation of lands to whānau and hapū before identifying the lands available for Pākehā settlement. Land transactions between Māori and the Crown were never just about the land and were fundamentally concerned with the relationship between these two parties.[953] In our view, an emerging and potentially damaging difficulty – and one to which McLean himself had alluded – was a deepening erosion of trust on the part of Te Raki Māori in the Crown.

951. McLean to Gore Browne, 20 March 1857 (1858, in Turton, *Epitome*, A1, p 58).
952. McLean, journal, 18 December 1858 (cited in Bayley, 'Aspects of Maori Economic Development and Capability' (doc E41), p 55).
953. O'Malley, 'Nortland Crown Purchases' (doc A6), p 495.

CHAPTER 9

TE KOOTI WHENUA MĀORI I TE RAKI, 1862–1900 / THE NATIVE LAND COURT IN TE RAKI, 1862–1900

> [T]he Native Land Court was established. Then we perceived our misfortunes when it was decided that pakehas should be Judges of the Court. What did the pakehas know of Maori customs that they should be appointed Judges?
>
> —Te Hemara Tauhia, Ōrākei, 1879.[1]

> [T]he whole object of appointing a Court for the ascertainment of Native title was to enable alienation for settlement. Unless this object is obtained, the Court serves no good purpose, and the native would be better off without it, as in my opinion, fairer Native occupation would be had under the Maoris' own customs and usages without any intervention whatever from outside.
>
> —T W Lewis, former Native Department Under-Secretary, 1891.[2]

9.1 Hei Tīmatanga Kōrero/Introduction

In chapter 8, we examined the alienation of Te Raki Māori lands from 1840 to 1865, the period in which the Crown asserted a right of pre-emption under article 2 of the treaty to impose a monopoly on purchasing. Throughout that period, settlers and Crown officials expressed dissatisfaction with the pace of acquisition and debated how land in customary Māori ownership might be more easily obtained without provoking conflict. Growing Māori resistance to the sale of land in Te Raki and elsewhere in the country, unease over the Crown's dual role as both the judge of Māori rights in land and sole purchaser of it following the outbreak of war in Taranaki in 1860, and a reduction in the area the Crown was able to obtain, led to the development of a titling regime that enabled settlers to directly purchase land from Māori. This regime was ushered in by the Native Lands Act 1862 and the Native Lands Act 1865.

Pivotal to the origins of the Native Land Court, the 1862 Act provided for individuals, tribes, or communities to bring land before newly constituted local land courts in order to convert their customary tenure to a Crown-derived freehold

1. Paora Tuhaere's Parliament at Orakei, AJHR, G-8, 1879, p 27 (cited in David Armstrong and Evald Subasic, 'Northern Land and Politics: 1860–1910' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2007) (doc A12), p 945).

2. 'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws', minutes of evidence, 12 May 1891, AJHR, 1891, G-1, p 145.

title.[3] Following an investigation of rights, a certificate of title, 'conclusive as to ownership', could be issued, and applications for partition could be made. While presided over by a Pākehā judge, these courts would consist of at least two local rangatira with equal status, making the title determination process effectively Māori directed.[4] As we discuss in detail in section 9.3.2, 'experimental' or 'prototype' courts briefly operated at Kaipara and Whāngārei under the 1862 Act – a point that distinguishes Northland from many other regions in the history of the Native Land Court (elsewhere the Court did not begin operating until later legislation was in place). From late 1864, Francis Dart Fenton, who became first chief judge of the Court, significantly altered the body's composition and operating procedure, and oversaw its reconstitution as a national court of record under the direction of Pākehā judges.[5] These changes were later included in the Native Lands Act 1865, which came into effect in October 1865.

The foundation of the Native Land Court enabled a transformation of land tenure in Te Raki. At 1865, Te Raki Māori retained some 64 per cent of the 2.123 million acres comprising the inquiry district.[6] As we have discussed in preceding chapters, the impact of old land claims processes and large-scale Crown purchasing had created what legal scholar and historian Professor Richard Boast has described as a 'complex tenurial checkerboard' in Te Raki.[7] In the 35 years following the introduction of the Native Land Court, however, a further aggregate area of 684,620 acres was titled, approximately half of the total area that had remained in collective Māori ownership in 1865.[8] The pace of titling was especially rapid during the period from 1870 to 1875, notably in the Whāngārei and Mahurangi taiwhenua (subregions). Titling would subsequently slow, before the rate declined in the last two decades of the nineteenth century. By this stage, much of the land in the district had already been brought before the Native Land Court while Te Raki Māori resistance to the Court was intensifying.

3. Richard Boast, *The Native Land Court 1862–1887: A Historical Study, Cases and Commentary* (Wellington: Thompson Reuters/Brookers, 2013), pp 50, 59.

4. Dillon Bell, Minute, 5 November 1862, BPP, vol 13, p 215 (cited in Donald Loveridge, 'The Origins of the Native Lands Acts and Native Land Court in New Zealand,' report commissioned by Crown Law Office, 2000 (doc E26), p 190 and app 14.).

5. Boast, *The Native Land Court*, p 45.

6. The Crown estimated that approximately 34.7 per cent of Māori land in the district had been alienated by 1865. This figure appears to account for a combined total loss of approximately 736,282 acres of land by 1865 – or the sum of the Crown's figures for land loss as a result of old land claims, pre-emption waivers and pre-1865 Crown purchases. If our figure for lands considered purchased as a result of old land claims and pre-emption waivers from chapter 6 (see table, section 6.1.3) are adopted, and using the same method, then the result is slightly higher: approximately 758,708 acres alienated by 1865, or 35.6 per cent of the district: Crown closing submissions (#3.3.407), p 3; Crown closing submissions (#3.3.412), p 6; Crown closing submissions (#3.3.404), p 5.

7. Boast, *The Native Land Court*, p 50.

8. Thomas, 'The Native Land Court' (doc A68), pp 17, 20.

9.1.1 The purpose of this chapter

The claimants in our inquiry presented a range of specific grievances related to the imposition, legislation, operation, and effects of the Native Land Court in Te Raki. We set out their arguments at an overview level in section 9.2.3 and consider them in detail at relevant points throughout the chapter. More broadly, the claimants identified the Native Land Court as immensely significant to loss of land and resources. They generally perceived the Court's role as being to investigate and individualise title, and its operation in the district, as central to the long-term alienation of land and associated social and economic marginalisation of Te Raki Māori. They noted that the effects of these processes, which began during the nineteenth century, are still being felt in the district today.[9]

This chapter examines the Crown's Native Land legislation and the operation of the Native Land Court in Te Raki from 1862 until 1900. This period is bookended by the Native Lands Act 1862 – the legislation that established the Native Land Court – and the Maori Land Administration Act 1900, which ushered in a new era of Native Land legislation. We first examine the court system originally instated by the Native Lands Act 1862, the reformulation of the Court from 1864 to 1865, and the scope and character of these changes. We also consider the evolution of the legal regime underpinning the Court, how its operation was structured in our inquiry district, and the nature of that operation.

While drawing at times on illustrative examples to support our analysis, this chapter does not consider the wide variety of individual cases heard by the Native Land Court in depth. Instead, we focus on the reasons Te Raki Māori communities engaged with the Court, the effects of their engagement, and the larger question of whether the Court – and the titles created under Crown legislation – served the needs and interests of Te Raki Māori seeking to exercise their tino rangatiratanga over their communities and their lands, as guaranteed by article 2 of te Tiriti.

9.1.2 The structure of this chapter

The next section of this chapter (section 9.2) canvasses the issues we will determine. We begin by introducing the positions of the claimants and Crown, and acknowledge concessions the Crown has made. We then introduce central themes and conclusions of the Tribunal's extensive prior consideration of the Native Land Court and the operation of Native Land legislation in other inquiry districts. We distil a series of issue questions to be addressed in the chapter from the key differences in the positions of claimant and Crown parties, our examination of treaty jurisprudence, and the statement of issues for stage 2 of our inquiry.

The first analysis section (section 9.3) considers the introduction of the Court, including its political context, constituting legislation, and the degree to which Te Raki Māori were consulted on the model of title determination the Crown instituted. We then discuss the reformulation of the Court after 1864, codified in the Native Lands Act 1865 (section 9.4); the subsequent development of Native Land legislation and the appropriateness of titles awarded by the Court (section 9.5); the

9. Claimant closing submissions (#3.3.225), pp 259–270.

operation of the Court in the inquiry district (section 9.6); Te Raki Māori engagement with the Court (section 9.7); and remedies and redress available to Māori aggrieved by its decisions and general operations (section 9.8). Finally, we summarise our findings of treaty breach (section 9.9), and consider prejudice arising from these breaches (section 9.10).

9.2 Ngā Kaupapa/Issues

9.2.1 What previous Tribunal reports have said

9.2.1.1 *Introduction*

Over many years and in many inquiries, the Tribunal has considered the legislation that created the Native Land Court and governed its development. Tribunal reports have discussed in detail enactments including the Native Lands Act 1862, the Native Lands Act 1865, the Native Lands Act 1866, the Native Lands Act 1867, the Native Land Act 1873, the Native Land Administration Act 1886, the Native Land Act 1888, various land laws of the early 1890s, and the Native Land Court Act 1894. The Tribunal has generally found many aspects of Native Land legislation to have breached treaty principles. In addition to criticising the precepts of the individualisation model introduced under Native land legislation, reports have stressed in particular the deleterious impact of post-1864 changes to the Court brought about by the Native Lands Act 1865. The Tribunal has concluded that these and successive legislative developments deprived Māori of meaningful and effective participation in the process of tenure conversion, which had far-reaching implications for whānau, hapū, and iwi.

A shared set of themes and conclusions emerge from earlier district inquiries which offer us some initial guidance. In the following section, we summarise aspects of this jurisprudence that have the greatest bearing on our consideration of the Native Land Court in Te Paparahi o Te Raki.[10]

9.2.1.2 *Key premises underlying nineteenth-century native land legislation*

Across multiple inquiries, the Tribunal has commented on the key premises and assumptions of nineteenth-century Native Land legislation. Previous reports have identified the Crown's overriding conviction that it could, notwithstanding the treaty guarantee of tino rangatiratanga, and without the consent of its treaty partner, make and impose laws for the determination and regulation of Māori land

10. Where not specifically attributed, the synthesis of jurisprudence presented in this section is our own and has been drawn from holistic consideration of various Tribunal reports including: Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, Wai 814, 2 vols (Wellington: Legislation Direct, 2004), vol 2; Waitangi Tribunal, *The Hauraki Report*, Wai 686, 3 vols (Wellington: Legislation Direct, 2006), vol 2; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, Wai 785, 3 vols (Wellington: Legislation Direct, 2008), vol 2, p777; Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, Wai 1200, 4 vols (Wellington: Legislation Direct, 2008); Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims – Pre-publication Version*, Wai 898 (Wellington: Legislation Direct, 2018), pts 1–2.

ownership and establish institutions for their implementation.[11] A second major Crown premise was that the customary ownership of land, involving complex and changing layers of rights, could not provide an adequate legal basis for economic growth and development, necessitating its extinguishment and replacement with a system of English-derived, private-property ownership based on precise boundaries, certainty of title, and clearly delineated rights. The Crown believed that imposing a court system enabling the individualisation and transfer of Māori rights in land independently of the collective would hasten the decline of traditional tribal and hapū-based authority and promote assimilation. As *The Hauraki Report* (2006) concluded, the Crown was motivated to introduce the Native Land laws in part by a 'civilising mission', believing that Māori would reap cultural as well as economic benefits from individual title.[12]

The third premise held that the transfer of land from Māori into settler ownership, essential if the colony was to prosper, could be realised most expeditiously not through pre-emptive purchasing but, following a process of title investigation and determination, through direct purchase; that is following direct negotiation between owners and purchasers. Finally, a fourth premise held that the extinguishment of customary tenure could proceed most efficiently through an independent court that (from 1865) would operate in accordance not with tikanga, with its emphasis on discussion, negotiation, and compromise, but with English judicial norms and with minimal formal Māori involvement in decision-making processes. The Tribunal has now developed a standard interpretation with respect to Native Land legislation and the institutions it created: that they were founded on and shaped by premises broadly inconsistent with Māori treaty rights and the Crown's obligations.[13]

9.2.1.3 *Purpose of the Native Land Court*

In their conclusions on the purpose of Native Land legislation and the Native Land Court, previous Tribunal reports have advanced several major themes. The first centres on the purpose of the Native Land Court. Tribunal reports have broadly concluded that, given the perceived failure of Crown pre-emptive purchasing to yield 'sufficient' quality land for the continued expansion of British settlement, the Crown's primary purpose in conceiving and introducing the Native Land Court was to determine the ownership of customary land in order to expedite the transfer of land out of Māori ownership. As the Tribunal's *Te Urewera* report (2017), observed, echoing *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims* (2004), the introduction of the Native Land Court was 'primarily for the benefit of settlers, and its machinery was deliberately designed to bring about the transfer of the bulk of Maori land into settler ownership.'[14]

11. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, Wai 785, vol 2, p 777; Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, 3 vols (Wellington: Legislation Direct, 2010), vol 2, pp 529–530.
12. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 2, pp 663–671, 710, 778; Waitangi Tribunal, *Te Urewera*, Wai 894, 8 vols (Lower Hutt: Legislation Direct, 2017), vol 3, p 1009.
13. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 1, pp xxiii–xxiv.
14. Waitangi Tribunal, *Te Urewera*, Wai 894, vol 3, p 1009.

The Tribunal has concluded that a related underlying purpose of the Crown's tenure reform initiatives was to extend its own authority and reach. In this interpretation, the Crown's avowed aim of promoting the advancement of Māori through land reform was, at best, a secondary consideration to strengthening the dominance of the Crown and its British-derived legal system. In short, previous inquiries have found that the Crown, through the Native Land Court, usurped the right of Māori communities themselves to establish ownership of land and to control and manage their lands as they deemed fit. In doing so, the Tribunal has found that the Crown encroached on Māori autonomy in a manner not contemplated by, and in breach of, the treaty guarantee of tino rangatiratanga.[15]

9.2.1.4 *Understanding of Māori society and culture*

The Tribunal has now commented widely on the degree of cultural understanding the Crown and judges and administrators of the Native Land Court possessed. The Tribunal has regularly found that despite the requirement to determine ownership 'according to native custom', the post-1865 Native Land Court devised and applied a set of criteria that accorded primacy to descent, conquest, and occupation. At the same time, it often elected to minimise or ignore the dynamic complex of overlapping and intersecting rights and obligations that characterised customary tenure. In brief, previous inquiries have held that the Native Land Court was not equipped, in terms of its knowledge and understanding of history, whakapapa, tikanga, and relationships among hapū, and on account of the disposition of at least some of its presiding officers, to recognise and deal equitably with the complexities and subtleties of customary ownership.[16]

9.2.1.5 *Consultation and consent*

In assessing the Native Land Court and its controlling legislation, previous Tribunal reports have considered the issues of consultation and consent. They have generally concluded that, given the assurance of tino rangatiratanga rights in article 2 of the treaty, any changes in the ownership, control, and management of Māori lands, fisheries, and forests required consultation with Māori and the receipt of their express consent prior to the formulation and implementation of any such transformation. The Tribunal has regularly found that no such consultation took place in respect of the introduction of Native Land legislation, in particular the Native Lands Act 1865, nor was Māori consent secured. As we discuss later, before the passage of the Native Lands Act 1862, some general dialogue occurred between the Crown and Te Raki Māori communities over the introduction of a rūnanga-style court to hear and determine claims of ownership and to resolve disputes

15. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, p 535; Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 2, p 663; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, Wai 785, vol 2, pp 777–778; Waitangi Tribunal, *Te Mana Whatu Ahuru*, p 1187.

16. Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands*, Wai 64 (Wellington: Legislation Direct, 2001), pp 134–135, 146; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, Wai 785, vol 2, pp 774–775; Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 537.

over land.[17] Tribunal inquiries have been very critical of the Crown's lack of consultation regarding the reformulation of the Court. As *The Wairarapa ki Tararua Report* (2010) observed, 'the proposition that those in government should engage with Māori on law changes that would profoundly affect them and their chief asset (land) is a reasonable one, even in the nineteenth century'. Tribunal inquiries have concluded, however, that reasonable Māori expectations as treaty partners overwhelmingly did not influence the Crown.[18]

9.2.1.6 *Engagement with the Court*

Previous Tribunal inquiries have consistently found that while bringing lands before the Court was in theory non-compulsory, Māori were in practice forced to engage in the Court's processes should they wish to receive legally recognised titles to their lands. Potential non-participants, the Tribunal has also found, were drawn involuntarily into the Court system, as remaining uninvolved meant they risked being dispossessed of their interests through the Court's determination of the claims of others.[19] The potential price of non-participation in the Court system, the Tribunal has determined, was in nearly all cases simply too high for it to have been a viable option. As the *Te Urewera* report concluded, the Crown effectively 'set up a system in the form of the Native Land Court that compelled Maori to participate against their wishes, and took their land from them if they did not'.[20] The imposition and operation of a land title system with no choices – or no choice but one, 'rejected in principle but inescapable in practice – was in breach of the Treaty'.[21]

9.2.1.7 *Changes to customary tenure*

Previous inquiries have concluded that many Māori communities recognised that if they were to participate in the commercial economy, some changes to customary tenure would be necessary. However, such changes did not need to embrace all land in customary ownership. In effect, the Tribunal has determined that Māori wished to retain and exercise the treaty promise of options. The *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (1988) memorably described the power of choice inherent in the treaty as the right of Māori to walk 'in two worlds', or in only one if they chose.[22] As *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (2022) put it, when entering into the treaty relationship with the Crown, Māori could reasonably expect 'the right to continue to govern them-

17. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 2, p 710; Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 536.
18. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 2, p 532.
19. Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report*, Wai 903, 3 vols (Wellington: Legislation Direct, 2015), vol 1, pp 471–472; Waitangi Tribunal, *Te Urewera*, Wai 894, vol 3, pp 1084–1088; Waitangi Tribunal, *Te Mana Whatu Ahuru*, p 1188.
20. Waitangi Tribunal, *Te Urewera*, Wai 894, vol 2, p 577.
21. Waitangi Tribunal, *Te Urewera*, Wai 894, vol 2, p 577.
22. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 3rd ed (Wellington: GP Publications, 1996), p 195.

selves along customary lines, or to engage with the developing settler and modern society, or a combination of both.'[23] Further, the Tribunal has generally concluded that while some Māori were interested in securing titles backed by the Crown, the Crown failed to give effect to their preference for a secure and stable form of collective title until practically the end of the nineteenth century. The Tribunal has found that management by Māori of their lands through collective or corporate bodies was clearly feasible, but while the Crown considered these possibilities, it did not provide for the establishment of Māori incorporations until 1894.[24]

9.2.1.8 *Titles*

The Tribunal has closely considered the various forms of title Native Land legislation introduced, particularly those made available under the Native Lands Act 1865 and the Native Land Act 1873. Tribunal reports have widely judged the 'ten-owner rule', which came into effect under the Native Lands Act 1865, to have deprived all but the nominated owners of their rights and interests, and to have served the Crown's determination to individualise the ownership of customary lands, despite the preference of many Māori for collective ownership. Previous inquiries have concluded that the 'multiple title' introduced under the Native Land Act 1873 and extended by the Native Land Court Act 1880 and the Native Land Division Act 1882 gave the drive towards individualisation of Māori land interests strong and sustained impetus. In signing the treaty, the Tribunal has observed, Māori did not contemplate a system enabling the conversion of owners into holders of undivided interests able to alienate them without consulting the collective or securing its consent. Previous inquiries have thus concluded that the forms of title introduced in 1865 and 1873 were not intended to meet Māori needs and wishes, but to support and further the Crown's agenda.[25] They have also highlighted that the Crown had other title options available to it, but failed to consider them or otherwise respond to Māori wishes for a legal collective title.[26]

9.2.1.9 *Constitution and operation of the Native Land Court*

Other important findings centre on the constitution and operation of the Native Land Court. Previous inquiries have concluded that the local and flexible rūnanga-style courts established under the Native Lands Act 1862, together with their broadly tikanga-compliant mode of title investigation, were abandoned on the

23. Waitangi Tribunal, *Te Manu Whatu Ahuru*, vol 1, p 189.

24. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, pp 378–379, vol 2, p 671; Waitangi Tribunal, *Te Manu Whatu Ahuru*, vol 1 pp 1186–1187, 1248–1249.

25. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, Wai 201, 2 vols (Wellington: Legislation Direct, 2004), vol 2, pp 447–448; Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, pp 441–446; Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 2, p 785; Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, pp 535–536; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, Wai 785, vol 2, p 785; Waitangi Tribunal, *Te Kāhui Maunga: The National Park District Inquiry Report*, Wai 1130, 3 vols (Wellington: Legislation Direct, 2013), vol 1, p 271.

26. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 2, p 777; Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 537; Waitangi Tribunal, *Te Mana Whatu Ahuru*, pp 1187–1188, 1247–1248.

grounds that this system would have sustained and strengthened Māori communities and impeded the transfer of land into Crown and settler ownership. With respect to the operation of the post-1865 Native Land Court, previous inquiries have concluded that:

- the adversarial nature of proceedings discouraged negotiation and compromise between and among contending claimants, encouraged the presentation of false or misleading evidence, and often resulted in protracted and unnecessarily expensive proceedings;[27]
- the Crown's title system was complex, inefficient, and replete with contradictions, with an end result that Māori were neither safeguarded in the Court process nor in the retention of their lands;[28]
- the manner in which the Court chose to notify and schedule hearings, its disposition to ignore provisions of Native Land legislation that it considered unworkable, notably preliminary investigations and prehearing survey plans, and its willingness to accept out-of-court arrangements as presented to it, disadvantaged many with otherwise legitimate claims and the right to be heard;[29] and,
- the costs of the Court's processes were not shared among benefiting parties, including the Crown and private purchasers.[30]

Previous Tribunals have concurred in finding that by establishing and operating the Native Land Court, the Crown had an overall responsibility to ensure that this institution, empowered to determine questions of custom and right, should be 'designed and implemented with Māori consent and cooperation'. They have generally found that the Crown failed to fulfil this obligation. As the Wairarapa ki Tararua Tribunal summarised, '[t]his did not occur in [other Tribunal] districts . . . It was no different in this district.'[31]

9.2.1.10 *Appeal and redress*

On the matter of appeal and redress for Māori, the Tribunal has found that the Native Land Court was not the appropriate body to decide upon applications for rehearings or to investigate its own decisions. It has also found that rehearings in fact constituted (at least until 1889) fresh hearings with all the attendant costs, and that the Crown's failure to provide an independent legal appeal procedure until 1894 denied Māori the treaty right of equal treatment under the law and breached its obligation to protect their interests.[32]

27. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 448; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, Wai 785, vol 2, p 785.
28. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, p 469.
29. Waitangi Tribunal, *Te Mana Whatu Ahuru*, p 1247.
30. Waitangi Tribunal, *Te Mana Whatu Ahuru*, pp 1224, 1247.
31. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 2, p 531.
32. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, pp 450–452, 468; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, Wai 785, vol 2, p 786; Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 473; Waitangi Tribunal, *Te Mana Whatu Ahuru*, pp 1291–1292.

9.2.1.11 *Reform of the law*

A common Tribunal finding is that successive governments proved unwilling to re-examine and reconsider the systemic issues and difficulties to which Native Land law and its administration gave rise. The Crown instead preferred to deal with any such difficulties on a case-by-case, unsystematic, and extemporary basis, leaving unaltered the assumptions upon which such law was based and the principles it embodied.[33]

9.2.1.12 *Costs and their allocation*

Tribunal inquiries have found that the process of title investigation prescribed by law frequently resulted in the imposition of heavy costs – both direct and indirect – on Māori, compelling many to incur debts that proved difficult to discharge. Moreover, the Crown failed to consider distributing those costs among the parties involved (Māori, the Crown, and private purchasers) according to the benefits each derived from the process of tenure conversion.[34]

9.2.1.13 *Succession*

By adopting and applying succession rules of its own devising, the Court, in the view of the Tribunal, set in motion a process that had grave effects on all Māori communities. In conjunction with the transmutation of customary ownership of land into individual and tradeable rights, succession protocols of the Court resulted over generations in fractionation of ownership, title congestion, and fragmentation through continual processes of partition, as well as burdensome survey costs, and land management difficulties.[35]

9.2.1.14 *Outcomes and prejudice*

The Tribunal has found consistently that Native Land legislation and the Native Land Court had transformative and often grave effects for whānau, hapū, and iwi. As *The Mohaka ki Ahuriri Report* (2004) concluded, 'native land legislation imposed a revolution in Maori land tenure that seriously undermined the social, political, and economic structures of customary Maori society'.[36] Previous inquiries have attested that the large-scale transfer of land out of Māori ownership and the imposition of the full costs of introduced processes on Māori were major contributors to the impoverishment of many Māori communities that became apparent by the close of the nineteenth century. A further general finding is that the operation of the Native Land Court systematically undermined the social

33. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, Wai 785, vol 2, pp 782–783.

34. Waitangi Tribunal, *Mohaka ki Ahuriri Report*, vol 2, p 448; Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, pp 518–519; Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, pp 519–520, 537; Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, pp 472–473; Waitangi Tribunal, *Te Urewera*, Wai 894, vol 3, pp 1270–1272; Waitangi Tribunal, *Te Mana Whatu Ahuru*, pp 1267–1270.

35. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, pp 499–500; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, Wai 785, vol 2, p 785; Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 470; Waitangi Tribunal, *Te Mana Whatu Ahuru*, p 1248.

36. Waitangi Tribunal, *Mohaka ki Ahuriri Report*, vol 2, p 447.

integrity, social cohesion, governance, and economic functioning of Māori communities. Insofar as the imposition of the Native Land Court and its operating framework were concerned, the Tribunal's overarching conclusion has been that the Crown failed to uphold the terms and principles of the treaty, and failed to honour its promise of shared security and prosperity.

9.2.1.15 *Conclusion*

In summary, we had before us an extensive and well-established body of Tribunal findings as we heard evidence on the introduction to Te Paparahi o Te Raki of the Native Land Court and its operation there. The Tribunal's findings related to Native Land legislation are of course too diverse to have detailed exhaustively within this introductory discussion of jurisprudence. We have therefore chosen to reserve some focused jurisprudential analysis for our later assessment of the establishment, restructure, and operation of the Native Land Court in Te Raki. For instance, in section 9.3, we closely consider Tribunal findings pertaining to the 1862 Act and the creation of the Court as a part of a discussion of its formation and operation in our district under the original statute. In sections 9.4 and 9.5, we discuss the development of consistent lines of finding by successive Tribunal reports on later Native Land legislation. Other legislation-related findings are integrated at relevant points throughout the remainder of the chapter.

While these previous findings may help frame our analysis, as alluded to in the introduction to this chapter, the Māori experience in Te Raki was distinctive in the national unfolding of the Native Land Court. Governor George Grey's rūnanga scheme operated more fully in the district than elsewhere (see chapter 7); and three of the five short-lived courts established under the Native Lands Act 1862 were located in Te Raki until their abolition in December 1864 (although only one operated, in Whāngārei). Three major titling regimes were implemented during the nineteenth century, introduced under the Native Lands Act 1862, the Native Lands Act 1865, and the Native Land Act 1873 respectively. In most other districts, the Native Land Court was the body reconstituted under the Native Lands Act 1865, and in a number of districts land only went through the Court under the Native Land Act 1873.[37] The singular experience of Te Raki, where lands were titled under the three different regimes, therefore needs to be taken into account when considering the application of some general conclusions the Tribunal has previously reached.

9.2.2 Crown concessions

The Crown conceded breaches of the treaty in three areas with respect to the Native Land Court system and the legislative regime that established it; the consequences for tribal structures; the operation of the ten-owner rule, and the Crown's failure to provide for a collective title. We reproduce these concessions in full here:

37. For instance, see Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, p 398; Waitangi Tribunal, *Te Mana Whatu Ahuru*, p 1178.

Impact of Native Land laws on tribal structures

The Crown concedes that the operation and impact of the native land laws, in particular the award of land to individuals and enabling individuals to deal with land without reference to iwi or hapū, made those lands more susceptible to partition, fragmentation and alienation. This undermined traditional tribal structures which were based on collective tribal and hapū custodianship of the land. The Crown failed to protect those collective tribal structures which had a prejudicial effect on the iwi and hapū of Northland and was a breach of the treaty and its principles.

Ten-owner rule

The Crown concedes that the ten-owner rule had the potential to cause prejudice to Māori in circumstances where:

- some right-holders were omitted from titles and dispossessed of their interests as a result;
- the named owners acted individually in a manner contrary to the wishes or intentions of the wider community;
- there was a subsequent succession of interests where there was no allowance for wider community interests.

The Crown concedes that in these circumstances the ten-owner rule did not operate in a manner that reflected the Crown's obligation to actively protect the interests of Māori in land they may otherwise have wished to retain in communal ownership and this was a breach of the treaty and its principles.

Lack of collective title

The Crown concedes that its failure to provide a legal means for the collective administration of Māori land until 1894 was a breach of the treaty and its principles by failing to actively protect Māori interests in land they may otherwise have wished to retain in communal ownership.[38]

Crown counsel also accepted under questioning that the Native Land Court process could not be considered voluntary if a person was required to attend the Court to defend his or her rights.[39] The Crown submitted that, when taken together, these concessions addressed the claimants' overall allegations; namely, that Native Land laws 'undermined the communal nature and tribal structure of Northland Māori society, and thereby contributed to land loss.'[40]

9.2.3 The claimants' submissions

9.2.3.1 *The purpose of the Native Land Court*

The claimants argued that a number of drivers prompted the Crown to establish the Native Land Court.[41] Counsel submitted that motivating factors included

38. Crown closing submissions (#3.3.406), pp 5–6.
39. Crown counsel, transcript 4.1.32, Waitaha Events Centre, p 271.
40. Crown closing submissions (#3.3.406), p 6.
41. Claimant closing submissions (#3.3.225), p 23.

both 'immediate causal events on the ground' and 'long-held cultural ideologies brought to this country by the Pakeha settlers and then implemented by the colonial government'.[42] While noting that the premises underlying the establishment of the Court are difficult to describe in neat political or economic terms, claimant counsel distilled two main Crown objectives:

- to convert customary ownership into a form of title visible to the legal system that could then be easily alienated to the Crown and private purchasers to satisfy their desire for land; and
- to 'encourage and facilitate assimilation of the Maori people into the European population'.[43]

The claimants submitted that the 'extinguishment of tribal tenure and the undermining of customary Maori authority' was the Crown's dominant objective in establishing the Native Land Court.[44]

9.2.3.2 *Consultation on the introduction and restructuring of the Court*

The claimants noted the Crown's 'clear umbrella duty under Te Tiriti to consult meaningfully and genuinely with Nga Hapu o Te Raki on the legislation establishing the Native Land Court'.[45] Claimants cited the conclusion of our stage 1 report that Te Raki Māori did not cede sovereignty to the Crown in 1840; this they characterised to mean that when introducing changes that might abrogate or qualify Māori sovereignty, the Crown was obliged to consult Te Raki hapū. The claimants accepted that some 'discussion and communication' of land title determination and tenure reform occurred at Kohimarama in 1860 and during Grey's 1861 efforts to promote his rūnanga system in Northland.[46] But they argued that this discussion was general in nature, was focused on the assumption that Māori would control any future adjudication process, and did not specifically reference provisions of the later legislation.[47] The claimants submitted that while detailed communication about the 1862 Act itself did occur, this consisted of the Crown 'telling' Te Raki Māori about it after the fact, which did not satisfy any credible definition of consultation.[48] The claimants argued that no consultation at all took place on the introduction of the 1865 Act, which they described as reflecting a major departure from the Māori-controlled investigation process the 1862 Act had enabled.[49]

9.2.3.3 *The structure and operation of the Court*

The claimants submitted that the Native Land Court, as it operated in Te Raki under the Native Lands Act 1865 and subsequent legislation, was not an appropriate

42. Claimant closing submissions (#3.3.225), p 23.
43. Claimant closing submissions (#3.3.225), p 23.
Claimant closing submissions (#3.3.225), p 23.
44. Claimant closing submissions (#3.3.225), p 23.
45. Claimant closing submissions (#3.3.225), p 35.
46. Claimant closing submissions (#3.3.225), p 38.
47. Claimant closing submissions (#3.3.225), pp 38–39.
48. Claimant closing submissions (#3.3.225), p 44.
49. Claimant closing submissions (#3.3.225), pp 38–39.

investigator of land titles. They dealt at some length with what they perceived as the flawed orientation and rigid procedures of the Court. The adversarial nature of the Court, claimants argued, led to the presentation of divisive, misleading, and even false evidence.[50] Further, they claimed that the Court's Pākehā judges lacked the familiarity with mātauranga Māori and tikanga necessary to effectively discharge their roles.[51]

In the claimants' view, the Native Land Court also essentially functioned as part of the Executive, with the Crown having an 'improper and pervasive influence . . . on a supposedly independent and neutral judicial body'.[52] For these and other reasons, claimants argued that the imposition on Ngā Hapū o Te Raki of a court characterised by 'severely deficient' processes and mechanisms was an 'intrusion into their sovereignty guaranteed to them under Te Tiriti, as well as a breach of Article three and the principle of active protection of Te Tiriti'.[53]

9.2.3.4 *Māori engagement with the Court*

The claimants noted the significant extent to which Te Raki Māori participated in Native Land Court processes. They argued that Te Raki Māori sought title from the Court for a number of reasons, but primarily because:

- the Native Land Court was the only means by which they could gain recognised legal title to their land which then enabled them to participate in the developing colonial economy;
- they needed some form of protection for land that was under dispute or threat particularly relating to boundary issues; and
- pressure came from Crown purchasing officers, largely in the form of tāmana payments (advance payments made to individuals within ownership groups prior to title determination).[54]

In the claimants' submission, participation in its processes did not mean Te Raki Māori 'consented to or approved of the Native Land Court or the titling system that it implemented'.[55] As already noted, taking part was in fact their only option if they hoped to receive the secure title to their land necessary to participate in the colonial economy. Claimant counsel contended that Te Raki Māori were also often drawn into Court proceedings to protect their interests from others.[56] Those who chose not to engage with the Court faced serious consequences. Because individuals could bring land before the Native Land Court by applying for a title determination, other interested parties would effectively be compelled to participate if they wanted to secure their interests. If they failed to do so, Māori risked the Court awarding the land exclusively to a very small group of applicants.[57]

50. Claimant closing submissions (#3.3.225), pp 88.
51. Claimant closing submissions (#3.3.225), pp 97.
52. Claimant closing submissions (#3.3.225), p 96.
53. Claimant closing submissions (#3.3.225), p 110.
54. Claimant closing submissions (#3.3.225), pp 76–77, 86.
55. Claimant closing submissions (#3.3.225), p 76.
56. Claimant closing submissions (#3.3.225), p 77.
57. Claimant closing submissions (#3.3.225), p 77.

Claimants also raised concerns about the costs of the Native Land Court, which they noted fell almost entirely upon Māori landowners rather than being distributed equitably among the beneficiaries of the determination process.[58] These costs ranged from formal procedural expenses such as legal representation, court fees and survey costs, to the incidental expenses of attending distant sittings (for instance, medicine, food and other general expenses), to income and other opportunities lost as a result of being absent in the Court.[59] While noting that these costs are 'not necessarily quantifiable in a monetary sense',[60] the claimants stressed that for the hapū and iwi of Te Raki, they were 'crippling in many circumstances'.[61]

9.2.3.5 *Appropriateness of titles in respect of Māori interests*

The claimants argued that the Crown failed to provide titles recognising the rights of all owners and enabling collective ownership and management of land. The Crown, they submitted, instead experimented with forms of title intended to 'break down' communal ownership and expedite alienation.[62] The claimants observed that the application from 1865 of the ten-owner rule (which limited to 10 the number of owners able to be listed on the title of a block 5,000 acres or smaller) resulted in dispossession for many, and that amendments made to the legislation in 1867 did not materially change the situation.[63] For the claimants, the succession rules adopted unilaterally by the Native Land Court in 1867 established conditions for later title congestion and fractionisation of ownership shares, both of which had devastating effects.[64] The claimants argued overall that during the period from 1865 to 1900, Native Land legislation and the Native Land Court remained focused on the conversion of customary interests in land into individualised titles derived from the Crown in order to facilitate and expedite the transfer of land out of Māori ownership. Further, they claimed that the Crown failed to consider title options that reflected Te Raki Māori tikanga and aspirations, nor did it provide a secure basis on which they could invest in and develop their lands.[65]

9.2.3.6 *Protections and remedies*

On the safeguards available to them in the Native Land Court process, the claimants argued that legislative protections, such as restrictions on alienation, were 'insufficient, ill-thought out and for the most part ineffective'. The claimants again referred to the conclusion of stage 1 of our inquiry that Te Raki rangatira did not cede their authority to make and enforce law over their people and within their territories in 1840, and argued that inadequate protections to prevent or decelerate the loss of Māori land had crippling effects on rangatiratanga. The claimants noted

58. Claimant closing submissions (#3.3.225), p 184.
59. Claimant closing submissions (#3.3.225), p 175.
60. Claimant closing submissions (#3.3.225), p 175.
61. Claimant closing submissions (#3.3.225), p 181; 175–183.
62. Claimant closing submissions (#3.3.225), p 112.
63. Claimant closing submissions (#3.3.225), pp 115, 118.
64. Claimant closing submissions (#3.3.225), pp 146–147, 151.
65. Claimant closing submissions (#3.3.225), pp 112–128, 146–152.

that Court protections and restrictions would potentially have enabled communities to maintain some control over the alienation of their land.[66] However, as these protections were either removed or weakened by land legislation and inconsistently applied by Native Land Court judges, their efficacy was severely undermined and eroded. In particular, the claimants noted that:

- legislation that allowed and obliged the Court to inquire whether land should be protected from alienation as part of the title determination process was often ignored; and
- if alienation restrictions were placed on land, they could be easily circumvented by getting the owners to agree to alienation.[67]

The claimants submitted that legislation providing for the creation of reserves was unfit for purpose, seldom used, and in many cases where lands were reserved, the Crown was often able to circumvent the protection offered when targeting a reserve for purchase.[68]

The claimants also argued that the Crown failed to provide adequate recourse or remedies for Ngā Hapū o Te Raki aggrieved by decisions of the Native Land Court, that remedial mechanisms – such as rehearings – which did exist were ineffective and inappropriate, and that the Crown, although aware of decisions that resulted in injustice, failed to respond adequately.[69]

9.2.4 The Crown's submissions

9.2.4.1 *The purpose of the Native Land Court*

Crown counsel submitted that the Native Land Court was established as an independent tribunal to investigate claims, ascertain the ownership of Māori customary land, and issue certificates of title. While acknowledging the Crown's concessions on aspects of Native Land legislation, counsel observed that, overall, 'the establishment of the Native Land Court was consistent with the treaty and its principles'.[70] In the Crown's submission, the introduction of the Native Land Court was the outcome of a period of social, cultural, and economic change in the mid-nineteenth century and must be understood in the 'context of the time'.[71] The Crown stressed the agency of Te Raki Māori in navigating transitions of the era and argued that the Native Land Court emerged to fulfil a 'demonstrable need by the early 1860s for a forum to determine competing claims to land'. The security and certainty necessary for Māori to operate in the new economy, the Crown submitted, 'could not have been provided by customary tenure.'[72]

The Crown argued that the Native Land Court's 'largely voluntary' investigation process was designed to facilitate Māori involvement in the colonial economy by

66. Claimant closing submissions (#3.3.225), p 187.
67. Claimant closing submissions (#3.3.225), p 187.
68. Claimant closing submissions (#3.3.225), pp 187–188.
69. Claimant closing submissions (#3.3.225), p 222.
70. Crown closing submissions (#3.3.406), p 5.
71. Crown closing submissions (# 3.3.406), p 3.
72. Crown closing submissions (# 3.3.406), p 3.

ensuring they enjoyed the 'same rights as Europeans'.[73] The Crown acknowledged its policy in the nineteenth century to have favoured the alienation of Māori land, but argued that disposing of property was a right of ownership and consistent with its goal to bring 'unproductive' land into the national economy. In the Crown's assessment, land tenure conversion was implemented primarily to assist Māori and was consistent with the principles of the treaty. The transfer of land out of Māori ownership, the Crown argued, was a secondary purpose of tenure conversion and 'cause and effect' did not characterise the relationship between title adjudication and land alienation.[74] Finally, the Crown maintained that the Native Lands Act 1865 was originally 'framed to take communal interests into account', and Native Land legislation was 'progressively reformed to promote such recognition'. The Crown acknowledged, however, that tribal titles were not issued in Northland, but noted there is 'no evidence to explain why Te Raki Māori did not apply for them'.[75]

9.2.4.2 *Consultation on the introduction and restructuring of the Court*

The Crown accepted that its degree of consultation with Te Raki Māori prior to introducing the Native Lands Act 1862 would not meet today's standards.[76] Counsel argued that some consultation did take place before the introduction of the Court into Northland, and this 'was consistent with the standards of the time'.[77] In support of this argument, counsel cited the 1860 Kohimarama Conference, the translation of the Native Lands Act 1862 into Māori and its distribution in Te Raki, and the efforts by Resident Magistrate John Rogan and Colonial Secretary William Fox in 1864 to explain the new law to Māori in Kaipara. Further, counsel noted Māori were advised that they would – and indeed they did – play a 'major role in title adjudications'.[78] At the same time, the Crown rejected the claimants' argument that the Native Lands Act 1865 constituted a major departure from its predecessor. The Crown argued that the 1865 Act was, in fact, 'substantially similar to the 1862 Act', and Te Raki Māori claims they were unfamiliar with the Native Lands Act 1865 did not necessarily mean unfamiliality with the earlier legislation.[79] The Crown noted that the 1862 and 1865 Acts were both translated into Māori in 1865, but offered no specific comment on the extent to which it consulted Māori on post-1865 legislative changes.[80]

9.2.4.3 *The Structure and operation of the Court*

Aside from the matters on which it conceded, the Crown did not respond directly to most detailed claimant grievances regarding the Court's operation. The Crown

73. Crown closing submissions (# 3.3.406), pp 9–10.
74. Crown closing submissions (# 3.3.406), p 4.
75. Crown closing submissions (#3.3.406), pp 9–10.
76. Crown closing submissions (#3.3.406), p 10.
77. Crown closing submissions (#3.3.406), p 11.
78. Crown closing submissions (#3.3.406), p 11.
79. Crown closing submissions (#3.3.406), pp 12–15.
80. Crown closing submissions (#3.3.406), p 60.

did, however, refute the claimants' argument that the Native Land Court was not independent of the Executive and that it operated in accordance with the Crown's biases and motivations. The Crown argued that the Court's judges and officials may have shared cultural orientations with the Crown, but it was nonetheless an independent tribunal. The evidence available, the Crown submitted, is insufficient to substantiate allegations of widespread Crown collusion with the Court.[81]

9.2.4.4 *Māori engagement with the Court*

The Crown argued that Māori engaged with the Native Land Court for a number of reasons, including:

- to clarify boundaries between groups;
- to clarify and subdivide rights as among whānau;
- to attract European settlers and promote the establishment of towns; and
- to obtain a secure title from the Crown with which to transact land.[82]

The Crown noted further that some blocks came before the Court simply because the owners were anxious to establish the boundaries between their land and adjacent Crown land.[83] The Crown reiterated its concession that the individualisation of title undermined traditional forms of tribal authority. It noted, though, that Northland Māori were under no legal compulsion to bring their lands before the Court.[84] Nonetheless, in both its concessions and closing submission, the Crown acknowledged the 'reality' that

> Māori had no alternative but to use the court if they wished to secure legal title to their land. A freehold title from the court was necessary if Māori wanted to sell or lease land, or use it as security to enable development of land. This often left Māori with few options other than selling some of their interests in order to secure and protect a big enough area on which to live, cultivate, farm and sustain their families. There is evidence that Māori entered into informal arrangements regarding customary land. Such transactions had no status in the law.[85]

9.2.4.5 *Protections and remedies*

The Crown noted that the 1862, 1865, and 1867 Native Lands Acts did not contain automatic restrictions on alienation, but observed that some Māori resented encroachment on their ability to deal with lands as they chose, including disposal of interests, and evaded forms of protection that did exist. The Crown argued that when it became apparent greater safeguards against dispossession were needed, it responded with 'stringent protective mechanisms'; in particular, the provision of the Native Land Act 1873 that memorials of ownership automatically restricted alienation by sale or leases longer than 21 years, unless a majority of owners wanted

81. Crown closing submissions (#3.3.406), p 8.
82. Crown closing submissions (#3.3.406), p 24.
83. Crown closing submissions (#3.3.406), p 24.
84. Crown closing submissions (#3.3.406), pp 24–25.
85. Crown closing submissions (#3.3.406), p 25; Crown statement of position and concessions (#1.3.2), p 115.

to sell.[86] The Crown accepted that this restriction 'was also commonly evaded by putting forward a few representatives' names for the memorial, to ensure a quick and uncomplicated sale'.[87]

The Crown argued that restrictions on alienation were intended to be a temporary measure, 'until such time as Māori had adapted to and were amalgamated into the new economy', and it was for that reason that the restriction regime was 'progressively loosened up to 1909, when all existing restrictions on the sale of land were removed'.[88] In its submissions, the Crown noted that from 1883, alienation restrictions could only be removed 60 days after notice had been given in the *Gazette* or *Kahiti* (Māori Gazette). The conditions for removal subsequently changed 'from a majority requirement, to the consent of all owners with public inquiry and then to one third of the owners where all owners had sufficient land for their support'.[89]

On the issue of the remedies and redress available to Te Raki Māori aggrieved by Court decisions, the Crown pointed to the fact that all Native Land legislation from 1865 contained provisions for the rehearing of cases.[90] The Crown stated that the Native Lands Act 1865 provided that the Governor-in-Council could order a rehearing within six months of the original decision. Counsel noted that while the Native Land Court no longer had jurisdiction after this period had passed, those seeking redress could do so through the civil courts or petition the Government for special legislation authorising a rehearing. After 1872, they could petition the Native Affairs Committee. In the Crown's submission, Te Raki Māori were aware of the available avenues of remedy. Crown counsel also submitted that '[t]here is no reason to suppose that rehearing applications were not generally considered on their merits and treated accordingly'.[91] The Crown did acknowledge that Native Land legislation did not provide guidelines clarifying what would be legitimate grounds for a rehearing.

9.2.5 Issues for determination

Based on the evidence presented to us by both claimants and the Crown, and our consideration of previous jurisprudence, we have identified the following issues for determination:

86. Crown closing submissions (#3.3.406), pp 50–51.
87. Crown closing submissions (#3.3.406), p 51.
88. Crown closing submissions (#3.3.406), p 52.
89. The Crown cited the Native Land Court Act 1886 Amendment Act 1888, section 6, which provided for the removal of protections with majority consent; the Native Land Laws Amendment Act 1890, section 3, which removed the proviso in the 1888 Act requiring that 'those appearing as owners and all others having a beneficial interest concur in the proposed removal'; the Native Land Purchase Act 1892, which empowered the Governor to declare any restrictions on alienation void for the purposes of Crown purchase; and the Native Land Court Act 1894, section 52, which provided that restrictions could be removed 'with the assent of the owner, or of one-third in number at least of the owners . . . and on proof that every such owner has sufficient land left for his support': Crown closing submissions (#3.3.406), pp 51–52.
90. Crown closing submissions (#3.3.406), p 59.
91. Crown closing submissions (#3.3.406), p 60.

- Why was the Native Land Court established and was it designed to uphold Te Raki Māori tino rangatiratanga?
- Why and how was the Native Land Court restructured in 1864 and 1865?
- Did the Native Land Court award Te Raki Māori appropriate titles?
- How did the Court operate in Te Raki from 1865 to 1900?
- How did Te Raki Māori engage with the Native Land Court and what were the consequences of engagement?
- Were sufficient forms of redress and remedy available?

9.3 Why Was the Native Land Court Established and Was it Designed to Uphold Te Raki Māori Tino Rangatiratanga?

9.3.1 Introduction

As noted earlier, the Native Land Court in Te Raki was distinctive because, for a short period, the provisions of the Native Lands Act 1862 governed the operation of local courts. In April 1864, Governor Grey proclaimed the Native Land districts of Kaipara South and Kaipara North. The latter district extended to Whāngārei and included land blocks within the Te Raki inquiry district. The Native Lands Act 1862 was declared to be in operation in the proclaimed Native Land districts and a court was established to investigate Māori ownership of land blocks and issue certificates of title.[92] In August 1864, further Native Land districts were proclaimed for Hokianga, Kororāreka, and Waimate. These five operational districts for the newly established courts would be abolished by the end of the year, and only 14 blocks (including 10 in Te Raki) would be investigated over this period.[93]

In this section, we examine the Crown's motives in deciding to waive its exclusive right of pre-emption and enable direct purchase of Māori land through the operation of the Native Lands Act 1862, and the extent to which the Crown secured Te Raki Māori agreement for introducing this legislation. To provide context for this decision, we return to the struggle for control over Māori affairs between the Governor and successive new settler ministries responsible to Parliament, which we discussed in chapter 7. By the late 1850s, settler politicians were prompted by increasing Māori resistance to Crown purchasing to push for direct purchase as a means of opening up more land for settlement. The rise of the Kīngitanga and the outbreak of war in Taranaki in 1860 further increased pressure on the Government to establish institutions that would provide for a form of Māori self-government and would relieve the Governor (in practical terms, his Chief Land Purchase Commissioner) of the responsibility of determining Māori titles. In the coming sections, we return to the subject of the Kohimarama Rūnanga, which

92. David Armstrong and Evald Subasic, 'Northern Land and Politics: 1860–1910' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2007) (doc A12), p 299.

93. The blocks that are listed on a register of land blocks titled under the 1862 Act and sit within Te Raki include Kopuawaiwaha, Te Wharowharo, Tokitaruna, Turakiawatea, Te Roro, Ketenikau (which appears twice), Ngarangipakua, Waikaraka, and Kopipi: 'Register to Native Titles to Land as defined by Courts under "Native Lands Act 1862"', LINZ (Donald Loveridge, supporting papers (doc E26(a), pp [85]–[95]).

was convened by Governor Thomas Gore Browne and Donald McLean as Native Secretary following the onset of the Taranaki conflict, where they proposed new policies for the administration of Māori lands to rangatira). We also discussed in chapter 7 the establishment of Governor Grey's rūnanga or the 'new institutions' as bodies for the adjudication of land disputes, before they were abandoned in favour of a Native Land Court. We outline the convoluted story of the development of the Native Lands Act 1862 and its multiple iterations, before assessing, in light of the information available, that court's brief operation in Te Raki until it was restructured in late 1864 and 1865. The claimants and Crown, as we have set out earlier (see sections 9.2.3 and 9.2.4), viewed these matters differently, disagreeing particularly on the Crown's principal reasons for instituting the Native Land Court system and the adequacy of its consultation on the introduction of the 1862 Act.

9.3.2 The Tribunal's analysis

9.3.2.1 *The move to 'responsible government' and the question of Māori land tenure*

The passage of the first Native Lands Acts and establishment of the Native Land Court were preceded by years of debate over the Crown's Māori policy and its approach to Native title and land purchase. Neither settlers nor Māori were satisfied with the Crown's handling of these matters. The newly formed settler Parliament, with its early ministries dominated by former New Zealand Company officials,[94] accepted the treaty and the guarantee of Māori ownership of all land in New Zealand with the utmost reluctance. They resented both the retention of control of Māori affairs by the Governor and Donald McLean's influence on policy as Native Secretary (from 1856 to 1861), and as Chief Land Purchase Commissioner (from 1854 to 1865). As discussed in chapter 7, they were highly critical of what they considered to be the slow pace of land acquisition under Crown pre-emption, as conducted by McLean's Native Land Purchase Department (established in 1854), which they condemned as an impediment to colonial expansion and prosperity. For their part, Māori were critical of the low prices offered by the Crown, were increasingly opposed to land sale, and desired greater political autonomy, as evidenced in the growth of the Kīngitanga. In Te Raki, the pace of Crown land acquisition slowed appreciably in the late 1850s, as discussed in chapter 8. At Waitara in Taranaki, the activities of land purchase officers would exacerbate tensions between those who wished to sell and those who did not, resulting in an attack on the authority of chief Wiremu Kīngi and his ability to 'veto' land sales, followed by the outbreak of war in 1860.

These circumstances intensified debate over the respective merits of Crown pre-emption and direct private purchase of Māori land. Some critics pointed to the

94. Edward Stafford, William Fox, Francis Dillon Bell, C W Richmond, and J C Richmond all had strong connections to the New Zealand Company. See Hazel Riseborough and John Hutton, *The Crown's Engagement with Customary Tenure in the Nineteenth Century*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997), pp 33–34.

dangers of the Crown, as sole purchaser, also deciding title in the absence of any independent inquiry. At the same time, there was a growing acceptance among settler politicians of the need for some form of title determination before purchasing could take place without causing conflict. The benefits of a secure individual title for Māori as an essential precursor to their 'civilisation' were also widely assumed and this was an oft-repeated theme in political discourse of the 1850s and 1860s.

These matters – title determination and land purchase – were central points of contestation in the struggle between the Governor and the colonial Legislature for control of Māori affairs. The settler Parliament pressed for 'responsible government' at the first sitting of the General Assembly in 1854. As we discussed in chapter 7, the Acting Governor, Robert Wynyard, referred the matter to the Colonial Office, which did not oppose the idea – and nor did Gore Browne, the new Governor, except for desiring to retain control of Māori affairs. On his arrival in 1855, he had sought the opinion of Pākehā 'experts', including missionaries and a number of his own officials, as to whether the management of Māori affairs should be the responsibility of the Governor alone or handed over to a ministry chosen by elected representatives with the Governor retaining a right of veto. As historian Dr Donald Loveridge commented, it was perhaps predictable that all but two of the 38 respondents favoured the Governor keeping complete control over Māori policy rather than dividing responsibility for it.[95] Gore Browne decided to retain control of 'native policy', since the cost for any conflict resulting from policies relating to Māori would have to be borne by the British government, and he interposed himself between Māori and a settler Parliament in which they had no representation. In April 1856, he informed his Ministers that while he would receive their advice on imperial matters, including 'all dealings with the native tribes, more especially in the negotiation of purchases of land', he was not obliged to accept it.[96]

9.3.2.2 *Early attempts to convert customary tenure*

In the view of the board and settlers in general, the Government held 'insufficient land to meet the requirements of the Colonists'.[97] A means of extinguishing Native title had to be devised that would be speedier than Crown purchase, so that more land could be opened up to meet settler demand. Though the board did not support waiving Crown pre-emption, colonial politicians increasingly favoured that option.[98] In August 1856, member of the Legislative Council, J A Gilfillan (Auckland), opened a debate in the General Assembly on 'native land purchases', inquiring whether it was 'the intention of the Government to introduce

95. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 40.
96. Browne, minute, 15 April 1856 (cited in Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 39).
97. Board of Enquiry into Native Affairs, 9 July 1856 (cited in Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E2, p 49).
98. For discussion of the Board of Enquiry recommendations and reaction to them, see Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), pp 46–55.

this session any measure to legalise the direct purchase of land from Natives?'[99] Gilfillan claimed that a 'deadlock' had been reached because 'the Natives would not sell to the Government, the Government would not allow the Natives to sell to Europeans. This could only be remedied by allowing the Natives to sell their own land.'[100] The time had come for a new approach 'for the sake of the Natives' because the 'large quantity of land in their possession now unpeopled, and therefore untitled was of no real value to them' and would prevent their advance 'in the scale of civilization' by inducing them to 'lead a wandering unsettled life' resistant to Christian teachings. He adverted, too, to the long-standing criticism of pre-emption: that it denied Māori their rights as British subjects to sell their own lands, of which they had a 'surplus supply'.[101]

In his response, Attorney-General Frederick Whitaker agreed that it was 'very desirable that some change should be made in the mode of acquiring land from the Natives'.[102] He had drawn up a Bill enabling settlers to make a deposit on a desired piece of land to the Government, which would then complete the purchase and make the grant.[103] While the proposal to provide Crown grants to Māori 'was a measure he was inclined to look upon with favour' if it were first tried on a 'limited scale', there were major obstacles to overcome; direct purchase would not only interfere with the land fund but also the matter remained in the hands of the Governor.[104] However, a motion to modify the existing law to allow direct purchase 'through the agency and with the sanction of the Government' received general approval.[105] Members such as Henry Sewell thought 'precautionary steps' such as registering the rights of different Māori so as to 'prevent confusion and disputes' were required, but there was wide consensus on the need for change.[106]

By the late 1850s, Crown officials and settler politicians, anxious to undermine the Kīngitanga and stave off what they perceived as incipient Māori nationalism, were increasingly willing to institute some form of Māori local self-government and some say in the disposal of their own lands. Fenton, working as resident magistrate in the Waikato in 1857, had proposed a system through which local rūnanga would regulate the affairs of Māori under the direction and control of Government. It was his view that Māori would 'cease to fear for their independence and . . . cease to regard the possession of the land as a matter of such deep interest' if their 'importance and position [were] properly recognized and

99. J A Gilfillan, 7 August 1856 (cited in Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 56).

100. J A Gilfillan, 7 August 1856, *New Zealand Parliamentary Debates*, vol 386, p 335; see also Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 57.

101. J A Gilfillan, 7 August 1856 (cited in Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), pp 56–57).

102. F A Whitaker, 7 August 1856 (cited in Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 57).

103. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 57.

104. F A Whitaker, 7 August 1856, NZPD, vol 386, p 336; Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), pp 57–58.

105. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 58.

106. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 58.

protected'.[107] But the Governor withdrew Fenton from the district within a year, on the advice of McLean, who thought that he was exacerbating tensions and damaging the Government's efforts to constrain the influence of the Kīngitanga.[108] A later select committee which reviewed Fenton's operations criticised his withdrawal, lamenting that Māori had been 'once again left to their own devices'.[109]

Within a few months, the Stafford ministry (under Premier Edward Stafford) had introduced several measures concerning Māori land – notably the Native Territorial Rights Bill – as the struggle for control over Native policy intensified. As discussed in chapter 7, this measure would have established a process by which the Governor-in-Council (the Governor acting in accordance with ministerial advice) might issue certificates of title to Māori land, either to communities or individuals. There was also limited provision for the issue of Crown grants, up to 50,000 acres per year. Under a waiver of the Crown's right of pre-emption, settlers would have been able to purchase or lease some Māori land directly for a substantial fee per acre. However, Gore Browne opposed the Bill, which he saw as a challenge to the Crown's authority, stating it would require Royal assent.[110] The imperial government was unwilling, at this stage, to surrender control over Māori policy to the colonial Legislature, and considered any move to waive the Crown's right of pre-emption to be 'in the highest degree unadvisable' and contrary to the spirit of section 73 of the New Zealand Constitution Act 1852. According to the Secretary of State for the Colonies, Lord Carnarvon, a system of direct purchase would fail to guarantee the fairness of negotiations that preceded any transfer of land, expose the Government to a suspicion of favouritism, encourage speculators, and 'induce an intermixture of European with Native lands, calculated to cause confusion and inconvenience'. Continued imperial military support was also contingent upon the maintenance of existing arrangements.[111]

Nonetheless, Gore Browne indicated to a deputation of settlers in June 1859 that it was 'desirable to provide means for enabling tribes, families, and particular individuals to define and individualize their property, and that it would be just and proper to confirm well-ascertained rights by a Crown title'. While the Governor did not accept that the Native Land Purchase Department had failed to procure sufficient good-quality land for colonists, he recognised that it was 'very desirable for the interests of both races that the extinction of Native title over all land not required for the use or occupation of the Maories should be effected as rapidly as can be accomplished with justice'.[112]

The other measures proposed by the Stafford ministry – the Native Districts Regulation Act 1858, accompanied by the Native Circuit Courts Act 1858 – fared

107. Fenton, 31 August 1860, AJHR, 1860, E-1C, p 10.
108. Loveridge, 'The Origins of the Native Lands Acts' (doc E26), pp 70–71.
109. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 71; see also *Report of the Waikato Committee*, 3 November 1860, AJHR, 1860, F-3, pp 1–165.
110. Boast, *The Native Land Court*, p 50; Loveridge, 'The Origins of the Native Lands Acts' (doc E26), pp 81–85, 87.
111. Lord Carnarvon to Governor Browne, 18 May 1859, AJHR, 1860, A-4, pp 26–27.
112. Gore Browne, 9 June 1859 (cited in Loveridge (doc E26), p 91).

better and were approved, coming briefly into operation. The Bay of Islands Settlement Act 1858 was also approved. Intended to provide for districts of mixed populations (as discussed in chapter 7), it proved a disappointment to Te Raki Māori. They had swallowed the bitter pill that was the hard line taken by Francis Dillon Bell's Land Claims Commission (Bell commission) on Crown ownership of 'surplus lands' from old land claims and pre-emption waiver purchases, in the expectation that the Bay of Islands Settlement Act would assist in providing for shared authority and future prosperity; an expectation in which they would be disappointed.[113]

Pressure for direct purchase mounted in the following year. Gore Browne's response to the delegation (noted above) was considered promising. Even though he clearly intended to retain control of the process, colonists agreed on the need for some system of ascertaining title as a preliminary step to purchase.[114] The question was how to do this 'effectually'. Several proposals were in circulation: Fenton's 'Scheme for Partition and Enfranchisement'; four Native Land Bills produced by the Government in 1859 for introduction during the 1860 session;[115] a plan by Sewell for the creation of Native Councils to ascertain titles with the aim of promoting 'systematic colonisation'; and a plan from Gore Browne which modified Sewell's scheme.[116] After considerable debate in the Colonial Office, the British government came up with its own Bill 'for the better Government of the Native Inhabitants of New Zealand, and for facilitating the Purchase of Native Lands', which was brought before the House of Lords in 1860. This also provided for a Native Council, which would be empowered to declare native districts in which native law would be maintained and rules devised for the investigation of Māori title and respecting the 'use, occupation and devolution of Native Lands'. Certificates of title could be issued, but these would not confer the power of alienation without the approval of the General Assembly.[117] The Bill was passed by the Lords but was abandoned after meeting strong opposition in the Commons following the outbreak of war in Waitara.[118]

War in Taranaki also undermined Gore Browne's position that only the Crown could safely conduct land purchases from Māori and that policy should remain under his control. Former supporters, Bishop George Augustus Selwyn and politician William Swainson, began to endorse direct purchase, and the war prompted a prolonged debate in the colonial Legislature in which McLean and Māori policy

113. Grant Phillipson, 'Bay of Islands Maori and the Crown: 1793–1853' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2005) (doc A1), pp 173, 178, 363, 375.

114. Loveridge, 'The Origins of the Native Land Acts and Native Land Court' (doc E26), pp 92–93.

115. For discussion of these Bills, see Loveridge, 'The Origins of the Native Land Acts and Native Land Court' (doc E26), pp 100–103, 107–108.

116. For discussion of these proposals, see Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), pp 104–113.

117. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), pp 114–115.

118. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), pp 116–117.

were the focus of attack.[119] A Native Council Bill was introduced (news having reached New Zealand that the British government was contemplating such a measure) that would enable the 'Executive Government', on the council's advice, to make laws to regulate the purchase of land. The council would be able to suggest

> such measures as may appear to them to be desirable for promoting the civilization of the Natives; for ascertaining and defining their tribal and individual territorial rights; for encouraging the partition of lands held by them in common; for rendering their surplus lands available for purposes of colonization; for establishing law and order among them; for preparing them for the exercise of political power; and generally for promoting the welfare and advancement of the Native People.[120]

On a broad level the intention was clear: decisions about Māori affairs would be in the hands of Ministers – and customary tenure would be transformed to promote the transfer of lands and Māori adoption of British laws and institutions. A key aim of the proposal was to encourage Māori to partition their lands into smaller holdings held by individuals to make the 'surplus' available for purchase. While Gore Browne remained convinced that the Crown was the 'rightful guardian of the Maori race', he accepted that the Constitution Act 1852 had not made 'sufficient provision' for it to properly fulfil that role. In his view, the Native Council Bill was the 'best compromise' that could now be made, and he recommended that it be given Royal assent. In the end, however, a council could not be formed, and nothing further was done.[121]

9.3.2.3 *The Kohimarama Rūnanga and land titles*

Despite the growing challenge to his authority, including from the British government, in respect of Māori affairs, Gore Browne continued to search for a practical means of ascertaining customary interests in Māori lands and replacing them with Crown-derived titles.[122] In July 1860, he convened a major rūnanga at Kohimarama.[123] The main intention was to secure the allegiance of rangatira, particularly those from the putatively more 'friendly' regions north of Auckland, during the war in Taranaki. However, the rūnanga also provided a rare opportunity for Ngāpuhi and other invited Māori leaders to engage with the Crown on the treaty relationship (which we analysed in detail in chapter 7). Here we discuss the proposals raised at the meeting for a means of determining land ownership.

119. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), pp 118–121.

120. Joint Select Committee, 18 October 1860, JHR, 1860, pp 182–183 (cited in Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 123).

121. Gore Browne, 26 November 1860, AJHR, 1860, E-3, pp 6–7; Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 124.

122. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 125.

123. As noted in chapter 7, we use this term to refer to the meeting more commonly known as the 'Kohimarama conference'.

During the course of the hui, the Governor presented several 'Messages' directed to the topic of Māori welfare and 'advancement'. 'Message No. 2', delivered late in the proceedings, concerned land reform. Discussions touched explicitly upon the potential for Māori to be granted secure legal titles by the Crown. Reminding the assembled chiefs of the promise that had been made under article 2 of the treaty, the Governor asked them to consider 'the difficulties and complications attending the ownership of Māori land in the hope that they could devise a plan to simplify tenure. Blaming tribal wars and disputes on the uncertainty of their tenure, the Governor warned that they would make 'no progress in civilization' until general principles as to boundaries and rights of property were laid down and the rights of the individual were as 'carefully guarded as those of a community'. He suggested that land disputes might be referred to a 'committee of disinterested and influential Chiefs selected at a Conference' similar to that being currently held, or by an arbitration panel with members chosen by both sides of the dispute and a chief from an independent tribe.[124] Only 11 of the 250 or so rangatira in attendance spoke on the matter (all in support), none of them from Te Raki.[125] Nor did the Crown's proposals for the administration and titling of Māori land feature in the resolutions adopted by the Māori representatives present.[126]

In brief, the Kohimarama Rūnanga was but one step towards a negotiated agreement between the Crown and Māori on issues of key importance to both treaty partners, including tenure conversion and the administration of Māori land. This discussion appeared to signal that some degree of communication about the Crown's preferences for a title determination system had taken place, but Gore Browne seems not to have commented specifically on the response to his tentative proposals. It may be, as Loveridge has argued, that the Governor likely came away from Kohimarama thinking that his audience had been receptive to the idea of tenure reform and the introduction of a means of settling land disputes.[127] It is clear, however, that the rūnanga as a whole had not consented to any change in their system of ownership or the introduction of any adjudicating body, let alone an English-style court. The Te Raki attendees expressed no opinion on these matters at all.

In early 1861, Gore Browne sent a memorandum to Premier Stafford asking whether it would be practical to set up a 'court'. He hoped to introduce a Bill to this effect in the next session. When it opened shortly after, the new Native Minister, Frederick Weld, moved that a select committee be established to report on the advisability of the proposal and the 'constitution and functions' of such a body.[128]

124. Gore Browne, 18 July 1860, AJHR, 1860, E-9, p 10; Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), pp 126–127.

125. 31 July 1860, *Maori Messenger/Te Karere Maori*, pp 33–40 (Armstrong and Subasic, supporting papers (doc A12(a)), vol 1, pp 42–46).

126. 15 August 1860, *Maori Messenger/Te Karere Maori*, pp 6–8 (Armstrong and Subasic, supporting papers (doc A12(a)), vol 1, pp 101–102).

127. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 132.

128. F A Weld, 13 June 1861 (cited in Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), pp 138–139).

Before much more could be done, the Stafford Ministry fell, replaced by one led by William Fox, while Gore Browne had been replaced by Sir George Grey, who was already en route to New Zealand.

9.3.2.4 *Governor Grey's proposal for Māori adjudication of land ownership disputes*

Grey returned to New Zealand with discretion to make any change to the current native policy arrangements as he saw fit – and to a warm reception from colonists. He was expected to establish peace and improve the administration of Māori affairs; land was one of his first priorities. In June 1861, then Secretary of State for the Colonies, the Duke of Newcastle, signalled a change of heart on the part of the Colonial Office. He raised the prospect of declaring 'Native Districts' and 'withdrawing them, for purely native purposes, from the jurisdiction of the General Assembly, or Provincial Councils, or both', and of 'a distinct legislation and administration, in which the natives themselves should take a part'. Newcastle queried whether self-administered native districts, 'would not better promote the present harmony and future union of the two races' than the 'fictitious uniformity of law that now prevails'. He also suggested that the system of Crown pre-emptive purchase, which he described as a 'most important portion of the subject closely connected with the origin of the present disturbance', might be modified or superseded. In addition, a tribunal might be created to which land disputes could be referred. Newcastle indicated that should the Governor consider such a step desirable, the imperial government would be willing 'to assent to any prudent plan for the individualization of Native Title, and for direct purchase under proper safeguards of native lands by individual settlers, which the New Zealand Parliament may wish to adopt'.[129]

Grey responded by formulating proposals for State-mandated rūnanga, or 'new institutions', to be responsible for Māori self-government (we discuss Grey's rūnanga scheme in detail in chapter 7). To summarise, under this system some 20 rūnanga districts would be created (rather than following provincial borders). Their members would be appointed by the Crown and would operate under the direction of resident magistrates. They would have the power of adjusting disputed land boundaries of tribes, hapū, and individuals, and of 'deciding who may be the true owners of any Native lands'.[130] They would recommend the terms and conditions on which Crown grants would be issued and, jointly with the Governor, monitor and approve land transactions. There would be tight restrictions on land sales, however, including a requirement for the purchaser to live on the land for three years before receiving a Crown grant. It is worth noting the role of the Governor as a confirming authority in Grey's proposal; a similar provision would be included, albeit in a diluted form, in the 1862 Act.

129. Newcastle to Grey, 5 June 1861, AJHR, 1862, E-1, section III, p 4.

130. Grey, minute, October 1861 (cited in Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 144).

The Fox ministry had misgivings about the cost of the machinery Grey proposed and disliked the restrictions on purchase but approved its general direction.[131] The Minsters thought that the only practical way of dealing with land was to 'leave the matter substantially in the hands of the Runangas'; once titles had been ascertained and recorded, 'the Natives should then be left to hold, sell, lease, or otherwise dispose of their lands in such manner as they might themselves choose'. The Government would, however, attempt to guide them in adopting regulations 'as may lead to the sale and occupation of those lands in the manner most beneficial to both races'.[132]

Grey favoured trialling his proposals in the 'loyal' north, where Ngāti Whātua, Te Uri o Hau, and Ngāpuhi had declined to support the Kīngitanga movement. Accordingly, in November 1861 the Governor met Māori in Hokianga and at Waimate, Bay of Islands, and elsewhere 'for the purpose of introducing the proposed Native Institutions amongst the tribes in those localities'.[133] During those meetings, Grey emphasised the role rūnanga would play in resolving disputes over land, including those that involved purchases by the Crown; leasing as a means of generating revenue; and the establishment of towns. In effect, Grey emphasised the contribution that rūnanga, in concert or partnership with the Crown, could make in securing peace, stability, and economic advancement.[134] Grey also carefully stressed that land title determination was an essential prerequisite to such development.[135] Some 1,500 Māori assembled at Rāwene in November 1861 to hear '[v]ery full explanations' which provoked a great deal of discussion led by Arama Karaka Pī (Māhurehure) and other principal rangatira. According to a report in the *New Zealander*, Māori were 'very greatly pleased' with Grey's proposals, which promised partnership, cooperation, and an appreciable degree of Māori control or autonomy.[136] In February 1862, the *New Zealander* declared that 'Not a single *hapu* declines to accept the proffered system'.[137]

In his report on the proceedings, dated 5 April 1862, the former Chief Protector of Aborigines, George Clarke, advised the Government that he had identified wide support for the new rūnanga system.[138] But the key tasks of land title investigation and resolution of disputes over land rights were quickly transferred – without consultation with Māori – to the newly created Native Land Court.

131. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), pp 145–147.

132. William Fox, minute, 31 October 1861 (cited in Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), pp 146–147).

133. AJHR, 1862, E-9, p 3.

134. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 177.

135. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 10–12.

136. 'Governor Grey's Visit to the North', *New Zealander*, 16 November 1861, p 3.

137. 'The Native Question', *New Zealander*, 8 February 1862, p 3.

138. 'The First Maori Parliament or District Runanga', *Maori Messenger/Te Karere Maori*, 23 May 1862, p 13. This report was widely republished throughout the colony.

9.3.2.5 *Board of Inquiry into Native Affairs, 1856*

Later that year, Gore Browne also set up a four-man board 'to inquire into the system of purchasing land from the Natives, and other matters referred to them.'[139] We discussed the Board of Native Affairs in chapter 8 (with reference to the question of what Māori understood by their land transactions) and return to it here, since it conducted the most thorough local investigation of the nature of customary title to date, although one undertaken with the aim of deciding how best to set about extinguishing it. Again, the opinions of witnesses (a total of 35, comprising officials, missionaries, early settlers, and nine Māori including Te Hira Taiwhanga) were sought. There was near unanimity of opinion that an 'individual right to any particular portion of land' did not exist 'independent and clear of a tribal right' in Māori customary law. There was less agreement on other matters, notably whether Māori were willing to sell their lands. Historians Dr Hazel Riseborough and John Hutton, who analysed the responses of the board witnesses, found that 16 thought they were and seven that they were not, while Māori opinion was split on the matter.[140]

The board reported what had been long known by those with experience in Māori matters: that each person had a right in common with the whole tribe over the disposal of land, and use rights in such areas as he (or she) or their parents had regularly cultivated or occupied, but the claim of an individual did not amount to a right of disposal to Europeans 'as a general rule' – a qualification made to account for the sales under pre-emption waivers in the vicinity of Auckland.[141] The board emphasised the complexity of customary ownership, overlapping and competing claims, and the effects of intermarriage on claims to land based on descent. A number of major factors complicating the task of defining title were identified: the usufructary (temporary right of use) interests in the land, including those held by chiefs; inheritance through the female line and intermarriage between tribes that resulted in the ability to claim rights in the lands of different tribes; gifting of land; allocation of land in compensation for a wrongful deed; and the return of 'slaves' (war captives) to their former lands.[142] In the board's estimation, Māori lacked a secure and clearly defined title comparable to that held under the British system.[143]

Historian Dr Michael Belgrave has pointed out that such a complicated system of tenure presented 'real problems' for a Government anxious to extinguish Māori

139. Browne, 23 July 1856 (cited in Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 46).

140. Riseborough and Hutton, *The Crown's Engagement with Customary Tenure in the Nineteenth Century*, p 37.

141. Riseborough and Hutton, *The Crown's Engagement with Customary Tenure in the Nineteenth Century*, pp 36.

142. Michael Belgrave, 'Maori Customary Law: from Extinguishment to Enduring Recognition' (commissioned research report, Wellington: Law Commission, 1996), pp 30–31.

143. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 47. For the *Report of a Board Appointed by His Excellency the Governor to Enquire into and Report upon the State of Native Affairs*, see AJHR, 1856, B-3 (Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), app 3, pp 256–269).

title for the purposes of colonisation: '[s]low and painstaking investigation did not transfer much land.'[144] The Native protectorate had found this out; so had McLean and his purchase officers who had departed from recognised purchase standards in order to satisfy an increasingly impatient and powerful settler population. For the Government, Belgrave argued, the problem was unchanged: 'How to recognise Maori customary ownership in order to purchase land, without getting drawn into a never ending process of buying off everyone who had a claim? What was to be done if some of those with rights refused to sell?'[145]

The lack of a secure individual title was considered a serious obstacle to the progress of the colony and of Māori themselves for, in the Board's view,

> As long as Maori . . . hold their lands as they do at present they have no incentive worthy of the name to improve their social condition or to add permanent improvements to their land; and as regards the adoption of our laws and customs it is not likely that they will readily break off their connexions with the native tribes, which now afford them the only security they have for their holdings until they are assured of a better. While they continue as communities to hold their land, they will always look to those communities for protection, rather than to the British laws and institutions, which, although brought so near, does not embrace them in regard to their lands.[146]

Provision of Crown grants was seen as serving several purposes. As Loveridge observed, Māori society would be de-tribalised and would be brought 'under the control of the same law and institutions as the settlers', while it would also encourage Māori to sell their unoccupied lands in the longer term.[147] The board of inquiry, which had noted the increasing reluctance of Māori to sell their lands, believed that if titles were individualised 'to such portions of land as may be actually required for occupation' and held under Crown grant, the remaining unimproved, unused lands could then be sold (see also chapter 8, section 8.3.2.6).

9.3.2.6 *The development of the Native Lands Act 1862*

In January 1862, several months before the Bay of Islands rūnanga had met under Grey's scheme for the first time, the Fox ministry had already begun taking steps to introduce a different measure for the determination of Māori land title and direct purchase. Before the enactment of the Native Lands Act 1862, the proposal would undergo a convoluted legislative process where two different ministries (led by William Fox and Alfred Domett) would each introduce Bills directed at the conversion of Māori tenure and enabling settlers to buy lands directly themselves. The

144. Belgrave, 'Maori Customary Law', p 31.
145. Belgrave, 'Maori Customary Law', p 31.
146. Board of Enquiry into Native Affairs, 9 July 1856 (cited in Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 48).
147. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), pp 48–49.

two iterations of the Native Lands Bill 1862 reflected varying views on how Māori title should be decided and the role the Governor was to have in the process.

In opening the 1862 session of the New Zealand General Assembly, Governor Grey focused on his rūnanga scheme, which he hoped would 'elevate' Māori and reconcile them to British rule. Bills would be introduced to remove 'impediments' to the individualisation of title, the issue of Crown grants, and Māori capacity to dispose of their lands.[148] The Native Lands Bill No 1 drafted by Sewell (acting as Attorney-General) modified Grey's proposal, and a new Bill and further changes would prove necessary to ease the passage of such a measure through the Legislature.[149] First, Sewell considered it best to overcome the stumbling block of section 73 of the Constitution Act 1852, which declared that it 'shall not be lawful for any person other than Her Majesty to purchase or in any way acquire or accept from the aboriginal Natives any extinguishment of their rights'. According to Loveridge, the need to keep within the spirit of section 73 probably explains the awkward phrasing of Sewell's Bill 'for regulating the disposal of Native lands'.[150]

Bill No 1 enabled the Governor to ascertain 'in such manner as he shall think fit . . . who according to Native custom are the Proprietors of any Native Lands' (clause 4). The Governor was, however, to 'as far as possible in such manner as he shall think fit obtain the assent and co-operation of the Natives interested therein' (clause 6). Ownership would be confirmed by Order in Council. Where collective ownership was recognised, the Governor could 'in his judgment deem according to Native Custom' who should be entitled to act as their representatives. And once an Order in Council had been obtained, the 'Native proprietors' could submit requests to the Governor for the issue of regulations for the sale, or other disposal of the lands concerned (under clause 9). Sewell apparently thought the language of the Bill remained consistent with section 73 of the Constitution Act because, as Loveridge has interpreted his reasoning, 'the recognition of ownership and control over alienations by means of Orders in Council extinguished Maori title before the land passed into the possession of private individuals'.[151] Loveridge observed that others were far less certain the Crown was able to legislate over lands not yet acquired from Māori.[152] To finally resolve this issue, Sewell proposed in April 1862 that Grey 'obtain from [the imperial] Parliament an extension of power enabling the General Assembly to legislate with the assent of the Native Proprietors as

148. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), pp 158–159.

149. This is referred to in the NZPD as 'Native Lands Bill No 1', as Bell introduced a second Bill, 'Native Lands Bill No 2' (Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 159, fn 338).

150. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), pp 148–149.

151. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), pp 150–151.

152. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 151.

regards lands not yet ceded to the Crown'. He also proposed that the Governor be authorised 'to assent to such Bills without reserving them for the Queen's assent'.[153]

Grey endorsed this request and sent the Bill and Sewell's memoranda off to London the same day, adding that he sought the power to make regulations 'for the sale letting occupation or other disposal of such lands' under any legislation approved by the Assembly as soon as an amending Act arrived in New Zealand. Loveridge noted that '[c]learly, the Governor (and probably his advisers) were eager to get the new system up and running'.[154] This feeling was shared in the Colonial Office, which responded by quickly moving to introduce amendments to 'The New Provinces Bill', which was already before committee, to empower the New Zealand General Assembly to alter or repeal section 73 of the Constitution Act, and providing that 'no Act passed by the said General Assembly, nor any Part of such Act, shall be deemed to have been invalid by reason that the same is repugnant to any of the said Provisions'. The New Provinces Act 1862 (also referred to as the New Zealand Act) received Royal assent on 29 July 1862, but would not be gazetted in New Zealand until November.[155] Loveridge observed that 'a surprising feature of the passage of this legislation is the complete absence of any recorded debate on the constitutional change, or its implications for Maori interests or colonization'.[156]

As the imperial government took steps to open the way for direct purchase of Māori land, Sewell's Native Lands Bill was introduced in the New Zealand General Assembly on 22 July 1862.[157] In introducing it, Fox made an opening statement on 'Native policy', which he maintained was essentially that adopted by the Governor and which the Minsters were now 'devoting themselves . . . to carrying into operation'.[158] The only practical way forward, he suggested, was for responsibility for Māori affairs to be shared between the Governor and his Ministers. He described the importance of engaging Māori 'in the work themselves', and explained that 'to this end' the Government 'look[ed] to the runanga, or Native council, as the point d'appui [support] to which to attach the machinery of self-government, and by which to connect them with our own institutions', while the 'institution of Government so established should be worked under European agency, but as far as possible by the Natives themselves'.[159] A vigorous debate about native policy and responsibility for it followed, and the Fox ministry resigned in the face of opposition before its land legislation could be passed.

Alfred Domett formed a new ministry in August 1862. Dr Loveridge noted that it contained many of the same people, minus Fox. The ministry's policy on Māori affairs was similar although it adopted a 'harder line on the question of

153. Sewell, memorandum, 9 April 1862 (cited in Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 151).
154. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 152.
155. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 156.
156. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 156.
157. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 159.
158. Fox, 22 July 1862, NZPD, vol D, p 421.
159. Fox, 22 July 1862, NZPD, vol D, p 422.

responsibility'.[160] It also pared back the scheme for deciding title. Bell, who served as Native Minister, quickly introduced his own measure – the Native Lands Bill, No. 2 – 'to remove restrictions which now exist upon the sale and occupation of Native lands in New Zealand'. According to a later memorandum by Domett, the Bill differed materially from Grey's rūnanga system and the proposals advocated by the Fox ministry; these had had 'no chance of becoming law'. At the heart of this new piece of legislation was 'the unqualified recognition of the Native Title over all land not ceded to the Crown, and of the Natives' right to deal with their land as they pleased, after the owners, according to Native custom, have been ascertained by Courts to be established for the purpose'.[161] These were to replace rūnanga but were to be composed wholly or partly of persons of 'the Native race' and presided over by a European Magistrate who would also have a vote, while the role of the Governor was reduced. Grey's scheme for gradual and conditional sales was also abandoned.[162]

Despite a continued preference for his rūnanga and the gradual opening of Māori land 'by European proprietors agreeable to the Natives of the district', Grey thought it better to have some law passed dealing with setting up a means of determination of ownership rather than none.[163] He approved the principle of the Bill, which he understood to mean '[t]hat Natives of New Zealand should be allowed to have as good a title to their lands as Europeans, and that they should, in the event of their disposing of or renting these lands, be allowed to obtain the value of such lands.'[164] In moving the second reading of the Bill, Bell described it as a major departure from Fox's Bill, in which the Governor had retained the power of determining Native title. By contrast, he noted, 'we desire, subject to proper safeguards, that the Natives themselves should be empowered to ascertain and define their own titles.' The courts would 'after a proper survey, a careful enquiry, and confirmation of their proceedings by the Governor . . . have the power of certifying who, according to Native custom, are the owners of any land.'[165] Bell argued that the right of the Government to take part in the process and 'rightly legislate, was settled when the Queen's sovereignty was established in these Islands.'[166]

Unsurprisingly, the new Bill provoked a heated debate both in and outside the House, which resulted in a number of concessions in the committee stage and as it went through the Legislative Council. Questions under discussion included whether the General Assembly had the power to create such a court, the wisdom of giving Māori customary rights any form of recognition in British law other than

160. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 161.
161. Domett to Grey, 24 August 1862, AJHR, 1863, A-1, p 7.
162. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), pp 162–164.
163. Grey, quoted in Bell minute, 5 November 1862 (cited in Loveridge, 'The Native Lands Acts and Native Land Court' (doc E26) p 182).
164. Grey to Domett, 25 August 1862 (cited in Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 163.
165. 'Native Lands Bill', 25 August 1862, NZPD, vol D, p 610.
166. 'Native Lands Bill', 25 August 1862, NZPD, vol D, pp 610–611.

'An Imaginary Title'

It was considered essential that questions of Māori land title be settled before civil institutions could be successfully established. The introduction of the land court as a means of establishing who were the correct owners of the land was seen as inextricably linked to the success of colonisation. Attorney-General Sewell expressed great anxiety about whether a land court and direct purchase would be the best way forward, but he had no doubt as to the need for the 'imaginary rights' of Māori to be extinguished and for title to transfer into Pākehā hands. He told the Legislative Council:

> In fulfilling the work of colonization, we are fulfilling one of our appointed tasks. It is our duty to bring the waste places of the earth into cultivation, to improve and people them. It was the law laid upon our first parents to be fruitful and multiply, and replenish the earth and subdue it — to restore the wilderness to its original gardenlike condition. In doing this work we are fulfilling our mission. As a matter of abstract theory, I utterly deny that the land of these favoured Islands were meant by Providence to be retained in a state of waste — that a territory as large in extent and possessing as great natural advantages as the British Islands was to be rendered for ever inaccessible to civilization and forbidden to the use of man by an imaginary title vested in fifty or sixty thousand semi-barbarous inhabitants scattered thinly over the country in miserable villages in a few scarcely perceptible spots. I deny that, in the sense of any inherent right, this people can maintain their exclusive title to forests and plains which they never trod, and mountains, teeming probably with unlimited store of wealth, which it may be they never have seen. Those who, in opposition to such imaginary rights, maintain and assert the rights and duties of colonization have to my mind great truths on their side. In conformity with these truths the work of colonization proceeds.[1]

1. Sewell, 9 September 1862, NZPD, vol D, pp 684–685; Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), pp 184–185.

by Crown grant, the effect on the provincial land funds, and the possible impact on the relationship between Māori and Pākehā at a time of heightened tensions.[167]

Bell vigorously defended the measure as removing an entrenched Māori suspicion that the Government was intent upon taking their lands and sought to 'impoverish and degrade them'. In Bell's estimation, 'the one great mistake' of the Crown's approach to Māori land lay in it 'always trying to give them the least price

167. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), pp 170, 173.

they would accept for their land, in order that we might ourselves get the greatest profit we could by its sale.'[168] Once Māori were allowed full rights of ownership and 'benefit of their wealth', the 'root of agitation' – which had been the source of the outbreak of war in Waitara and the growth of the King movement – would be removed.[169] The result would be the 'advancement of their prosperity and wealth which [would] be the best and most lasting guarantee for the permanence of peace'.[170] He expanded on this theme in a subsequent November memorandum; the Act's political objective was the assimilation of Māori into colonial society and its economy by convincing them that the Crown did not desire to dispossess them of their land or to extinguish them as a people. Bell concluded that

> if we give . . . [Māori] a common bond of interest with ourselves, and assure to them and to their children a legal right to, and the full money value of their great territorial possessions, we may some day make them believe, in spite of themselves, that the progress of colonisation by our race means wealth and power for them as well as for us.[171]

Grey also endorsed the measure on these grounds. When proroguing Parliament in September, he had welcomed the new Act as assisting him 'in the work of restoring this country to tranquillity, and of bringing its native population to obey the law, and acknowledge the authority of Her Majesty's Government'. Further, in his view, it demonstrated the colonial Government's commitment to 'the welfare of the natives'.[172]

These objectives were reflected in the Act's preamble which, at some unknown stage,[173] was altered from a simple statement that it was 'desirable to remove restrictions which now exist upon the sale and occupation of Native Lands in New Zealand' to a much fuller explanation of its purpose invoking the guarantee of 'full exclusive and undisturbed possession of their lands and estates' under article 2 of the treaty and declaring the intention to relinquish Crown pre-emption. Additionally, 'the peaceful settlement of the Colony and the advancement and civilization of the Natives' would be promoted 'if their rights to land were ascertained defined and declared' and if such rights were 'assimilated as nearly as possible to the ownership of land according to British law'.[174]

There were further amendments to the original Bill. The most significant of these was a change in the wording of clause 2 which had initially stated: 'All Lands in New Zealand over which the Native Title shall not have been extinguished shall be deemed to be the absolute property of the persons entitled thereto by native custom.' Such an explicit acknowledgement of absolute Māori ownership made even members of the ministry uneasy, and the clause was altered to read:

168. Dillon Bell, 25 August 1862, NZPD, vol D, p 611.
169. Bell, 25 August 1862, NZPD, vol D, p 611.
170. Bell, 27 August 1862, NZPD, vol D, p 653.
171. Bell to Grey, 6 November 1862, AJHR, 1863, A1, pp 10–11.
172. Prorogation, 15 September 1862, NZPD, vol D, p 727.
173. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 174.
174. See Loveridge 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 174.

> All Lands in New Zealand over which the Native Title shall not have been extinguished may . . . after the respective owners by Native Custom of the same shall have been ascertained as hereinafter provided be dealt with and disposed of under the provisions of this Act.[175]

A clause was introduced and subsequently amended as a result of Grey's initiative to provide for the provincial land funds by imposing a transfer duty of 10 per cent on the first sale of land by Māori who held the certificate of title, and four per cent on each sale thereafter.[176]

In summary, then, the Native Lands Act 1862 in its final form was a compromise between the Governor and colonial politicians and within the Colonial Legislature itself. However, in the view of Bell and his fellow Ministers, it managed to

> give effect to the chief design they had in introducing it, namely, that the title, according to Native custom . . . be ascertained by regular tribunals, instead of being determined by the Executive Government, and that when that title has been so ascertained and registered, the Native owners may deal with their land as they shall think fit.[177]

In this way, the Act would reduce the powers of the executive Government to determine Māori land ownership and, in his words, 'reverse the policy which has guided the Government in its relations to the Natives on the land question for the last twenty years.'[178]

The Act established a court or courts to ascertain title to Māori customary lands. Although presided over by a Pākehā magistrate as president, in essence the court would be run by local rangatira. Before coming to any decision, it would ensure the land was carefully surveyed and marked on the ground and in a plan. Once titles had been defined and ownership confirmed and registered, Māori would have all the rights of ownership that could be exercised under British property law and, more particularly, to sell their lands to whomsoever they pleased.[179] Although the Governor's role was much reduced. it was not fully dispensed with; if a claim was established to the satisfaction of the court, it would be registered, and the record of proceedings submitted to the Governor for confirmation. At this point, the Governor could set aside reserves for the benefit of the tribe, particular rangatira, or whānau.

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175. See Loveridge, 'The Origins of the Native Lands Act and Native Land Court' (doc E26), pp 176–177.

176. Initially it was proposed in Council that clause 17, which enabled Māori owners named in a certificate of title to alienate their land, be modified to prohibit any alienation lasting more than seven years – whether by sale or lease – until and unless a fee of 2s 6d per acre had been paid. Governor Grey, who had the right under the Constitution Act to suggest amendments, argued that the fee would often exceed the value of the land being alienated. His proposal of a transfer duty of 10 per cent on the first sale by Māori and four per cent on each sale thereafter was accepted by the Council. See Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), pp 185–188.

177. Bell, minute, 5 November 1862 (Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26, app 9, p 329).

178. Bell, 25 August 1862, NZPD, vol D, p 608.

179. Bell, 25 August 1862, NZPD, vol D, pp 610–611.

'Calling a Spade' a 'Horticultural Utensil'

The different preoccupations of colonial politicians in passing the Native Lands Act 1862 were reflected in the various titles proposed for it:

- 'An Act to remove restrictions which now exist upon the Sale and Occupation of Native Lands in New Zealand';
- 'An Act to render the Title of Natives to their Lands as Valid and Effectual as the Title of Europeans under Grant from the Crown';
- 'An Act to provide for the Ascertainment of the Ownership of Native Lands, and for granting Certificates of Title thereto, and for other Purposes';
- 'An Act to alter the Provisions of the Treaty of Waitangi, and to legalize and facilitate direct Purchase from the Natives by Individuals';
- 'An Act to provide for the Ascertainment of the Ownership of Native Lands, and for granting Certificates of Title thereto, and for regulating the Disposal of Native Lands, and for the removal of the Restrictions on the Sale of Land by the Natives imposed by the Treaty of Waitangi'; and ultimately
- 'An Act to provide for the Ascertainment of the Ownership of Native Lands, and for granting Certificates of Title thereto, and for regulating the Disposal of Native Lands, and for other Purposes'.[1]

1. Loveridge, 'The Origins of the Native Lands Act and Native Land Court' (doc E26) pp 222–224. The title of this sidebar was taken from 'The Native Lands Bill', *Wellington Independent*, 6 September 1862 (cited in Loveridge, pp 178–179).

Once confirmed, certificates of title would be issued by the court to 'Tribe Community or Individuals' (under section 12). Despite this recognition of the existence of an individual right independent of a more general tribal right – one which might be proven in court – this was not intended to be the primary means of individualising title. Rather, this would be achieved when tribes decided to partition their territory, requiring the owners to return to the court for that purpose (section 20).[180] Certificates issued to individuals could be turned into Crown grants and sold or leased or both, so long as there were not more than 20 persons in the title (sections 15, 17, 18). However, as an alternative to individualisation and direct purchase, sections 21 to 25 provided that certificates issued to a 'Tribe or Community' could also be alienated or otherwise disposed of, with the consent and supervision of the Governor, through a complicated process of gazetted regulations which would be binding upon the Crown. For example, they could lay out

180. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 191, app 8, p 322.

townships, propose mining regulations, or raise mortgages.[181] In short, under these provisions, the Crown would assist hapū communities to plan for and regulate the alienation, occupation, and utilisation of their lands and resources.

Modern scholars have tended to overlook the importance of the Native Lands Act 1862 since it did not come into operation in many districts and was soon replaced by the Native Lands Act 1865, which had much wider application and established the procedures that would be followed for the rest of the nineteenth century. Dr Loveridge has commented, however, that the earlier measure promised 'a complete revolution in the native policy of the country', including the abandonment of the Crown's right of pre-emption, the commutation of native into English titles, and the individualisation of ownership and the system of 'direct purchase', or purchase by private interests that such individualisation would allow and support.[182] In Loveridge's assessment, the Native Lands Act 1862 was in these regards a very significant and 'plain and straightforward piece of legislation'.[183] Professor Boast has also described the legislation (along with its 1865 successor) as dramatically reversing previous Crown policy toward Māori land, and marking a 'turning point in New Zealand history'.[184] In Boast's assessment, the 1862 Act must be considered the true starting point of the Native Land Court system, introducing its basic 'conceptual structure': the waiver of Crown pre-emption, the conversion of customary ownership interests to English-derived titles, and the establishment of a new judicial body for these purposes.[185]

While we agree with this assessment of the 1862 Act as laying the foundations of a tenure conversion process that would have enormous implications for Māori society, we also consider the changes instituted by its successor, the Native Lands Act 1865, to be crucial in influencing the success, or otherwise, of Māori engagement with the Crown's system of title determination (as we explain later in the chapter).

9.3.2.7 *Consultation with Māori on the Native Lands Act 1862*

We received no evidence that the Crown, following the Kohimarama rūnanga of 1860 and Grey's efforts in 1861 to promote the adoption of his rūnanga scheme, attempted to consult Ngāpuhi, or any other group of Māori, when preparing and enacting the Native Lands Act 1862. Instead, the Crown took steps to promote its new policy for the determination of Māori rights in land in Te Raki, but only after it had been codified in law. In this section, we discuss these efforts and the level of support amongst Te Raki Māori for the legislation. Historical commentary on

181. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 192.

182. That assessment was offered in [editorial], *Lyttelton Times*, 11 October 1862, p 4 (Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 13). For that gestation, see Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26). For the *Report of the Board of Inquiry into the State of Native Affairs*, see AJHR, 1856, B-3 (Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), app 3, pp 256–269).

183. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 165.

184. Boast, *The Native Land Court*, pp 45, 52.

185. Boast, *The Native Land Court*, p 50.

the 1862 Act has tended to emphasise the delay between its passage and attempts to implement the legislation. As Loveridge noted (and as we discuss in the previous section), this delay was largely because the Crown was preoccupied throughout 1862 and 1863 with planning measures to enable the establishment of the Kaipara and Whāngārei pilot courts.[186] A major hui held at Waimā in Hokianga in September 1863 appeared to indicate acceptance of the idea of a Crown-sponsored means of determining tribal boundaries and resolving disputes as to ownership. The hui, convened by Arama Karaka Pī, took place in a large and substantial 'House of Assembly', which he had built specially for the proceedings at a cost of approximately £300.[187] According to local official and merchant James Reddy Clendon, who was present with George Clarke at the meeting as an observer, those assembled determined to define tribal boundaries and allocate land to hapū and whānau according to tikanga and the provisions of the Native Lands Act 1862, with the expectation of securing certificates of title. As commissioned researchers for this inquiry, David Armstrong and Evald Subasic have argued the hui was 'evidence of Māori *adapting* to changing economic conditions on their own terms and within existing tribal structures' (emphasis in original).[188] In their assessment, it demonstrated a desire on the part of Māori to control the titling and alienation process, to acquire secure titles, and to invest in and develop their lands. It also made clear Māori expectations as to how the new system would work in practice.[189]

The Crown's first major steps to publicise the character of its new arrangements to Māori in Te Raki happened in March 1864 when Native Minister and Colonial Secretary William Fox, accompanied by John Rogan, who would be appointed a judge early the following year, toured Northland. The pair met with Māori at Te Awaroa, Tanoa, Oruawharo, Marekura (Te Tirarau's settlement on the Wairoa River), and Wharekohe. The purpose of the tour appears to have been to emphasise the need for law and order in the wake of the Waikato War; to set out the Act's provisions and to signal that there would be 'a new way of buying land'; and to publicise the arrival of Mr Rogan to adjudicate titles.[190] At meetings in 'all the principal native settlements', Fox primarily addressed the need for Māori and settlers alike to abide by the law. According to the *Daily Southern Cross*, the 'leading native chiefs' present 'unanimously expressed their willingness to submit themselves to the quiet operation of the law'. However at Tanoa and Marekura, Fox also addressed 'the sale of native lands' and foreshadowed the new system of direct purchase, explaining (according to the account published by the *Daily Southern Cross*) that

186. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court', p 206.
187. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 290–291.
188. Armstrong and Subasic, 'Northern Land and Politics (doc A12), p 294. Emphasis in the original.
189. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 290–292.
190. 'The Hon. Colonial Secretary in the North', no I-11, encl. in Grey to Newcastle, 3 May 1864, BPP, vol 13, pp 583–589.

> hitherto the natives could only sell their land to the Government, by whom it was resold to Europeans who desired to occupy it. In future that system would be altered. Any native in the districts named, who felt disposed to sell his land to any European, might do so on condition of first satisfying Mr Rogan that their title to the land was clear. In that way they would be enabled to sell land without Government intervention; and no disputes could arise hereafter.[191]

It is important to underscore that the tour was not intended as an exercise in consultation. Despite the Crown's assertions that a degree of consultation commensurate with the 'standards of the time' occurred regarding the 1862 Act,[192] Fox and Rogan's tour did not meet any reasonable definition of the term, as it occurred significantly after the fact; rather, it was an exercise to persuade and encourage Te Raki Māori to accept decisions that Parliament (which lacked any Māori representation) had already made. According to Armstrong and Subasic, Māori largely welcomed the new court as the system of direct purchase it established would allow them to control alienation and settlement and thus secure their economic and allied objectives.[193]

9.3.2.8 *The abandonment of the rūnanga system*

While it had initially seemed that the title determination system established by the Native Lands Act 1862 would develop alongside the rūnanga, politicians such as Weld disliked separate rules and institutions for Māori. By the mid-1860s, the Crown's commitment to the latter scheme had clearly waned; the Native Land Court created by the Native Lands Act 1862 represented a step away from the rūnanga-based system first proposed by Grey and subsequently under Fox's ministry. In November 1864, Weld claimed that 'attempts to force political institutions upon the Natives' had failed.[194] Notwithstanding Grey's declaration that the rūnanga would be a permanent institution, 'a shelter and refuge for all times', the Weld Government withdrew support for these 'new institutions' in December 1865.[195] As we noted in chapter 7, in its submissions to our inquiry, the Crown denied that the rūnanga were deliberately 'abolished', arguing that they instead suffered from funding cuts applying to all areas of public expenditure, and exactly when and why rūnanga ceased to operate in Te Raki was unclear.[196]

As that chapter also discussed, most historians have described the demise of rūnanga as being more intentional. They included Dr Loveridge, who noted that

191. 'The Kaipara District', *Daily Southern Cross*, 31 March 1864, p 9; see also 'Tour of the Colonial Secretary and his Favorable Reception', *New Zealand Herald*, 6 April 1864, p 6.

192. Crown closing submissions (#3.3.406), pp 10–11.

193. Armstrong and Subasic, 'Northern Land and Politics (doc A12), pp 287–290.

194. Frederick Weld, 28 November 1864, NZPD, vol E, p 16.

195. For Grey's assurance, see Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 175, 264.

196. Donald Loveridge, 'The Development and Introduction of Institutions of Governance for Maori, 1852–1865' (commissioned research report, Wellington: Crown Law Office, 2007) (doc E38), p 282.

they did not feature in the plans of the government after 1865 and were thereafter purposefully all but 'eradicated'. Loveridge additionally observed that while the Government was divesting itself of rūnanga and other commitments, the Native Land Court was one of the few areas in which Crown expenditure actually grew or stayed the same during this era. With Crown support, the Court became 'a major institution'.[197] It seems likely, then, that the Crown saw the individually oriented and judicially directed approach to title determination established by the Native Land Court as more conducive to its goals of expediting land sales and assimilation than the Māori autonomy inherent in the rūnanga model. The Crown's allocation of resources evidently reflected these priorities.

9.3.2.9 *The operation of the Native Lands Act 1862 in Te Raki*

Royal assent for the Native Lands Act 1862 was proclaimed in July 1863.[198] Steps were promptly taken to implement the new arrangements on a 'trial' basis in Northland.[199] On 19 April 1864, Grey established two 'Native Land Districts', Kaipara North and Kaipara South, covering lands between the Waitematā and Tūtūkākā Harbours on the east coast, and Manukau Harbour and Maunganui Bluff on the west coast.[200] The following June, John Rogan (who had previously acted as a land purchase commissioner in the district) was appointed the president of both Kaipara courts; Wiremu Tipene and Matikikuha of Ngāti Whātua were appointed as judges in Kaipara South; and Te Keene and Tamati Rewiti of Ngāti Whātua in Kaipara North.[201]

The first sitting of the Kaipara South court was held outside the Te Raki inquiry district, at Te Awaroa (Helensville) on 7 June 1864. By this stage, an agreement was already in place to sell the lands Kaipara Māori had brought before the court to a local settler, John McLeod, so a town could be developed at Helensville. The sitting took place at McLeod's house, reflecting mutual recognition of the potential transaction as central to the proceedings.[202] This openness demonstrated the strategic and voluntary nature of this early stage of Māori engagement with the court. Reports from around the time of the first sitting suggested Māori were satisfied with the new law, with its method of title investigations conducted by Māori for Māori, and were disposed to take advantage of it.[203]

197. Loveridge, 'Institutions of Governance for Maori' (doc E38), p 277.
198. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 206.
199. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court (doc E26), p 206.
200. The two districts were separated by a line that began on the southern boundary of the Waikeriawera block (in the Kaipara inquiry district) and crossed to the southern head of the Kaipara Harbour. As a result, both districts contained land in Te Raki: Kaipara North including parts of the Whāngārei and Mangakāhia taiwhenua, and Kaipara South containing the Mahurangi taiwhenua: Proclamation, 23 April 1864, *New Zealand Gazette*, 1864, no 14, p 168; Loveridge, 'The Origins of the Native Lands Acts and Native Land Court, p 212.
201. Proclamations, 25 June 1864, *New Zealand Gazette*, 1864, no 23, p 273; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 299.
202. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 299; Loveridge, 'The Origins of the Native Lands Acts and Native Land Court (doc E26), p 213.
203. See, for example, 'Kaipara', *Daily Southern Cross*, 14 June 1864, p 3.

At Te Awaroa, Rogan appears to have bypassed any preliminary investigation of tribal boundaries and instead proceeded directly to the first land to be adjudicated upon, the 396-acre Otamateanui block (outside the district). Various claimants presented their whakapapa during a day-long discussion about the block. Following consultation, 'it was communicated to the meeting that the persons appointed to ascertain the native title to lands in the district were satisfied that a title according to native custom was proved to the satisfaction of the court'.[204] The land was awarded to one individual as a trustee so as to make a legal transfer easier. A similar day-long process subsequently resulted in a title determination for the 67-acre Te Pua a Mauku block (also outside the district). According to the account of the case in the *Daily Southern Cross*, the 'Native Judges . . . well know that all the responsibility will fall upon themselves should they award certificates to any but the rightful owners – hence the examinations are extremely minute, and well and ably conducted.'[205]

Deeming the Kaipara 'experiment' a success, in August 1864 the Crown established three further Native Land districts and courts, for Hokianga, Kororāreka, and Waimate.[206] The following October, former Chief Protector of Aborigines George Clarke was appointed president of the three courts and he, in turn, named their Māori Judges.[207] Governor Grey also issued regulations for the guidance of the Native Land Court in the Bay of Islands, outlining that it should be comprised of a president and not fewer than two judges, meaning that they could out-vote the president.[208] Furthermore, the Native Lands Act Amendment Act 1864 empowered the Governor to add an additional member or members to any court; whether they were to be Māori or Pākehā was not specified. Regardless, by December 1864 Weld, Fenton and Mantell began to take steps to restructure the Native Land Court as a national institution and to reclassify the Māori judges as 'assessors' (we discuss the restructure of the Native Land Court further in the following section).[209] Ultimately, the Hokianga, Kororāreka, and Waimate courts appear not to have sat.

Despite these changes to the overall structure of the court, Rogan continued to hold title investigations in Kaipara North during 1865 – before the 1862 Act itself

204. Rogan to commissioner of crown lands, 7 December 1864 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 300–301).

205. 'Kaipara', *Daily Southern Cross*, 14 June 1864, p 3 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 301).

206. Proclamations, 18 August 1864, *New Zealand Gazette* 1864, no 33, pp 345–346; Loveridge, 'The Origins of the Native Lands Acts' (doc E26), p 219.

207. Proclamations, 25 October 1864, *New Zealand Gazette* 1864, no 42, pp 402–403; ; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 302; Loveridge, 'The Origins of the Native Lands Acts' (doc E26), p 219.

208. 'Order in Council', 28 October 1864, *New Zealand Gazette*, no 42, pp 403–404; Armstrong and Subasic, 'Northern land and politics' (doc A12), pp 303–304.

209. 'A Proclamation Bringing "The Native Lands Act 1862" into Force within the Whole of the Colony', 29 December 1864, *New Zealand Gazette*, 1864, no 51, p 465; 'A Warrant making Rules for Regulating the Sittings of Courts under the "Native Lands Act 1862"', 29 December 1864, *New Zealand Gazette*, 1864, no 51, p 467; Loveridge, 'The Origins of the Native Lands Acts' (doc E26), pp 222–223.

was modified later that year. Of particular relevance to Te Raki was the court sitting in Whāngārei in March 1865, where title was determined in 15 blocks.[210] As Dr Loveridge notes, during these sittings the Native Land Court continued to operate as it had during the 1864 sittings, with two Māori assessors (as newly classified) 'still required to constitute a legitimate Court'.[211]

The first blocks that came before the court were the Matakohe, and Motu o Tawa blocks – small islands in the Whāngārei Harbour – and the 11-acre Motu Kiwi block. The three blocks were claimed by Te Parawhau rangatira Te Tirarau on the basis of his tūpuna's possession of the land. After providing whakapapa evidence in support of his claim to the Matakohe block, he informed the court that 'the whole of the Parawhau tribe own this land as descendants of these ancestors but they are willing that the Certificate of title be made in my name'.[212] The minutes record that Te Keene asked the members of Te Parawhau present whether they were 'all willing that the Crown grant should be made in Tirarau's name', and that the reply was 'we are'.[213] A survey of the block was then produced, and a proclamation was made of Te Tirarau's claim. As no objectors appeared, a certificate of title was issued to him.[214] Both the Motu o Tawa and Motu Kiwi blocks were claimed on the same basis, and Te Keene again received consent from the members of Te Parawhau present that the certificate of title should be issued to Te Tirarau.[215]

Each of the cases followed a similar pattern, in which the lead claimant would present a survey plan of the block and list of names before reciting whakapapa evidence in support of the claim. The boundaries of the block would then be recited, and the Court would establish that the claimant or claimants had the support of the wider tribal community by recording the response of those present during proceedings. In a number of cases, the Māori assessors sought the input of other rangatira on the validity of the claims. For instance, during the proceedings for the Tokaitarua block, Te Manihera stated that the whole of Te Parawhau had a 'tribal claim' in the block, while Te Tirarau informed the court that the 'tribal right is forgone'. Te Keene then recorded Te Parawhau's consent to both the boundaries of the block and the names to be recorded on the certificate of title.[216] Te

210. The lands investigated included the Matakohe, Motu o Tawa, Motu Kiwi, Tokaitarua, Okara, Te Wharowharo, Te Roro, Kopipi, Turaki Awatea, Ngarangipakua, Ketenikau, Kopua Waiwaha, Waikaraka, Te Rewarewa, and Whiti Nga Marama blocks: Boast, *The Native Land Court*, p 244. It appears that the Kaipara North court also awarded the Opurepure block to Paikea and Manukau in 1864. This block was located in the Kaipara district, and Loveridge gave evidence that the court's findings were criticised by Alfred Domett, the Commissioner of Crown Lands, on the grounds that the record of proceedings did not 'bear any evidence of the fact of the title being satisfactorily investigated and ascertained': Loveridge, 'The Origins of the Native Lands Acts' (doc E26), pp 217–218; see also 'Register to Native Titles to Land as defined by Courts under the "Native Lands Act 1862"' (Loveridge, supporting papers (doc E26(a)), p [87]).

211. Loveridge, 'The Origins of the Native Lands Acts' (doc E26), p 223.

212. *Matakohe* (1865) 1 Whangarei MB 1; Paula Berghan, 'Northland Block Research Narratives', 13 vols, report commissioned by Crown Forestry Rental Trust (doc A39(l)), vol 8, pp 343–344.

213. *Matakohe* (1865) 1 Whangarei MB 1; Boast, *The Native Land Court*, p 244.

214. *Matakohe* (1865) 1 Whangarei MB 1, 3.

215. *Motu o Tawa* (1865) 1 Whangarei MB 3; *Motu Kiwi* (1865) 1 Whangarei MB 3–4.

216. *Tokitaruna* (1865) 1 Whangarei MB 4–7.

Tirarau and other members of Te Parawhau similarly supported the claim of Te Manihera to the Te Wharowharo block.[217] In the case of the Kopipi block, Mohi Te Peke of Te Waiariki and the other claimants received a number of questions from Te Keene regarding the basis of their claim, but once Ngāti Hau rangatira Haki Whangawhanga supported it, a certificate of title was issued to Te Peke.[218] Where a claim was disputed, such as occurred with respect to that of Wiremu Pohe to the Tauranga block, and agreement could not be reached in court, the investigation of the block was adjourned.[219]

Ten of the blocks investigated during this sitting (covering an area of 3,515 acres) were issued certificates of title in April 1865 and were included in a later register of blocks titled under the Native Lands Act 1862.[220] Dr Loveridge suggested that during 1864, the court ascertained ownership of 'a great deal more' land blocks; however, their certificates of title were issued after October 1865 under the Native Lands Act 1865, and he found that no information on those blocks was available.[221] He observed that the large number of blocks investigated by the court over this period reflected the high prices settlers were willing to pay for land in Whāngārei township. Rogan commented at the time that this would have incentivised Whāngārei Māori 'to submit nearly the whole of their lands to the operation of the Native Land Act'.[222] Indeed, settler Henry Walton purchased the Matakohe, Tokitaruna, and Ketenikau blocks shortly after title determination.[223] Some of the newly titled land remained in Māori ownership, at least initially, and a Crown grant was issued to the Māori owners of the 309-acre Ngarangipakua block. It is also notable that most of the Whāngārei blocks titled under the 1862 Act included small reserves that ranged between three and 20 acres, while a further 89 acres was reserved for roads in the Kopuawaiwaha, Matakohe, and Te Wharowharo blocks.[224] For the Māori owners, a township from which they might benefit economically, whilst retaining significant land, was surely a welcome and exciting prospect.

217. *Te Wharowharo* (1865) 1 Whangarei MB 11, 13.

218. *Kopipi* (1865) 1 Whangarei MB 20, 22–23; Kerehama Mahanga (doc AA75), p 4; Hana Maxwell (doc I5(a)), p 2.

219. *Tauranga* (1865) 1 Whangarei MB 30–31.

220. The blocks within the Te Raki district were Matakohe, Kopuawaiwaha, Te Wharowharo, Tokitaruna, Turakiawatea, Te Roro, Ketenikau, Ngarangipakua, Waikaraka, and Kopipi: 'Register to Native Titles to Land as defined by Courts under the "Native Lands Act 1862"' (Loveridge, supporting papers (doc E26(a)), pp [85]–[95]).

221. Loveridge, 'The Origins of the Native Lands Acts' (doc E26), p 217. We note that three of the Whāngārei blocks, investigated under the 1862 Act, – Motu o Tawa, Motu Kiwi, and Te Rewarewa – apparently were not issued certificates of title until after 1 November 1865, under the later Native Lands Act 1865: Return of the Certificates Issued by the Native Land Court, AJHR, 1867, A10(c), pp 4–5.

222. Loveridge, 'The Origins of the Native Lands Acts' (doc E26), p 217.

223. The 88-acre Te Roro block was also purchased by settler Isaac Lawrie in 1865: 'Register to Native Titles to Land as defined by Courts under the "Native Lands Act 1862"' (Loveridge, supporting papers (doc E26(a)), pp [85]–[95]).

224. 'Register to Native Titles to Land as defined by Courts under the "Native Lands Act 1862"' (Loveridge, supporting papers (doc E26(a)), pp [85]–[95]).

The Whāngārei sittings were viewed as a success. The *New Zealand Herald* reported that where several disputes were anticipated, they had been 'amicably adjusted'.[225] Armstrong and Subasic noted that in Whāngārei, Rogan 'maintained the procedure he had devised at Awaroa in June 1864, and the process remained largely a Maori one'.[226] They described Te Raki Māori as having largely 'responded enthusiastically to Rogan's court', the evidence indicating 'an informal process largely driven by the iwi and hapu themselves in pursuit of their own rational economic objectives'.[227] In our view, the record from the minute book suggests that the court offered Māori significant control over land title investigation, land alienation, and land settlement. As historian Dr Vincent O'Malley has observed, the Crown, on the other hand, regarded the court as an effective means of ending the contraction in land sales that had prevailed since the late 1850s. In O'Malley's analysis, the Crown saw the court as a means of expediting the assimilation of Māori into the colonial society and economy, and of avoiding disputes over land sales with ugly consequences such as the Waitara debacle that had led to war in Taranaki.[228] In the words of Fox, Rogan, under whom the Native Land Court operated in the north, was intended to be the 'plough' and the 'eyes and ears' of the Government.[229] The only practical alternative to war, declared the *Press*, was 'the slow, certain, irresistible, inexorable march of the civil power'.[230]

In sum, the provisions of the 1862 Act, and the experimental Kaipara and Whāngārei courts set up under that legislation, appear to have broadly met the expectations of Te Raki Māori for a title determination process they would lead, with the assistance of a suitably experienced Pākehā official. While a prototype for such a system existed in the Te Raki and Kaipara inquiry districts, the fact that it operated for only a short time and on a limited basis complicates analysis and judgment of its potential. What appears reasonably clear, however, is that the original iterations of this court system, should it have been allowed to develop further, may have gone some way towards meeting the Te Raki Māori need to determine ownership according to custom and tikanga, and enable the development and utilisation of land as they wished. But as discussed in section 9.4, before the court had the chance to operate on a wide scale, it was restructured, reducing the role of Māori and introducing a form of title incompatible with customary tenure.

225. 'Wangarei', *New Zealand Herald*, 28 September 1864 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 302).

226. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 302.

227. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 304.

228. V O'Malley, 'Runanga and Komiti: Maori Institutions of Self-government in the Nineteenth Century' (doctoral thesis, Victoria University of Wellington, 2004) (doc E31), pp 60, 64; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 282.

229. Fox, 14 March 1864, BPP, vol 13, p 582 (cited in Loveridge, 'The Origins of the Native Lands Acts' (doc E26), p 209).

230. 'Native Policy', *Press*, 21 February 1863, p 1.

9.3.3 Conclusions and treaty findings

9.3.3.1 *Why did the Crown decide to establish the Native Land Court?*

In submissions to our inquiry, Crown counsel asserted that the Native Land Court was introduced primarily for the benefit of Māori, rather than as a means of obtaining more Māori land for settler use.[231] This argument is contrary to the Tribunal's jurisprudence on the political and economic underpinnings of nineteenth-century Native Land legislation. As Tribunal observed in *The Hauraki Report*, there were 'good reasons for the Crown to establish a tribunal, independent of the Executive, to determine intersecting and disputed claims to Maori customary land, and to administer legislative modifications to customary tenure to meet new needs'.[232] Nonetheless, Tribunal inquiries have generally concluded that the Crown's introduction of the Native Land Court was at heart an attempt to smooth the path of colonisation by speeding up the purchase of tribal lands. The Hauraki Tribunal found, accordingly, that the Native Lands Acts and the court system they established in general 'did not give Maori control – rangatiratanga – over their land. On the contrary, they represented for Maori the *loss* of control (as well as no development opportunities and the inexorable alienation of their lands).'[233] The Tribunal noted similarly in *Te Tau Ihu o te Waka a Maui: Report on the Northern South Island Claims* (2008) that the Crown's predominant intention in establishing the Native Land Court was to 'facilitate the alienation of Maori land to the Crown and private settlers'.[234] As we set out earlier, the claimants in our inquiry adopted a similar position in respect of the Crown's motives for developing the Native Lands Act 1862 and implementing it in our district.[235]

While recognising that customary Māori tenure would need to be adapted in some respects to meet the demands of a 'modern economy', we do not accept as credible the Crown's argument that the Native Land Court was conceived and introduced to Te Raki through the Native Lands Act 1862 primarily as a strategy to assist Māori. While rhetoric accompanying the introduction of this legislation trumpeted the economic and cultural advantages the new system would have for them, it is clear that Māori treaty rights were, at best, a secondary motive in developing and instituting the 1862 Act. The Crown, we have seen, had more complex and distinctly less altruistic motives for embarking upon what would prove to be a protracted, difficult, and costly process to identify and individualise Māori land title. We can only concur with the jurisprudence that the Crown's major purpose in establishing the Native Land Court system was to expedite the alienation of this land, believing that allowing direct purchase by settlers would increase supply of Māori land and undermine nascent Māori collective efforts to stem sales.

With these conclusions in mind, we find in respect of the establishment of the Native Land Court that:

231. Crown closing submissions (#3.3.406), pp 9–10.
232. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 2, p 777.
233. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 2, p 788.
234. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, Wai 785, vol 2, p 777.
235. Claimant closing submissions (#3.3.225), p 23.

- By developing and implementing a system for title determination based on its own agenda to acquire more land, rather than the protection of Māori rights as guaranteed under article 2, the Crown breached te mātāpono o te tino rangatiratanga and te mātāpono o te matapopore moroki/the principle of active protection.

9.3.3.2 *Were Te Raki Māori consulted about the Crown's decision to develop and implement legislation enabling tenurial reform?*

Te mātāpono o te houruatanga/the principle of partnership requires the Crown to consult and gain Māori consent on any changes affecting their rights under the treaty, in particular rights to their lands and other taonga guaranteed under article 2 (see section 2.3.4). Jurisprudence on the treaty principle of active protection, which emphasises the Crown's obligation to positively intervene to protect the interests of its treaty partner, also specifies the importance of ensuring 'full consultation with – and, where appropriate, decision-making by – those whose interests are to be protected.'[236] As the Tribunal observed in *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of the Te Ture Whenua Māori Act 1993* (2016), '"full, free, and informed consent" of Māori is required when a legislative change substantially affects or even controls a matter squarely under their authority.'[237] In an area of key significance to Māori treaty interests such as their customary ownership of land, the Crown's responsibility to consult its partner was undeniably high.

Claimant and Crown parties in our inquiry agreed that some discussion on the possibility of developing a process for defining Māori customary rights in land occurred between the Crown and Te Raki Māori at the Kohimarama Rūnanga in 1860, and during Grey's trip to Northland in 1861, but they disagreed over the extent to which this was sufficient to satisfy the Crown's obligation to consult with and engage Māori in respect of the 1862 Act.[238] In our view, the discussions about title determination that took place in 1860 and 1861 were neither specific nor genuinely open or transparent enough to meet the Crown's duty to consult with and involve Te Raki Māori in decision-making on vital changes affecting their rights, as guaranteed by the treaty. No agreement was reached about these matters at Kohimarama, while what Grey discussed in Northland was substantially changed by the Colonial Legislature.

We received no evidence that the Crown communicated the provisions of the 1862 Act to Māori prior to its enactment, nor that it viewed Māori input as essential to the process of developing and refining the legislation. Although the arrangements of the 'experimental' courts later established under the 1862 Act in some ways reflected Māori needs and expectations, this does not excuse or negate the

236. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, Wai 785, vol 1, p 4.

237. Waitangi Tribunal, *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua MāoriMāori Act 1993*, Wai 2478 (Lower Hutt: Legislation Direct, 2016), p 157.

238. Claimant closing submissions (#3.3.225), pp 38–39; Crown closing submissions (#3.3.406), p 11.

Crown's failure to meaningfully consult with Māori on a matter inherent to their treaty interests. Neither do we find persuasive the Crown's argument that it made concerted efforts to inform Te Raki Māori of the provisions of the 1862 Act in 1864. While it was commendable of the Crown to actively disseminate this information, this occurred so clearly after the fact that it cannot be considered part of any credible consultation process.

Accordingly, we find in respect of consultation that:

- The Crown's failure to seek Māori engagement on the provisions of the Native Lands Act 1862 was inconsistent with its duty to consult and gain the consent of Te Raki Māori on matters central to their guaranteed treaty rights, in breach of te mātāpono o te houruatanga/the principle of partnership and te mātāpono o te tino rangatiratanga.

9.3.3.3 *Did the courts established at Kaipara and Whāngārei under the 1862 Act provide for Te Raki Māori to exercise tino rangatiratanga over their lands?*

The Crown initially considered a system for determining title to collectively held Māori land, enabling its direct purchase by settlers, in the context of the rūnanga, or local tribal councils which Governor Grey promoted and implemented. As we have seen, from the early 1860s the idea of a court model to determine Māori interests in land gained precedence. These courts were initially envisioned to operate alongside the rūnanga. However, the settler Parliament quickly changed its mind on the merits of the respective systems, consciously letting the rūnanga model for self-government wither while diverting resources to the emerging Native Land Court. We believe that had the Crown allowed self-directed Māori title determination to take place within the context of a fully funded and supported rūnanga system, this would have given the greatest possible effect to Māori treaty rights, principally the tino rangatiratanga guaranteed by article 2. This did not happen, and the Crown instead jettisoned the rūnanga and embraced a judicial model that – particularly as reformulated after late 1864 – would become increasingly incompatible with tikanga and Māori control.

In assessing the treaty compliance of the 'experimental' or 'prototypical' courts operating briefly in Kaipara and Whāngārei under the 1862 Act, we must first acknowledge the limitations of the available evidence due to the brief tenure of these courts and the failure to keep full records of their hearings. However, from the primary sources and technical evidence in our record of inquiry, we consider that the system established under the 1862 legislation appears, in general, to have been consistent with Te Raki Māori expectations as to how their customary rights in land might be ascertained and reformed in a manner giving primacy to their agency and tino rangatiratanga. Under Rogan, the court operated as intended, giving Māori substantial control over the process for determining ownership of their lands. Most importantly, its orientation broadly affirmed the right of Te Raki Māori to manage their lands as they saw fit. But it would be wrong to assume that the court model established under the 1862 Act was the inevitable or the natural outcome of Māori aspirations for a central role in determination of their land title. In fact, it appears that quite the opposite is true: other systems more conducive to

tino rangatiratanga – principally the rūnanga model promoted by George Grey – were contemplated and then discarded.

As we have discussed in this section and in the preceding chapter, Te Raki Māori trust in the Crown had been seriously eroded by the latter's pre-emptive purchasing programme in Te Raki during the 1850s. This growing distrust was a key factor in the sharp contraction in land sales during the late 1850s, and the land-related tensions were further stoked by outbreak of military conflict following the Crown's bungled efforts to acquire land at Waitara in 1859 and 1860. Following the Kohimarama Rūnanga, where no resolutions were reached on the administration of Māori lands, the Crown instead forged ahead with establishing the system for land title determination established under the Native Lands Act 1862, despite little-to-no consultation with Te Raki or other Māori. It recognised in subsequent years both that Māori expected such consultation to take place and that the Crown was obliged to ensure this happened when their fundamental interests were at issue.[239] This failure to consult on the 1862 Act was unacceptable in treaty terms. Nonetheless, the courts that operated at Kaipara and Whāngārei, consisting as they did of Māori judges able, in theory, to outvote the presiding officer, at least provided a workable compromise over the control of title determination and land alienation.

The courts created under the 1862 Act were a step away from the rūnanga-based system which Grey had discussed, but the impact of this change was ameliorated by the retention of a determining role for Māori within it. While we cannot find that the operations of the local land courts established at Kaipara and Whāngārei under the 1862 Act themselves breached treaty principles (other than in the aspects already noted), we do not wish to diminish the significance of the Crown's decision to begin a process of tenure conversion which, in its later iterations, would prove much more difficult for Māori to control.

9.4 Why and How Was the Native Land Court Restructured in 1864 and 1865?

9.4.1 Introduction

From December 1864, just a few months after the establishment of the 'experimental' courts at Kaipara and Whāngārei, a range of changes largely attributed to incoming Chief Judge Fenton were made to the Native Land Court. These were later included in the Native Lands Act 1865. The nature and extent of the shift they represented has generated considerable historical and legal debate. In our inquiry, the claimants have argued that the post-1864 restructuring of the Court was a significant departure from the Māori-directed title determination process established by the 1862 Act and which operated briefly at Kaipara and Whāngārei.[240] For its part, the Crown maintained that the Native Land Court, as reformed in 1864 and

239. Walter Mantell, 19 October 1872, NZPD, vol 13, p 801; William Kenny, 25 September 1873, NZPD, vol 15, pp 1375–1376.

240. Claimant closing submissions (#3.3.225), pp 56–59.

1865, was not significantly different from the earlier body, and the new legislation merely extendied its operation throughout the country, introducing other minor amendments.[241] In short, where the claimants emphasised differences between the courts of 1862 and 1865, the Crown stressed continuity of legislation and processes.

The parties also disagreed on the issue of consultation. While the claimants argued that none occurred, the Crown emphasised that it 'took steps to ascertain the views of Northland Maori both prior to the introduction of the Court and after it had started operating'. Crown counsel drew attention to the discussions that took place at Kohimarama in 1860, discussions with Grey in 1864, and the tour undertaken by Fox and Rogan in the Kaipara district that year. In the Crown's submission, 'Northland Māori had received assurances that a major role in title adjudication would remain with them', and the consultation had been 'significant'.[242] Counsel did not distinguish between the consultation that had been required for the two Acts, apparently considering this unnecessary because the Native Lands Act 1865 had introduced only minor changes.

In the following section, we consider why the Court, and the laws under which it operated, were changed; the impact on its structure; the degree of control that could be exercised by Māori, and the sorts of title available to them; as well as the extent of consultation that took place with Te Raki Māori about those changes, and whether they were approved by them.

9.4.2 The Tribunal's analysis

9.4.2.1 *The restructure of the Court*

When a new Government led by Frederick Weld replaced the Whitaker–Fox ministry in November 1864, its central policy tenet was 'self-reliance'. Weld immediately moved in Parliament that the colonial Government must accept full responsibility for Māori affairs, rather than risking 'divided counsels and a vacillating policy'.[243] As we discussed in chapter 7, this meant that the colony would fund its own defence policies and the British government would withdraw its armed forces from the colony (see section 7.3.2). Weld believed that full settler control would put an end to the conflict in Waikato; the Government would continue to 'suppress outrages' but would trust 'to time and other means for the termination of our difficulties'.[244] The Native Land Court operations were a key aspect of those 'other means' of maintaining peace and security in the colony by providing a peaceful avenue for Māori aspiration and for converting the communal title that Weld regarded as preventing their progress.[245] As Weld later noted, the Court would:

241. Claimant closing submissions (#3.3.406), p 12.

242. Claimant closing submissions (#3.3.406), p 12; Crown closing submissions (#3.3.406), pp 12–15.

243. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court', doc E26, p 220.

244. F A Weld, *Notes on New Zealand Affairs*, 1869 (cited in Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 220).

245. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 220.

> indulge the natives in their passion for litigation, if we did not indulge them in war, [and] we hoped thereby not only to occupy their minds, but to give them real and substantial justice, by means of a Court in which they were to a great extent themselves the judges; and to give them the means of raising themselves above that communism which was weighing them down, to enable them to make themselves individual landowners, able to sell their lands in the open market at a fair price, or to let them, and thus to become rich, and interested in the maintenance of law and order.[246]

The Court would also satisfy settlers wishing to acquire land more easily. While the system enabling direct purchase of Māori land embodied in the Native Lands Act 1862 had won general settler support in the early 1860s, potential purchasers were critical of the 'cumbrous and imperfect' nature of its provisions.[247]

The other important context was the hardening attitude of the Colonial Legislature to 'any manifestation of Maori political autonomy'.[248] In the view of Armstrong and Subasic, O'Malley, and others, the expansion of conflict into the Waikato resulted in the further retreat of the Crown from the shared spheres of authority expressed within the treaty and its seeking to restrain Māori aspirations for self-determination. The rūnanga model was abandoned and the Native Land Court restructured to reduce Māori control of its processes.[249] Dr O'Malley commented that the Court created by the Native Lands Act 1865 was the result of 'increased settler hegemony and Pakeha demographic dominance in the wake of the Waikato war'.[250]

The Government subsequently decided to replace the system of courts operating within native districts with a single, national, permanent, and centralised court of record. As Dr Loveridge has noted, the Weld ministry moved quickly in making arrangements for this body, which would be headed by a chief judge and would operate throughout the colony. Weld recalled: 'The first day I was in office, I waited upon a gentleman [Fenton] in every way qualified for the task, and said, "Native land courts are the last straw to save the drowning race, will you accept the office of chief judge of that Court"?'[251]

Fenton was duly appointed chief judge in late-1864 and with Walter Mantell, who became the new Native Minister, set about the task of restructuring the

246. Weld, *Notes on New Zealand Affairs*, 1869 (cited in Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 221.

247. Untitled, *Daily Southern Cross*, 24 June 1865, p 4.

248. Armstrong and Subasic, 'Summary of "Northern Land and Politics: 1860–1910"' (doc A12(c)), p 5.

249. See David Armstrong, transcript 4.1.8, Kerikeri, p 789; O'Malley, 'Northland Crown Purchases, 1840–1865' (doc A6), p 177.

250. O'Malley, doc E31, p 4.

251. Weld, *Notes on New Zealand Affairs*, 1869 (cited in Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 221).

Court.[252] Fenton later expressed the view that the 1862 Act had been too cautious and almost a dead letter, having '"died of Domett" who had the working of it'.[253]

The five existing native districts declared under the Native Lands Act 1862 were abolished by proclamation in December 1864, and the Act was extended to cover the colony as a whole.[254] 'A Warrant Making rules for Regulating the Sittings of Courts, under the "Native Lands Act 1862"' was also issued by the Governor on the same day.[255] This document set out a brief set of regulations for the Court, specifying that

> A Court established under the said Act shall consist of one Chief Judge, being a European Magistrate, and other such Judges, being European Magistrates, and such Native Assessors as may be from time to time appointed by the Governor.
>
> Any one of the Judges sitting, with two Native Assessors, shall have the powers of the Court.
>
> . . . [N]o Native Assessor shall act in a case in which he has any personal interest.[256]

Dr Loveridge and Professor Alan Ward have argued that the creation of a single national institution rather than several for individual districts was consistent with Weld's dislike of 'special machinery' for Māori and his policy of making them equal with Europeans in the eyes of the law. Whereas the 1862 Act had been passed in the context of Grey's rūnanga and native districts system, the 1865 Act set up a structure more akin to the Supreme Court, was extended as widely as possible and would be the cornerstone of Native policy for the next forty years.[257]

Fenton's appointment as chief judge (under the 1862 Act) was announced in early January 1865. John Rogan and George Clarke senior were appointed as judges and the 11 Māori judges under the 1862 Act were now 'assessors'.[258] Over the next months, further judges were appointed (still under the 1862 Act); numerous surveyors licensed, and Fenton provided with a staff. It was at this point that the 1862 Act was translated into te reo.[259] In May 1865, the Native Land Purchase Department, which had been active in Te Raki from the 1850s, was abolished, deemed no longer necessary.[260] The *Daily Southern Cross* greeted this as a signal that 'the triumph' of direct purchase was complete, and that the Crown would no longer be perceived by Māori as 'a great land-jobbing company', its declared

252. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court', doc E26, p 221; Armstrong and Subasic, 'Northern land and politics' (doc A12), p 305.
253. Fenton (cited in Loveridge, 'The Origins of the Native Lands Acts' (doc E26), p 221, fn 520).
254. 'A Proclamation', 29 December 1864, *New Zealand Gazette*, no 51, p 465.
255. 'A Warrant', 29 December 1864, *New Zealand Gazette*, 1864, no 51, p 467.
256. 'A Warrant', 29 December 1864, *New Zealand Gazette*, 1864, no 51, p 467 (cited in Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 222).
257. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), pp 222–223; A D Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand* (Auckland: Auckland University Press, 1973), p 183.
258. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court', p 222.
259. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 222.
260. 'The Native Land Purchase Department,' *Press*, 15 June 1865, p 2.

desire to protect them from 'the assumed rapacity of the settlers . . . [being] only a pretext to cover its own greed for land'.[261] The Native Land Court was no longer 'experimental' and, in the words of Loveridge, was 'to be the principal vehicle by which Maori customary land was made available for colonization, through its conversion to freehold land which could be purchased or leased to European settlers'.[262]

The changes announced in December 1864 were incorporated into the Native Lands Act 1865. That measure formed part of a debate over how best to govern the entire colony and, as Colonial Secretary J C Richmond expressed it, 'to quietly push forward the frontier of law and civilization'. The Native Lands Act 1862 had 'afforded them [the Government] means of testing where, when, and how far the jurisdiction of the ordinary Courts could be practically carried'. But the 1862 system,

> although . . . nominally for the purpose of investigating Native titles, could not be said to be so in the sense in which Europeans were accustomed to apply to their Courts generally, for there was no settled custom among the Maoris. In the main the title of a Native was the simple law of power. The Land Court, then, did not properly investigate titles: it ascertained and registered assents. A certificate by the Court amounted to this: that the persons named could hold the land claimed by common consent.[263]

It is striking, although not unusual, that an influential figure such as Richmond should exhibit such overt ignorance of tikanga and appear to view Māori land rights as arising solely from a primitive struggle for supremacy.

9.4.2.2 *The scope and significance of the changes introduced under the Native Lands Act 1865*

Dr Loveridge has suggested that the extent of changes made to the Native Land Court in December 1864 and codified by the Native Lands Act 1865 have been exaggerated and were instead mostly consistent with the system introduced under the 1862 Act.[264] Crown counsel also maintained that the 1865 Act did not represent a major departure from the earlier legislation.[265] By contrast, Armstrong and Subasic insisted in their evidence to our inquiry that the reformulation constituted a radical departure from previous arrangements.[266] The claimants adopted Armstrong and Subasic's interpretation, which accords with both their own position and most of the prior historical analysis and treaty jurisprudence concerning the 1865 Act (as we discuss later).[267] Over many years, historians and Tribunal

261. [Editorial], *Daily Southern Cross*, 24 June 1865, p 4.
262. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 223.
263. J C Richmond, 24 August 1865, NZPD, vol E, p 348.
264. See, for example, 'Evidence of Donald Loveridge concerning the origins of the Native Land Acts and Native Land Court in New Zealand', 2000 (doc E26(c)), p 29.
265. Crown closing submissions (#3.3.406), pp 12–15.
266. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 322.
267. Claimant closing submissions (#3.3.225), p 23.

inquiries have roundly criticised the Native Lands Act 1865. While Dr Loveridge and Professor Boast have observed that the 1865 Act essentially codified changes already instituted from late 1864, most commentators regard the 1865 Act as instituting significant changes not only in the structure of the Court, but also in the conversion of customary title to facilitate alienation – an approach followed in our analysis.[268] The principle of empowering a body to investigate the customary ownership of lands so that they could be purchased without causing conflict had been established under the 1862 Act and remained unchanged, but there were important innovations in 1865 that had profound implications for Māori.

The destructive nature of these changes and the system of title conversion they introduced have been emphasised by many scholars and the Tribunal in other inquiries. In his seminal work *A Show of Justice*, Professor Ward argued that under the Native Lands Act 1865, Māori communities were reduced to the role of litigants appearing before a 'body of self-proclaimed experts who had to try, and frequently failed, to interpret Maori custom.'[269] In 1976, anthropologist Professor Hugh Kawharu described the post-1865 Native Land Court as 'a veritable engine of destruction for any tribe's tenure of land anywhere.'[270] The *Report of the Waitangi Tribunal on the Orakei Claim* (1987) observed that 'it is clear to us that the legislature [in passing the 1865 Act] was anxious that the right of Ngati Whatua and all other Maori to hold their lands on a tribal basis, guaranteed to them by the Crown in the Treaty, should if possible be extinguished.'[271] As *The Kaipara Report* (2006) concluded in its assessment of the Native Land Court's operation in Kaipara South:

> by imposing the legislative regime which governed Maori land tenure and the Native Land Court, the Crown failed in its fiduciary duty, set out by Lord Normanby in his instructions to Lieutenant-Governor Hobson and in the guarantees in the Treaty of Waitangi, to protect Māori interests and to ensure that a sufficient land base was reserved for the present and future needs of Kaipara Māori communities.[272]

In his study of the Native Land Court, *Te Kooti Tango Whenua* ('the Land-Stealing Court'), legal scholar Professor David Williams explicitly framed the differences between the 1862 and 1865 models in terms of their potential treaty compliance, observing that

> there was nothing historically inevitable about the Native Land Court operating in the way it did from 1865 onwards. A system of adjudication in which Maori judges had

268. Boast, *The Native Land Court*, p 50.
269. Ward, *A Show of Justice*, p 186; see also Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 310–311.
270. I H Kawharu, *Maori Land Tenure: Studies of a Changing Institution* (Oxford: Clarendon Press, 1977), p 15 (cited in Waitangi Tribunal, *The Kaipara Report*, Wai 674 (Wellington: Legislation Direct, 2006), p 61).
271. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, Wai 9, 2nd ed (Wellington: Brooker and Friend Ltd, 1991), p 213.
272. Waitangi Tribunal, *The Kaipara Report*, Wai 674, p 228.

> the actual power of decision, especially on questions as to who had customary entitlements over land, would have been much less open to attack for non-compliance with Treaty principles than the court system which was put in place by the Government during 1865.[273]

In *Te Tau Ihu o te Waka a Maui*, the Tribunal referred to the 1865 body as an 'adversarial, winner-takes-all court, dominated by European officials applying a simplified and simplistic understanding of Maori land tenure'.[274] In *He Whiritaunoka: The Whanganui Land Report* (2015), the Tribunal recorded that the changes set forth in the Native Lands Act 1865 meant that the 'flexible and local court system with a high degree of Māori input' established under the 1862 Act and realised briefly in the form of the Kaipara court, was promptly replaced with a single, centralised, and adversarial Native Land Court.[275]

The Tribunal has also highlighted a disjunction between the identification of customary interests enabled by the 1862 legislation and the process of tenure conversion and individualisation intrinsic to the 1865 Act and the Court it established. As the Tribunal noted in *The Hauraki Report*, the preamble to the Native Lands Act 1865 'made clear the intention (once customary ownership had been determined) to encourage the extinction of such proprietary customs and to provide for the conversion of such modes of ownership into titles derived from the Crown'. This time, the Act was not simply about ascertaining customary rights and authorising direct dealing, it was also emphasising tenure conversion.[276]

We concur with the Tribunal's well-established understanding of the 1865 Native Land Act as a significant departure from the 1862 Act with considerable negative consequences for Māori landowners. The purpose of the Crown's amendment both of Native Land legislation and of the court itself was clear. It expanded the court's reach and abandoned the two-stage approach to individualisation of title. Sections 21 to 26 of the 1862 legislation, which had provided for tribal titles followed by certificates of title for subdivisions, were not carried forward into the new Act. As the Hauraki Tribunal has pointed out, this meant that the possibility of Māori undertaking careful planning – a tribal title, followed by partition to individuals – was no longer possible.[277] The 1865 Act also reduced the status and influence of Māori as decision makers. The ability under the 1865 Act (section 6) to appoint additional judges to the Court ensured the guaranteed majority that had made the title determination process Māori-controlled would be able to be diluted, as it invariably was in practice (see section 9.6). At the same time, the role of the Governor (and the protections he might exercise) was downgraded and replaced by the Governor-in-Council. The Governor would no longer have the

273. David V Williams, '*Te Kooti Tango Whenua*' *The Native Land Court, 1864–1909* (Wellington: Huia, 1999), p 138.
274. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, Wai 785, vol 2, p 775.
275. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 384.
276. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 2, p 684.
277. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 2, p 684.

What Changes Were Implemented under the Native Lands Act 1865?

Composition of the Court

Section 5 of the 1865 Act established a formal national court of record, consisting of one chief judge, various judges, and 'native assessors'. This was a departure from the initial composition of the court under the 1862 Act, which was primarily a Māori body, comprised of a panel of leading local rangatira supervised by a European magistrate.[1] These Māori judges were reclassified as 'assessors' in December 1864, and two of them were required to sit with a European judge to constitute a legitimate Court under the 1865 Act.[2] All three had to agree on an award, precluding any possibility that assessors could outvote the judge.[3] Section 6 of the 1865 Act followed the Native Lands Act Amendment Act 1864 in empowering the Governor to add an additional member or members to any Court; whether they were to be Māori or Pākehā was not specified.

The process of tenure conversion and alienation

Section 21 of the 1865 Act enabled '[a]ny Native' (defined in section 2 as 'an aboriginal Native of the Colony of New Zealand') to give notice of interest in a piece of land and name those interested. This empowered a single individual to bring land before the Court without the knowledge of hapū and others, thus precipitating a Court inquiry not just into the applicant's claim, but into the interests of all other claimants. This differed in intent from the 'Any Tribe Community or Individuals' specified as applicants in the Native Lands Act 1862.

Section 23 of 1865 Act specified that tenurial change would immediately follow an individual's application. Whereas the 1862 Act had implemented a process whereby tribal lands would be identified and then application could be made to subdivide these lands at a later date, the 1865 Act provided for a different approach: ownership would be determined first by the Court according to 'Maori proprietary customs', followed by a process of conversion in which a certificate of title would be issued to those with established interests.

The 'Ten-Owner rule' and tribal titles

Section 23 also introduced what became known as the ten-owner rule, which provided that 'no certificate shall be ordered to more than ten persons'; nor could certificates of title be issued 'in favor of a tribe by name' unless the block was over 5,000 acres in area. This was a departure from section 12 of the 1862 Act

1. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 190; Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, p 412.
2. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 223; Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, p 412.
3. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, p 414.

which provided that certificates of title could be issued to the 'Tribe Community or Individuals' whose title had been 'ascertained defined and registered'. The 1865 provision was intended to compel Māori to subdivide their lands immediately. We discuss the further implications of the ten-owner rule in practice in section 9.4.2.

Succession

Prior to the 1865 Act, succession was dealt with under the Intestate Natives Succession Act 1861. Section 30 of the 1865 Act provided the Court jurisdiction over succession matters when Māori landowners died intestate (without a will). It permitted the Court to inquire into and decide who, in accordance with native custom, ought to receive the hereditaments (that is, property that could be inherited), a responsibility that would expand following later legislative amendments. However, early on, Chief Judge Fenton established the principle in the 1867 *Papakura* case that all children were to inheret equally the shares of both their parents.[4]

4. Tom Bennion and Judy Boyd, *Succession to Maori Land, 1900–52*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997), p 5; Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, p 499.

power to make reserves, and while the Court could recommend that restrictions on alienation be placed on the title, it was not required to do so.

Of particular note, sections 23 and 24 of the Native Lands Act 1865 marked a radical departure from the provisions of its predecessor. There was no longer provision for collective or tribal titles, except for blocks of 5,000 or more acres. Instead, section 23 of the new Act ordered the Court to issue Certificates of Title, which included the 'names of the persons or of the tribe who according to native custom own or are interested in the land'. There were two provisos to this stipulation: (i) 'no certificate shall be ordered to more than ten persons'; and (ii) no block of less than 5,000 acres could be vested in a tribe. The Court was also directed to describe in the certificate the 'nature of such estate or interest' held by the individual owners or the tribe. Section 24 authorised the Court to issue more than one certificate for any particular claim, by dividing the land between owners or 'set[s] of owners' after ascertaining their respective interests, if that was what the owners wished. The parliamentary debates shed no light on the reason why the provisions for vesting title in a tribe or community (as well as individuals) were changed to these new requirements, since they were mostly carried out in committee. However, the impact on Māori land ownership and exercise of tino rangatiratanga was profound.

The changes introduced under the 1865 Act effectively removed or reduced the protections contained in the earlier statute. They transformed what had been a rūnanga-style tribunal, dominated by rangatira with the status of judges and

familiar with tikanga, into an English-style court of record operating according to standardised procedures, many of which were fundamentally incompatible with Māori custom and tikanga. The rule of 'best evidence', which held that the Court could only consider evidence from initial claimants and objectors rather than making its own independent inquiries, has been criticised in earlier inquiries for the revival or continuation of tribal rivalries.[278] This stipulation had the wider implication that all owners would either need to attend or entrust the protection of their interests to others in the group. While the latter may have been possible in certain relationships and circumstances, the ability to bring applications to the court without community consent and the ten-owner rule established under section 23 were nonetheless incompatible with tikanga and created a potential to disinherit great numbers of Māori, as we discuss further in section 9.5.2.[279]

In sum, it is evident that the Government of the day sought to accelerate the individualisation of ownership interests initiated by the provisions of the Native Lands Act 1862 and to bring all land in customary ownership within the scope of the tenure conversion process with the intention of undermining Māori collective ownership and accelerating the alienation of land. Nor do we accept the Crown's assertions that continuity defined the relationship between the Native Lands 1862 and the Native Lands Act 1865; we consider this inconsistent with both the majority of the evidence we heard and the Tribunal's careful jurisprudence on the topic.

9.4.2.3 *Were Te Raki Māori consulted?*

As our earlier discussion has demonstrated, the Crown engaged in some limited consultation at Kohimarama with Te Raki Māori over the proposals for the methods of investigating titles subsequently contained in the Native Lands Act 1862. Previous Tribunal reports have stressed how crucial it was for the Crown to have had an earnest prior discussion with Māori about the changes to this system contained in the 1865 Act, and to have obtained their consent for these. As the Tribunal found in the *Wairarapa ki Tararua* report, '[t]he Native Lands Act 1865 signalled profound and far-reaching changes, and there is no question that a Kohimārama type of hui should have been convened to discuss the Act with Māori before it went to Parliament.'[280] No such meeting took place, and nor did we receive evidence that the Crown, when preparing the changes to the Court instituted in 1864 and contained in the Native Lands Act 1865, consulted with or secured the approval of Te Raki Māori in any way.

9.4.3 Conclusions and treaty findings

In their extensive consideration of district-based claims, previous Tribunal inquiries have found that the imposition of the remodelled court and tenure system contained in the Native Lands Act 1865, without Māori consent and contrary to their

278. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, pp 413–414; *The Hauraki Report*, Wai 686, vol 2, p 696.

279. See Waitangi Tribunal, *The Kaipara Report*, Wai 674, p 227.

280. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 2, p 531.

wishes, breached the treaty. The Central North Island Tribunal highlighted that the guarantee of tino rangatiratanga in article 2 meant Māori should have control of their affairs and the development of their own institutions, including systems to control title determination and prevent disputes:

> The alternative . . . was that judges would attempt to manage Maori custom from the outside, looking in. Such an alternative was inconsistent with the autonomy guaranteed to Maori by the Treaty. There was a fundamental disjunction when Maori law was placed under the control of a British court, with the decisions to be made not by the Maori people concerned but by a British judge. The Treaty could not be kept in those circumstances.[281]

The Central North Island Tribunal described as a 'universally adopted treaty standard' the interpretation that the decision to establish the post-1865 Native Land Court system, based on external adjudication of titles, was 'fraught with such consequences for Maori, and for the system of native title that protected their customary rights, [that it] could only have been taken without their consent'.[282]

Having reviewed the evidence relevant to our inquiry district, we agree with the conclusions of earlier Tribunal reports on the Crown's heightened duty to consult on the significant changes introduced to the Native Land Court system from late 1864. The deficiency of this process in Te Raki was manifest. In particular, we consider the Crown's claim entirely to lack foundation that 'Northland Māori' engaged with the 1862 court, 'over which they had already been consulted and with which they were familiar', and that they were therefore 'peculiarly placed to understand and engage with the Court system'.[283]

Although the Crown argued that the 1862 and 1865 acts were not fundamentally different, Tribunal inquiries have regularly emphasised the contrast between the 1862 and 1865 versions of the court. As the Tūranga Tribunal observed,

> for a measure introduced without Maori consent and accompanied by considerable doubt as to its efficacy, even among its leading proponents, the 1862 version of the court worked surprisingly well in the Kaipara pilot. Perhaps it was because the court did not attempt to transform customary rights but merely declared them. Perhaps it was its facilitative approach. Perhaps it was just because it was tried in a 'safe' district. . . . after Kaipara, a quite different court emerged.[284]

Our analysis of the legislation and the evidence we received concerning the brief operation of the 1862 system at Kaipara and Whāngārei leads us to concur with the jurisprudence on the topic.

281. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 417.
282. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 417.
283. Crown closing submissions (#3.3.406), p 12.
284. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, p 413.

We note first that we welcome the Crown's concession of treaty breach concerning the ten-owner rule and its effects (see section 9.2.2).

However, we find further in respect of the Native Lands Act 1865 that:

- By failing to make a good-faith effort to engage with and secure Māori consent in advance of the changes to the Native Land Court system, as set down in the Native Lands Act 1865, the Crown breached te mātāpono o te houruatanga/the principle of partnership, te mātāpono o te matapopore moroki/the principle of active protection, and te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect.
- By legislating unilaterally in 1865 to codify changes to the composition and decision-making powers of the Native Land Court, the Crown effectively removed Māori control of the title investigation and determination process, breaching te mātāpono o te tino rangatiratanga and te mātāpono o te houruatanga/the principle of partnership.
- By abolishing, without consultation, the flexible and tikanga-informed process the Court had originally employed to determine ownership in favour of a British system prioritising individual over collective rights, the Crown breached te mātāpono o te houruatanga/the principle of partnership and mātāpono o te tino rangatiratanga.

9.5 Did the Native Land Court Award Te Raki Māori Appropriate Titles?

9.5.1 Introduction

Claimants argued the Crown's Native Land legislation did not provide a form of title recognising the rights of all owners and enabling collective ownership and management of Māori land.[285] For claimants, the ten-owner rule, the memorials of ownership established by the Native Land Act 1873, and the succession rules adopted by the Court in 1867 resulted in dispossession of interests, title congestion, and fragmentation of ownership. In general, the claimants submitted that the Crown failed to consider title options reflecting Te Raki Māori tikanga and aspirations and failed to provide a secure basis on which they might invest in and develop their lands.[286]

As introduced in section 9.2.2, the Crown offered several concessions related to Native Land legislation. At the same time, counsel argued that the Native Land Court 'did not set out to establish title on a one-man, one-estate basis', and that the law was 'originally framed to permit the Court to take communal interests into account, and was progressively reformed to better promote such recognition'. Further, counsel claimed that the Crown 'made these options available to Māori applicants and to the Court, but they were not taken up'.[287] The Crown also noted that the 1865 Act directed the Native Land Court to determine succession 'accord-

285. Claimant closing submissions (#3.3.225), pp 117–123.
286. Claimant closing submissions (#3.3.225), pp 112–127, 146–152.
287. Crown closing submissions (#3.3.406), p 16.

ing to law as nearly as it can be reconciled with Native custom', and that the Native Land Act 1873 and the Native Land Court Act 1880 directed the Court to determine succession 'according to Native custom'. The Crown acknowledged, however, that the Court continued to apply modified English rules of succession, resulting in 'land fragmentation, with a range of prejudicial consequences for Northland Māori communities'.[288]

In this section, we examine the development of Native Land legislation following the Native Lands Act 1865 and consider whether the titles available to the Court for award fulfilled the Crown's treaty obligations to Te Raki Māori. We assess the Court's practice and operation in our inquiry district in section 9.6.

9.5.2 The Tribunal's analysis

9.5.2.1 *The scale and pace of titling, 1865–1900*

Table 9.1 makes it clear that the bulk of the Court's titling activity occurred during the 15 years from 1865 to 1880, and principally under the Native Lands Act 1865 and the Native Land Act 1873. Historian Paul Thomas gave evidence that, between 1865 and 1874, customary ownership in some parts of Te Raki was practically extinguished, notably in Mahurangi and the Gulf Islands. In other taiwhenua, Māori secured titles over parts of their land while maintaining substantial areas under customary ownership. Notably in Whangaroa, Thomas calculated that just 23.2 per cent of the Māori land that would have its title determined in the Court had been titled by 1874. But by 1880, the Court had investigated and awarded titles in over 57 per cent of those lands in the Bay of Islands that would come before the Court, 63.2 per cent in Hokianga, 81.8 per cent in Mahurangi, 78.1 per cent in Whāngārei, and 59.4 per cent in Whangaroa.[289] In a short period of 15 years – and especially between 1875 and 1880 – the Native Land Court had profoundly altered the tenure of land in Te Raki. After this, the pace and scale of titling slowed sharply, partly in response to growing Te Raki Māori resistance to the Native Land Court (we discuss the Waitangi parliaments and Kotahitanga movements in detail in chapter 11x) and partly as a result of the withdrawal of the Crown from the land purchasing that drove much of the Court's activity (land purchasing during this period is discussed in chapter 10).

9.5.2.2 *Certificates of title and the ten-owner rule: the Native Lands Act 1865*

While the Native Lands Act 1862 represented a cautious step towards the individualisation of land ownership, the Native Lands Act 1865 marked the beginning of a more pronounced effort to promote it. As noted earlier, the core of the Native

288. Crown closing submissions (#3.3.406), pp 43–44.

289. We note that Thomas used a different figure for the total known acreage of the district (1,700,951 acres). As a result, while the percentages cited here provide a good indication of the rate at which title was converted, they do not precisely reflect the total amount of land in Māori ownership after 1865. Rather they reflect the total land that would be titled in the Native Land Court. Thomas furthermore noted that some 147,864 acres would be titled by the Court after 1900. We return to the administration of Māori land in the twentieth century in a subsequent volume of this report: Thomas, 'The Native Land Court' (doc A68), pp 20–71.

Period	Blocks titled	Proportion of known blocks	Acres titled	Proportion of known acres titled
1865–74	469	58.1	325,200	47.5
1875–80	202	25.0	255,860	37.4
1881–89	75	9.3	62,132	9.1
1890–99	61	7.6	41,427	6.0
Total	807	100.0	684,619	100.0

Table 9.1: Known blocks and acres titled by the Native Land Court in Te Raki, 1865–1899.
Source: Adapted from Paul Thomas, 'The Native Land Court in Te Paparahi o Te Raki: 1865–1900' (commissioned research report, Wellington: Waitangi Tribunal, 1865).

Lands Act 1865 lay in sections 21 and 23 which enabled individuals to apply for investigations of title without hapū consent and created the ten-owner rule respectively. Section 24 then authorised the Court to divide the land between claimants after ascertaining their respective interests. While the decision to restrict the number of owners in blocks smaller than 5,000 acres was not debated in the Legislature, Judge Henry Monro later observed that it had in mind 'the great practical inconvenience certain to result, in any subsequent transactions, from having any larger number to deal with where unanimity in action would have become essential.'[290]

In carrying out its task of ascertaining ownership, section 23 empowered the Court to issue certificates of titles for collectively owned blocks greater than 5,000 acres in area to 'named tribes'. But only one tribal title was issued in Te Raki,[291] and in practice the ten-owner rule was often applied to such blocks. According to Armstrong and Subasic, the convention reflected the Court's assumption that its task was not to preserve but to extinguish collective ownership.[292] Riseborough and Hutton agree that it 'points strongly to the court's preference for procedures that would convert Maori land tenure into individual ownership, and not, for example, a legalised communalism of "tribe by name"'.[293]

Māori themselves may well have been unaware that a tribal title was available to them in the case of large blocks, given the Court's resistance to the option, but they also saw the practical convenience of restricting the number of owners to represent their interests and likely considered the role of nominated owner as an appropriate one for their rangatira. As table 9.2 demonstrates, the practice continued even after the law changed. The legislation offered the underlying ownership

290. Monro to Fenton 12 May 1871, AJHR, 1871, A-2A, p 15.
291. 'Native Land Titles Determined by Native Land Court', 18 June 1885, AJHR, 1885, G-6A, p 2.
292. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 312; Thomas, 'The Native Land Court' (doc A68), p 22.
293. Riseborough and Hutton, *The Crown's Engagement with Customary Tenure in the Nineteenth Century*, p 189.

Time period	Average number of awardees	Number of blocks	Average size of blocks (acres)
1865–74	4.2	469	693.39
1875–80	7.9	202	1,266.63
1881–89	22.1	75	828.43
1890–99	55.2	61	679.14

Table 9.2: Average number of persons placed in titles of blocks in Te Raki, 1865–1900.
Source: Adapted from Paul Thomas, 'The Native Land Court in Te Paparahi o Te Raki: 1865–1900' (commissioned research report, Wellington: Waitangi Tribunal, 1886).

no protection, however; it failed to specify how owners were to be selected and the scope of their responsibilities.

The failure to give effect to the undisclosed trusteeship obligations of the named owners was a serious deficiency in the legislation that was soon identified but not remedied (very partially only) until passage of the Equitable Owners Act 1886. This Act enabled the Native Land Court to inquire into the nature of titles granted under the ten-owner rule and determine whether a trust existed or had been intended to exist – but only in the case of blocks still remaining in Māori ownership.[294] The Act would be applied to only four blocks within Te Raki: Hauturu, Te Koutu, Ohawini, Pukanui, Pukeatua, Tapapanui, Waikariri.[295]

The long-standing lack of legal obligations on the part of nominated owners was compounded by the failure to provide an effective option for a collective title. As a result, the customary controls that the community could exercise were greatly reduced. As noted earlier, the Crown has conceded that these two features of its Native Land legislation (the ten-owner rule and failure after 1865 to provide for a collective title until some 30 years later), breached the treaty 'in certain circumstances'.[296]

In 1867, Chief Judge Fenton reported on the operations and impact of the Court; he expressed himself to be completely satisfied and commented on the 'wonderful ease' that had marked its operation. He suggested that every certificate represented a subdivision of the tribal estate, and that the process of individualisation was being managed at the hapū level. People were picked to go into the certificate by general arrangement of the tribe and, he implied, everyone was treated fairly: 'the consideration being that the names of those now inserted are to be omitted in certain other certificates'. Fenton noted at this point (two years into the Court's operation) that it was unclear whether or not the grantees were trustees or absolute owners as

294. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 522.
295. Thomas, 'The Native Land Court' (doc A68), app F, pp 334–373.
296. Crown closing submissions (#3.3.406), p 12.

> a great number of the certificates already issued are in favour of individuals, and whether these are trustees put in for the purpose of sale on behalf of the tribe, or whether they are to be regarded as intelligent members of the tribe determined to possess freeholds for themselves, it is impossible to say; and it would be difficult, if not impossible, to obtain this information from the Natives, unless they are thoroughly satisfied that our motives in seeking it are not such as to excite suspicion, and to satisfy them on this, as, indeed, on any other head, must be the work of time, and an unchanging policy.

He added that the ultimate result of the Court process would be to turn Māori into either 'well-to-do farmers' or 'intemperate landlords'.[297]

Despite Fenton's satisfaction with the individualisation process that had been initiated, it had already become apparent that its effects could be undesirable. Fenton acknowledged that the provision had had a damaging effect in the Hawkes Bay, but in his opinion, it was

> not part of our duty to stop eminently good processes because certain bad and unpreventable results may collaterally flow from them, nor can it be averred that it is the duty of the Legislature to make people careful of their property by Act of Parliament, so long as their profligacy injures no one but themselves[298]

This remained Fenton's policy throughout his tenure as chief judge and rested on the conclusion that he ultimately reached and would consistently maintain: that the grantees were not trustees under the Act.[299] He later recorded that had the Court recognised or enforced a trustee relationship, it would have perpetuated the 'evil' of communal ownership.[300]

Judge Monro also acknowledged that limiting the ownership to 10 grantees had caused some difficulty but, like Fenton, he considered the Act to have had its desired effect:

> Apart from the question of surveys, I cannot say that I have experienced any difficulty in the practical working of the Native Lands Act of 1865, except what may have arisen from clause twenty-three limiting the number of grantees to ten persons, but this difficulty has in each instance been easily overcome; and as one great object is to induce the Natives to individualize their titles as far as possible, I think it would be inadvisable to alter it.[301]

Judge Frederick Maning, for his part, indicated that he was prepared to issue certificates to the whole tribe in the case of large blocks. However, it appears that

297. Fenton to Richmond, 11 July 1867, AJHR, 1867, A10, p 4.
298. Fenton to Richmond, 11 July 1867, AJHR, 1867, A10, p 4.
299. Grant Phillipson, 'The Ten Owner Rule: A Selection of Official Documents with Commentary', report commissioned by the Waitangi Tribunal, 1995 (Wai 64 R01, doc K13), pp [19]–[20].
300. 'Native Land Court', *Hawkes Bay Herald*, 4 November 1880 (cited in AJHR, 1886, G-9, p 14).
301. Monro to Fenton, 27 June 1867, AJHR, 1867, A10, p 10.

he did so only once, in 1867, when Te Māhurehure received a certificate of title for the 11,828-acre Whakatere–Manawakaiaia block.[302] The same year, he reported that Māori in the Bay of Islands and Hokianga regarded the Native Lands Act as satisfying a 'great want and vital necessity' by 'offering them a means of extricating themselves from the Maori tenure'. He believed that they were keen to individualise their titles and subdivided their blocks to achieve this object.[303]

Māori named in the titles of blocks were in the legal position of joint tenants with absolute rights of ownership. This meant that they could mortgage or sell their shares without reference to others named in the title. It also became clear that other hapū members were being dispossessed without any legal say in the control and management of what had been previously shared tribal land. As the retired chief justice, Sir William Martin, noted, the direction under section 23 of the Act for the Court to 'ascertain by such evidence as it shall think fit the right title estate or interest of the applicant and all other claimants to or in the land' could not be reconciled with the ten-owner rule:

> The grievance of which we now hear is this . . . that, although the land comprised in the Certificate may belong to more than ten persons, a Certificate is granted which names only ten of the owners, and gives no indication of the existence of other owners; that the ten persons named in the Certificate or the Grant have not, on the face of the Certificate or the Grant, been made to appear as only joint owners with others unnamed and trustees or agents for those others, but have appeared on the face of those instruments as the sole and absolute owners; that, as such, they have, either of their own motion, or being induced by other parties, conveyed the land to purchasers; and that in this way many persons have been deprived of their rights.[304]

Riseborough and Hutton described the resulting form of tenure as 'a pseudo-individualistic tenure of joint tenants, but one in which the tenants acted as individual owners, and not as trustees for the other rights holders under Maori land tenure'.[305] In the Tūranga report, the Tribunal observed that joint tenancies could have further consequences for Māori landowners:

> By this form of title, all interests were deemed to be equal. Individual interests could be alienated during the lifetime of individual grantees, but they could not be inherited

302. Berghan, 'Northland Block Research Narratives' (doc A39(h)), vol 9, p 287; Maning to Fenton, 24 June 1867, AJHR, A-10, p 8; 'Native Land Titles Determined by Native Land Court', 18 June 1885, AJHR, 1885, G-6a, p 2.

303. Maning to Fenton, 24 June 1867, AJHR, 1867, A10, pp 7–9.

304. Sir William Martin, 18 January 1871, AJHR, 1871, A2, p 3.

305. Riseborough and Hutton, *The Crown's Engagement with Customary Tenure in the Nineteenth Century*, p 192.

by the successors of those grantees. Instead, on death, the individual undivided interests of the deceased joint tenant reverted to the pool of surviving joint tenants.[306]

The risk of dispossession may have been obviated to some extent in Te Raki by the smaller size of blocks being put through for title determination, in contrast to Hawkes Bay where some of the worst abuses were experienced in the early years of the Court's operation. Still, the extent of Court activity in Te Raki, where 58.1 per cent of all the blocks titled between 1865 and 1899 were put through while the ten-owner rule remained in force, suggests that the impact was considerable forcing the break-up of hapū ownership and their exclusion from key ancestral lands.

9.5.2.3 *The 'ten-owner' rule modified: the amendments of 1867 and 1869*

A number of amendments to the Native Land Act followed during the mid-to-late 1860s. The Native Lands Act 1866 dealt largely with reserves, the imposition of restrictions on alienability, and surveys. Of concern to us here is section 17 of the Native Lands Act 1867 which attempted to deal with the consequences of the ten-owner rule. Native Minister Richmond indicated that

> Great difficulty would be likely to arise in many parts of the country from tacit and unrecorded trusts being placed in the power of a few Natives holding grants or certificates for large tracts of land. The evil that existed in that respect should not be continued. It was very plain that hereafter persons holding those lands nominally in their own right, but really for large bodies of Natives, if they should find themselves pressed, as was not unlikely to be the case, for money, would desire to alienate from time to time, and the Government would have to sustain the irritation and discontent of those Natives for whom those persons held the property in an unacknowledged trust. He had desired that those who should have granted to them certificates for Crown Grants virtually in trust, should be called upon by the court to execute some declaration of trust, but the Attorney-General was of opinion that it would be attended with very great inconvenience.[307]

He did not elaborate on the nature of that 'inconvenience', but clearly lacking support for his efforts to have nominated owners defined as trustees, Richmond proposed that the names of all with interests should be recorded by the Court and that the land concerned should be held as inalienable (including by way of mortgage) except by lease for a period of up to 21 years.[308] Section 17 of the amending Native Lands Act 1867 thus offered several potential remedies:

306. The Tribunal observed that 'it was in 1869, and remains today, a presumption of the English common law that, unless otherwise expressly provided for or unless clear circumstances dictated otherwise, all Crown grants to multiple owners would take the form of joint tenancies': Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 1, p 379.

307. 'Native Lands Bill', 27 September 1867, NZPD, vol 1, part 2, p 1136.

308. 'Native Lands Bill', 27 September 1867, NZPD, vol 1, part 2, p 1136.

- The Court was directed to ascertain 'by such evidence that it shall think fit, the right title estate or interest of the applicant and of all other claimants to or in the land'.
- The Court would then issue a certificate of title which would 'specify the names or the persons or of the tribe who according to Native custom own or are interested' in the land.

Section 17 then went on to state:

- The Court would ascertain 'by such evidence that it shall think fit the right title estate or interest not only of the applicant and of all other claimants to or in the land' but also 'of every other person who and every tribe which according to Native custom own or is interested in such land whether such person or tribe shall have put in or made a claim or not'.
- If the Court concluded that there were more than 10 owners in the block or that a tribe or hapū was interested in it and consented, a certificate could be ordered to issue to 'certain of the persons not exceeding ten' while 'the names of all the persons interested in such land', including those named on the certificate of title, and 'the particulars' of all their interests would be 'registered'; certificates of title in such instances would state that they had been issued under section 17.

The Act also attempted to put a brake on the pace of alienation, stating:

- '[N]o portion of the land' could be alienated by 'sale gift mortgage lease . . . exceeding twenty-one years' unless it was subdivided first.
- It was lawful for 'the persons found by the court to be interested or for the majority of them' to apply for such a subdivision.[309]

The provision should have offered Māori owners a modest measure of protection, but how it would work in practice was obscured by the poor drafting. The most serious deficiency was its failure to create an explicit trust with the result that the status of the 10 owners named on the certificate of title was far from clear. According to Judge Monro, the certificate of title 'determine[d] the proper parties to be dealt with'.[310] That they were to be regarded as trustees was implied by the registration of all owners (recorded on the back of the title), but this was not stipulated; in the opinion of the Hauraki Tribunal, it was 'a very great missed opportunity'.[311] Further, as the *Mohaka ki Ahuriri* report recorded, the mere listing of owners under section 17 did not create a tribal right to land.[312] Nor did the requirement for a majority consent for partition so that a portion could be sold equate to an alienation by collective consent.

The instruction to the Court to ascertain the rights of all possible claimants was apparently intended to solve the problem created under the 1865 Act whereby only the interests of those who had lodged a claim were investigated. However,

309. Native Lands Amendment Act 1867, s 17.

310. Monro to chief judge, 12 May 1871, AJHR, 1871, A-2a, p 16.

311. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 2, pp 698–699; see also Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 523.

312. Waitangi Tribunal, *Mohaka ki Ahuriri Report*, Wai 201, vol 2, pp 447–448; see also Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 312–314.

Professor Boast notes that it is not clear how the Court would identify and inquire into every interested person if it was to be limited to the evidence before it.[313] Ultimately, he concluded that section 17 'gave the Court an option' to conduct a wider inquiry if this was sought by the applicants. When the Court was asked to make an order under section 17, its practice was to record two lists, 'one of the ten representative owners, and the other of the remaining owners'. In these cases, the nature of title the two groups possessed was, however, 'far from clear'.[314]

In any event, the potential of section 17 was never realised, nor its possible flaws revealed in operation. It appears that the Crown failed to advise Māori of the amendment which was, in any case, tortuously constructed and difficult to understand. It was also disliked by Fenton who, according to Professor Ward, made no effort to explain it to Māori applicants.[315] Most judges followed Fenton's lead in the matter with the result that the provisions of the Native Lands Act 1867 were rarely applied; the only two exceptions that have been identified in our inquiry district are the Parahirahi and Kokohuia blocks.[316]

The causes of the chief judge's dislike are readily found. In his view, expressed in early 1868, the provision would frustrate the intention of the Native Lands Act 1865, and 'make perpetual the communal holdings of the Natives, by getting them in their existing state registered in a Court of Record and made sustainable in the Supreme Court'. He considered it 'difficult to suppose that this would have [been] the effect intended; as it would be distinctly opposed to the declared intentions of the Legislature, and, in particular, to the essential object of these Acts'. Fenton went further, declaring that since the law makers had not clearly expressed their intention, it was a matter of discretion on the Court's part to interpret the law in accordance with the interests of the applicants and 'general public policy'.[317]

Fenton refused to acknowledge that there had been a problem in the first place beyond that of individual profligate owners. Although Parliament had clearly intended section 17 to remedy some 'mischief', in the absence of a preamble, he expressed himself ignorant of what the mischief could have been. The policy of the Native Land Court would be to continue to compel tribes to subdivide 'until the names in the grant are brought within the legal number, and display the whole of the persons interested in the property'.[318] He also argued that, in any case, no problem could be remedied by creating 'concealed equities'. He concluded: 'If this view is wrong, this Court may readily be compelled by *mandamus* to give the clause in

313. Boast, *The Native Land Court*, p 73.
314. Boast, *The Native Land Court*, p 74.
315. Ward, *A Show of Justice*, pp 216–217.
316. For Parahirahi, see Rosemary Daamen, 'Report on the Alienation of the Pararahi Block,' report commissioned by the Waitangi Tribunal, 1992 (doc E1), p 9; and for Kokohuia, see Coralie Clarkson, 'Pakanae and Kokohuia Lands, 1870–1990', report commissioned by the Waitangi Tribunal, 2016 (doc A58), p 32.
317. Fenton, 7 April 1868, AJHR, 1871, A-2a, pp 40–41.
318. Fenton, 7 April 1868, AJHR, 1871, A-2a, p 41.

question any other effect which the Supreme Court may think would more fitly interpret the intentions of the Legislature.'[319] No such order was made.

Nor did Parliament take any immediate remedial action. Although Richmond informed the House of the chief judge's refusal to execute the 'unworkable' provision, and highlighted the danger of issuing grants to individuals as trustees of the tribe without it being put into their power to 'arrest any dealings in regard to them', the Native Lands Act Amendment Act 1868 did not address these concerns.[320] The Government had instead distributed circulars to obtain declarations of trust on the part of owners who had been put into the title on behalf of the tribe – but we received no evidence of this having any success in Te Raki.

The Native Lands Act 1869, sponsored by Fenton as a Legislative Councillor, corrected one of the problems created by the earlier legislation.[321] Section 12 provided that in all instances where land had not already been sold, and in future cases, grantees under the 1865 and 1867 Acts were deemed to be tenants in common (meaning that individual interests were undivided, could be of variable value and proportion, and inherited by the heirs of each of the grantees) and *not* joint tenants (whereby all interests were deemed to be equal, could be alienated during the lifetime of the individual grantees, and could not be inherited by their successors).[322] Section 15 provided that any alienation required the agreement of 'a majority in value of the grantees'. These provisions were intended to restore 'some degree of corporate status to individualised title', but it was still possible for a grantee to 'call for subdivision and the ascertainment of an individual interest which could then be sold'.[323] In Sir William Martin's subsequent assessment, these changes were insufficient to protect the rights of tenants in common, let alone the many unnamed customary owners who had not been entered on the title. It was still easy for purchasers to obtain individual, undefined shares in a piecemeal fashion, leading to the unwilling sale of the whole block. While there were also Māori who were 'dishonest and reckless enough to abuse, to the detriment of their fellows, the facilities which the present system furnishes', Martin argued that the law should protect others from their actions.[324]

319. Fenton, 7 April 1868, AJHR, 1871, A-2a, p 41. A writ of *mandamus* is a court order restraining a public officer or institution from enforcing an order or doing an act which violates a person's fundamental rights.

320. 'Native Lands Act Amendment Bill', 8 October 1868, NZPD, vol 4, pp 229–231.

321. In 1870, the Government passed the Disqualification Act, one result of which was to invalidate Fenton's appointment to the Legislative Council (he was still chief judge of the Native Land Court); his rival Donald McLean, then Native Minister, is reputed to have been behind the Act: William Renwick, 'Francis Dart Fenton, *The Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, https://teara.govt.nz/en/biographies/1f5/fenton-francis-dart, accessed 1 November 2022.

322. See Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 1, p 379.

323. Phillipson, 'The Ten Owner Rule (Wai 64 R01, doc K13), pp [54]–[56].

324. Sir William Martin, 18 January 1871, AJHR, 1871, A-2, pp 3–4; Phillipson, 'The Ten Owner Rule' (Wai 64 R01, doc K13), pp [59]–[60].

9.5.2.4 *Memorials of ownership: the Native Land Act 1873*

In response to growing criticism of the continued application of the ten-owner rule, the Government directed the preparation of two reports. The first was by Sir William Martin, whose opinions we have already quoted, and the second by Theodore Haultain, a retired soldier and a trust commissioner under the Native Lands Frauds Prevention Act 1870.[325] Their reports found serious fault with the operation of the land laws to date, and their proposals, together with the findings of the Hawke's Bay Native Lands Alienation Commission of 1872, exerted considerable influence on McLean as he prepared what would become the Native Land Act 1873.

Sir William Martin considered the complaints regarding the ten-owner rule to be 'just and well founded'.[326] In his view, while it was reasonable to limit the number of people with whom a lessor or purchaser had to deal, Parliament could not have intended to secure this benefit by 'ignoring or sacrificing the rights of any of the owners'. He proposed that all owners be included in grants, fuller powers be accorded owners after subdivision into ten-owner blocks, and the agreement of all owners be secured before a subdivision could take place.[327]

Haultain, whom McLean had tasked with investigating the workings of the Native Lands Acts and making an 'impartial report' to the Government, also concluded that the law and actions of the Court had resulted in problems for many Māori. After seeking the opinions of Native Land Court judges, assessors, important chiefs, and other authorities on the matter, he reported that Māori had complained

> [t]hat the limitation of ten names to a Crown Grant, and the giving grantees equal interests, have put it in their power to dispose of the property, or parts of it, without reference to other persons who were also more or less interested, which power has, in many instances, been exercised to the great detriment of those parties.[328]

Haultain accepted that the complaint was legitimate and that the ten-owner rule had operated to the great detriment of those excluded from the titles. In his view, section 17 of the 1867 Act had failed to remedy this situation because most Māori were unaware of its existence – and even if they were, had been trapped in debt and were unable to afford the inalienability that would follow registration of all

325. See GP Barton, 'Martin, William', *The Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, https://teara.govt.nz/en/biographies/1m21/martin-william, accessed 5 December 2022; see also Gerald Hensley, 'Haultain, Theodore Minet', *The Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, https://teara.govt.nz/en/biographies/1h12/haultain-theodore-minet, accessed 5 December 2022.

326. Sir William Martin, 18 January 1871, AJHR, 1871, A2, p 4; Phillipson, 'The Ten Owner Rule' (Wai 64 R01, doc K13), pp [57], [60].

327. 'Draft Proposed Bill by Sir WM Martin', AJHR, 1871, A-2, pp 11–12, 15–16; Phillipson, 'The Ten Owner Rule' (Wai 64 R01, doc K13), pp [66], [69]–[70], [73-[74].

328. Haultain to McLean, 11 July 1871, AJHR, 1871, A2a, p 4; Phillipson, 'The Ten Owner Rule' (Wai 64 R01, doc K13), p [86].

owners and the creation of a binding trust.[329] Like Fenton, Haultain thought that the best course was for the Court to issue titles only when blocks had been subdivided into small blocks in which there were, at most, 10 persons who would be unable to sell or mortgage their undivided shares; but he also recognised that such a system would entail massive survey expenses and debts for Māori.[330]

Chairman of the Hawke's Bay commission, Supreme Court Judge CW Richmond, observed that '[n]o one can doubt the expediency of legislation to promote the breaking up of tribal property', but he concluded nonetheless that the ten-owner rule and the issue of Crown grants to those whose names were entered on certificates of title constituted 'a very serious grievance'.[331]

The legislation that followed these trenchant criticisms, the Native Land Act 1873, was intended to resolve a number of the difficulties that had been identified. These included the costs of title adjudication and especially the cost of surveys; the matter of reserves and 'sufficiency' of land to be retained by Māori; and the general inaccessibility of the law to Māori. Most importantly, it ended the ten-owner rule for all new investigations of title, although it did not change the situation for grants already issued under the Native Lands Act 1865. Instead, under section 47 of the new Act, all owners would be recorded on memorials of ownership, not merely those claiming to be their representatives. Not all shares were to be considered as equal in value, and where a majority of owners requested it, the Court was empowered to determine the proportionate share of each owner.[332] Under section 48, the owners had no power to alienate except by way of lease for up to 21 years, but section 49 allowed a sale where all were agreed. Under sections 59 to 68 – with section 65 of particular relevance – land could be subdivided at the request of a majority of owners. Owners who wished to sell were required to sign a memorandum of transfer, while a Crown grant would be issued in favour of the purchaser on the Court's recommendation.[333]

Rather surprisingly, McLean did not mention the extremely significant change in how Māori land was to be titled during his summary of the Bill's main provisions when he introduced it to the House. However, later in the debate he acknowledged:

> Hitherto it often happened that eighty out of a hundred might not participate in the benefits of the grant, and that ten persons, who looked upon themselves as the legal holders of the estate, might sell it without accounting to the remainder of the owners.

329. Haultain to McLean, 18 July 1871, AJHR, 1871, A-2a, pp 3–5; Phillipson, 'The Ten Owner Rule' (Wai 64 R01, doc K13), p [85]–[87].

330. Haultain to McLean 18 July 1871, AJHR, 1871, A-2A, pp 3–5; Phillipson, 'The Ten Owner Rule' (Wai 64 R01, doc K13), pp [85]–[87].

331. Richmond, 31 July 1873, AJHR, 1873, G7, pp 6–7; Phillipson, 'The Ten Owner Rule' (Wai 64 R01, doc K13), pp [147]–[148]; see also Keith Sinclair, 'Richmond, Christopher William', *The Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, https://teara.govt.nz/en/biographies/1r9/richmond-christopher-william (accessed 6 December 2022).

332. Native Land Act 1873, ss 34, 37, 38, 45, 47.

333. Native Land Act 1873, ss 59, 61.

> It was one of the great defects of the former Acts, and which this Bill would remedy, that the intended trusts were never properly secured or looked after.[334]

The Bill's reception was mixed. Karaitiana Takamoana, member for Eastern Maori, covering the region where some of the worst abuses had been identified, objected to it on the grounds that it would do nothing to remedy the injustices that had already occurred.[335] On the other hand, the Opposition's John Sheehan supported the intention to ensure that all owners were acknowledged and had to consent to any sale, but predicted that its provisions were insufficiently precise to prevent the old problem of piecemeal alienation of individual shares, resulting in the unwilling alienation of the whole block.[336]

The most interesting debate for the purposes of this chapter took place in the Legislative Council where the failings of the proposed measure were identified. Notably, Henry Sewell, a former Attorney-General, who had been involved in the drafting of the Native Lands Act 1862 (see section 9.3.2.6), suggested that it was premature to bring about the complete individualisation of Māori title, which he anticipated would be the effect of the new Bill. He argued that Māori 'communism' should be left intact for the meantime, and that Māori should be permitted to continue to deal with land transactions as a tribal body with collective structures and rights: 'What was now said was, that the Natives should be governed by majorities, and that their interest in their land should no longer be tribal or collective, but that each individual should have a distinct aliquot part [an individualised share, determined by dividing the value of collective assets by the number of interested persons]. That was a fundamental vice in this Bill.'[337] Dr Morgan Grace rejected these criticisms, throwing the blame for the failure of the 1865 Act and the frustration of Parliament's benevolent intent on Māori themselves – as did the Colonial Secretary of the day, Dr Daniel Pollen.[338] According to Grace, it had been Parliament's intention in the earlier Acts to recognise tribal entities by appointing 10 persons as trustees: 'But what did they find? They found that when it ceased to be to the interest of the trustees to respect those rights, they used them against the commune they were supposed to protect.'[339]

Pollen, in his summary of the Government's position, also indicated that the Native Lands Act 1869 had failed in have its intended effect:

334. 'Native Land Bill', 25 August 1873, NZPD, vol 14, p 621 (cited in Phillipson, 'The Ten Owner Rule' (Wai 64 R01, doc K13), p [197]).

335. 'Native Land Bill', 25 August 1873, NZPD, vol 14, p 611 (cited in Phillipson, 'The Ten Owner Rule' (Wai 64 R01, doc K13), p [197]).

336. 'Native Land Bill', 25 August 1873, NZPD, vol 14, p 618; Phillipson, 'The Ten Owner Rule' (Wai 64 R01, doc K13), pp [197], [206].

337. 'Native Land Bill', 25 September 1873, NZPD, vol 15, pp 1368–1370; Phillipson, 'The Ten Owner Rule' (Wai 64 R01, doc K13), pp [197], [212]–[213].

338. For Pollen's views see 'Native Land Bill', 25 September 1873, NZPD, vol 15, pp 1366–1367; Phillipson, 'The Ten Owner Rule' (Wai 64 R01, doc K13), p [211].

339. 'Native Land Bill', 25 September 1873, NZPD, vol 15, p 1371; Phillipson, 'The Ten Owner Rule' (Wai 64 R01, doc K13), p [213].

> There was nothing more common, he was sorry to say, than for one Native, out of a great many named in a grant, to sell his individual interest, without reference to the other grantees. He need not tell honorable members that the moment one interest in an estate of that kind was parted with, the claims of all the rest were vitiated, for no one would care to buy with an imperfect title; and in that way very great injustice had been inflicted upon the Natives. It was only necessary for a person to secure a conveyance of the interest of a single Native whose name was in the grant, to make sure of getting the rest at his own price.[340]

Pollen failed to explain, however, how this new measure and the naming of all owners on the memorial would prevent the same thing happening. As Professor Boast has noted, the Native Land Act 1873 created a new category of land, held under 'memorial'.[341] We note that both Mr Wī Tako Ngatata and Colonel William Kenny argued that Māori had not been sufficiently consulted about the Bill. Kenny pointed out that it had not been printed in te reo as it 'ought to have been for the Native race' nor had it been circulated properly. Given the importance of the measure, which would directly affect Māori interests, Ngatata and Kenny considered that further consultation should take place before the Bill became law.[342]

9.5.2.5 *The 'lesser of two evils'?*

It has been well demonstrated in Tribunal jurisprudence that the titles provided under the Native Lands Act 1865, its amendments, and under the Native Land Act 1873 did not meet the Māori need and increasing demand for a collective legal title; they did not provide the basis upon which Māori owners or any lending agency could contemplate the investment of capital and labour in development; and they imperilled the social integrity and cohesion of Māori communities.

While the ten-owner rule recognised the power and authority of rangatira (but without creating a trustee role in law), the memorial of ownership system had a contrary effect.[343] Rangatira were now but one of many owners who could exercise no collective control. Under the Native Land Act 1873, the land retained by owners remained in a modified form of customary ownership. All owners were supposed to be named, each of whom was awarded not a specific allotment of land but undivided tradeable shares where, as the Tūranga inquiry pointed out, 'none had existed in Maori custom'. The same report noted there was nothing in the Act that required 'that purchasers deal with the community of owners *as a community* in securing agreements for sale' (emphasis in original).[344]

Section 87 of the Act stated that conveyances of Native land before it was vested in freehold tenure by order of the Court would be 'absolutely void'. The protection

340. 'Native Land Bill', 25 September 1873, NZPD, vol 15, p 1379; Phillipson, 'The Ten Owner Rule' (Wai 64 R01, doc K13), p [217].
341. Boast, *The Native Land Court*, pp 98–99.
342. 'Native Land Bill', 25 September 1873, NZPD, vol 15, pp 1372, 1375–1376; Phillipson, 'The Ten Owner Rule' (Wai 64 R01, doc K13), pp [209], [214], [215]–[216].
343. Boast, *The Native Land Court*, p 80.
344. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, p 443.

offered here was negligible however. The Tūranga Tribunal cited the Supreme Court decision in *Poaka v Ward* (1889), which argued that:

> The Native Land Court system provided a number of safeguards for Maori, which ensured that all Maori listed on a memorial of ownership had a say in what happened to any single interest.
>
> . . . . .
>
> The effect of section 87 was that only transfers agreed by owners signifying their consent *in court* could be recognised as valid. All other transactions, and particularly all earlier transactions, were void. [Emphasis added.][345]

But, the Tribunal concluded, the reality of land transactions, both with the Crown and with private purchasers 'was not as the Supreme Court described it. Section 87 made pre-court individual dealing unenforceable, but did not *ban* it' (emphasis in original). Private purchasers could still buy up individual interests and avoid community decision-making if they considered that owners would not renege once the sale proposal came before the court for affirmation. The Crown was not bound by the terms of section 87 anyway.[346] In the Tūranga Tribunal's view, section 87 was never intended to stop individual dealing.[347] It was absolutely clear that '[t]he 1873 Act individualised the sale of Maori land. In fact, it individualised Maori title *only* for the purpose of alienation. For every other purpose it was merely customary land outside English law and commerce' (emphasis in original).[348] Similarly, the *Hauraki* report found that the Native Land Act 1873, like the Native Lands Act 1865, 'provided a form of title which fell between two stools, undermining the control of land at hapu level under customary tenure, while not providing truly individualised titles'. Lands held under memorials of ownership thus existed in 'a kind of legal limbo'.[349]

The claimants in our inquiry also emphasised the failure of the Crown to provide a title that was useful other than for its goal of facilitating the sale of land. They stressed that as a result of the changes forced on them by laws about which they had not been consulted and which they soon began to actively resist, the Crown undermined their tikanga, their social cohesion, their capacity to retain and manage their whenua, and their tino rangatiratanga. They regard this as a deliberate effort to assimilate them rather than incidental to the Crown's land laws.

In Te Raki, as table 9.2 indicates, by continuing the practice of naming a few owners as hapū representatives, the claimants' tūpuna had attempted to avoid the delay, expense, and inconvenience created by the memorial of ownership system

345. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, p 402.
346. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, p 441.
347. It cited section 59, which gave the court the role of safeguarding Māori against unfair or unjust transactions; but the section proceeded on the basis that an agreement or agreements had already been reached between the owner and the purchaser, and indeed that the purchase money had already been paid. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, Wai 814, p 442.
348. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, pp 443.
349. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 2, pp 731–732.

and the need for repeated partitions and surveys by those wishing to transact their lands. But this practice could also expose them to great risk because of the lack of legal protections and acknowledgement of responsibility on the part of the Crown. Te Kapotai claimants brought to our attention Te Turuki block, the site of their hapū marae, as one example of the long-term effects of the ten-owner rule. The original award to 10 owners by Maning in 1868 had resulted in a 'long running and bitter dispute' which had led to repeated applications to the Court and appeals well into the twentieth century. Over 70 years later, Judge Frank Acheson would remark on the 'ill-feeling' that existed between a 'small group' and the 'great majority of the people', and he would appeal to them to establish 'harmonious relations'.[350] But in the view of Te Kapotai at the time, the responsibility for the friction (and the obligation to repair the damage) rested with the Court and the Crown:

> It was Judge Manning who issued the title for Te Turuki in 1868. It was Parliament which established the Native Land Court and gave Judge Manning the right to issue the Te Turuki title. It is Parliament which gives the present Court the power to deal with this land. The Court gave the title to Te Turuki and it can take it away.[351]

Mr Wiremu Reihana, on the other hand, described the destructive impact of the system introduced by the 1873 legislation on Ngāti Tautahi not only in terms of land loss but also on social cohesion and the functioning of hapū. Whereas previously his tūpuna had complete tino rangatiratanga over their whenua and its resources, 'due to the workings of the Native Land Court, the land was broken up, partitioned and sold off'. The effects were long-term. He told us:

> Life would change forever. The ownership list for the land blocks allowed the Crown to target individual owners and buy their land interests off them. The Court also pitted relations against one another as they competed for the land. This would undermine the unity of the hapū and the rangatiratanga of the rangatira, to the point where we seldom now act as a hapū unit.[352]

While the Court had recognised the chiefly status of Ngāti Tautahi tupuna, Eruera Tāhere, individualisation of title had made it impossible for him to 'counsel the hapū to work together to keep the whenua'.[353]

Other witnesses made similar points with reference to the impact on their rangatira, hapū, and the relationship between them. Mr Pairama Tāhere argued that the Crown knew that Māori held their lands communally and that the authority of rangatira was dependant on the mutual backing of the hapū. In his view, the Crown deliberately set about removing the capacity of rangatira to manage

350. Te Kapotai Hapū, supporting papers (doc F25(c), p 1285 (cited in 'Mana i te Whenua: Te Kapotai Hapu Korero for Crown Breaches of Te Tiriti o Waitangi' (doc F26), p 40).

351. Te Kapotai Hapū, supporting papers (doc F25(c), pp 1334–1335 (cited in 'Mana i te Whenua: Te Kapotai Hapu Korero for Crown Breaches of Te Tiriti o Waitangi' (doc F26), p 40).

352. Wiremu Reihana (doc T10(b)), p 52.

353. Wiremu Reihana (doc T10(b)), p 52.

their people and their lands.[354] He brought to our attention instances where blocks such as Maungataniwha and Te Pupuke were brought through the Court for title determination and awarded without the knowledge of Te Uri o Te Aho. According to the recollection of his whānau, it was many years before the hapū realised that the land was gone.[355] Rihari Dargaville agreed that the land laws represented 'a deliberate act of undermining and the denigration of rangatiratanga over ancestral whenua tuku iho'.[356] Mr Dargaville provided various examples, including the Kaingapipiwai block which largely passed out of Māori ownership as individual owners sold their interests and the land was partitioned into smaller sections.[357]

We received no evidence in our inquiry that would cause us to reject claimant allegations regarding the destructive consequences of land legislation and the Court under both title systems or to reconsider the general Tribunal jurisprudence we have already outlined. The Crown has conceded as much: in particular, that 'the award of land to individuals and enabling individuals to deal with land without reference to iwi or hapū, made those lands more susceptible to partition, fragmentation and alienation.' The Crown accepted that this 'undermined traditional tribal structures which were based on collective tribal and hapū custodianship of the land' but rejected allegations that this was a deliberate and calculated policy on its part. Crown counsel did acknowledge, however, the failure 'to provide a legal means for the collective administration of Māori land until 1894', and that this was a breach of the treaty. We also welcome the Crown's general concession that it 'failed to protect those collective tribal structures which had a prejudicial effect on the iwi and hapū of Northland and was a breach of the treaty and its principles'.[358] But we do not accept that the consequences of the system introduced were unintentional except in the most limited sense; defenders of the Native Land laws threw the blame on rangatira themselves, but legislators had deliberately undermined their connection with hapu and offered no legal underpinning to ensure that responsibilities could be met.

9.5.2.6 *The power to determine relative interests and partition*

The Native Land Act 1873 laid the foundation for a system in which individual, undivided shares could be gradually acquired, later termed 'purchasing by attrition'. As noted above, officials and politicians often argued that the destructive effect of the ten-owner rule was unexpected, but baulked at creating a trustee relationship between the named owners and their hapū, introducing the memorial of ownership system instead. The Crown may have intended to prevent the legal dispossession of owners and facilitate Te Raki Māori participation in the colonial economy, but it was entirely as individual suppliers of land for settlement and not

354. Pairama Tahere (doc G17), pp 40, 64–66.
355. Pairama Tahere (doc G17), pp 68–69.
356. Rihari Dargaville (doc G18), p 7; see also evidence of Hazel Sade (doc I19), p [8]; Jasmine Williams (doc K5), p 31; Darryl Hape (doc N10), p 8; Trevor Tupe (doc S24), pp 2, 5; Nau and Hohepa Epiha (doc S25), pp 8, 21; Murray Painting (doc V12(a)), p 9.
357. Rihari Dargaville (doc G18), pp 21–28.
358. Crown closing submissions (#3.3.406), pp 5–6.

as collective owners and producers. As no more than a record of owners, memorials of ownership certainly did not provide a form of title upon which investment and development might take place; customary 'owners' were merely the lessors and vendors identified as such to Crown and colonists wishing to acquire land.[359]

When appearing before the Native Land Laws Commission in 1891, the Act's draftsman, John Curnin, claimed to have coined the term 'memorial of ownership' (as distinct from a certificate of title under the 1865 Act) to describe an English-style title 'issued to the Natives themselves, certifying that the title to such Native land had been ascertained'. According to Curnin, the Act's primary objective was to avoid the difficulties associated with the ten-owner rule and to encourage Māori to partition their lands into hapū and family holdings. Curnin went on to concede that some purchasers had 'got underneath the Act' to acquire individual shares.[360]

Curnin's explanations are, in our view, unconvincing. Many more than 'some purchasers' had managed to circumvent the supposed protections of the legislation to effect purchases by attrition. As Pollen had noted when introducing the Bill into the Legislative Council, once that happened, the rest of the block was sure to go as well. That was the conclusion, too, of the Native Land Laws Commission. In its view, through the 'pseudo-individualisation' of title, Māori had been reduced to 'a flock of sheep without a shepherd, a watch-dog, or a leader . . . The strength that lies in union was taken from them.'[361] The many obstacles to whānau partitioning land, especially the costs of survey and the trouble it caused, were already well known. These hurdles, in combination with the capacity of purchasers to acquire individual shares as and when they liked, makes it difficult to see the Act other than as intended to 'force sales'.[362]

The Crown's policy of enabling the Court to determine relative interests so that blocks could be partitioned and portions sold was central to the individualisation of Māori title and the process of alienation it facilitated.[363] The Native Land Act 1873 provided that a majority of owners could apply to the Court to ascertain 'the amount of the proportionate undivided share that each such owner of land is entitled to according to Native usage and custom'.[364] Under section 65, a simple majority also sufficed to initiate a partitioning out of their interests. There was no requirement for the entire group of owners to meet together and consent to alienations. As noted earlier, this meant that signatures could be acquired in a piecemeal fashion and a partition forced through the Court.

Over the following decades, the Crown, through a number of legislative provisions, continued to expand the Court's powers to determine the relative interests of Māori landowners and the capacity of individuals (including non-Māori)

359. Boast, *The Native Land Court*, p 99.
360. John Curnin, 14 May 1891, AJHR, 1891, G-1, pp 170–171; Phillipson, 'The Ten Owner Rule' (Wai 64 ROI, doc K13), pp [321], [353]–[354]).
361. W L Rees, James Carroll, 23 May 1891, AJHR, 1891, G-1, p x; Phillipson, 'The Ten Owner Rule' (Wai 64 ROI, doc K13), pp [312]–[313], [318].
362. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, p 528.
363. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 725.
364. Native Land Act 1873, s 45.

to initiate partitions. The *Turanga Tangata Turanga Whenua* report takes over a page to set out the many changes in the law during the late nineteenth century, including three u-turns over a 10-year period, as to who could apply for a partition. Sometimes, the rules applying to the Crown and private purchasers were the same, sometimes different.[365] Overall, the trend represented a substantial erosion of protections, reducing the requirement for a majority to initiate partition to a single individual owner, or on the instigation of the Crown. Provisions of note included:

- Intestate Native Succession Act 1876 (section 3) directed the Court to define proportionate shares when determining successors.
- Native Land Act Amendment Act 1877 (section 6) empowered the Crown to apply to the Court to have the shares it had acquired in a block partitioned out.
- Native Land Act Amendment Act (No 2) 1878 allowed any owner or interested party (including the purchaser of an undivided interest) to ask the Court to determine the value of any interest they held in order to partition out a portion of the land of an equivalent value; in effect, this provision ended the protection of a majority veto on the question of subdivision.[366]
- Native Land Division Act 1882 allowed an individual to partition out an interest from a memorial of ownership or certificate of title but not purchasers unless the interests had been acquired before that date; this represented a partial reversal of policy, but the removal of the majority veto over partition remained unchanged.
- Native Land Administration Act 1886 reversed the 1882 change so that purchasers could apply to partition out their interests; this reflected a wider change in policy prohibiting direct private purchase, but which would have otherwise left those who had not yet had the undivided shares they had acquired partitioned out in a 'sort of tenurial limbo.'[367]
- Native Land Court Act 1886 (section 42) provided that the Court might, on making an order on an investigation of title, or a partition, decide the relative shares or interests of owners in the land on the application of any individual interested in the land.
- Native Land Court Act 1886 Amendment Act 1888 (section 12) required the Court to subdivide a block if it found on title investigation that there were more than 20 owners and it was practical to do so; section 7 affirmed the capacity of the Crown to cut out the interests it had acquired; section 21 required the Court, on making an order as mentioned in section 42 of Native Land Court Act 1886, to determine the relative interests of owners in the land 'whether such procedure is applied for or not'; at the same time, private purchasing had been restored (see chapter 10).

365. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, pp 458–459; Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 2, p 729, fn 64.
366. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, p 458.
367. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, p 458.

- Native Land Court Acts Amendment Act 1889 (section 6) enabled a purchaser to ask the Court to partition out his or her interest once the deed had been certified by a trust commissioner.
- Validation Court was established under Native Land (Validation of Titles) Act in 1893 to enable partitions that did not comply with procedural requirements to be perfected; the court operated largely in the East Coast and to a certain extent in the Manawatū district.
- Native Land Court Act 1894 (section 17) enabled any person 'interested in the land' to initiate partition proceedings but dropped the trust commissioner requirement (that office having been abolished).

This remained the law regarding partition until 1909. However, additional rules gazetted in 1895, under the Native Land Court Act 1894, stated that it was the duty of the Court 'on every investigation of title or partition, and on determining any succession to ascertain or define the relative interests in the land of owners or successors.'[368] In *He Maunga Rongo: Report on Central North Island Claims, Stage One* (2008), the Tribunal observed that even as the Crown enacted these many legislative provisions to empower the Court to define relative interests in land and enable partition, it was aware of both 'the disintegrating, unusable, and insecure nature of Māori land titles', as well as 'the problems associated with the acquisition of undivided interests by private buyers' – and we would add, by the Crown itself.[369]

In contrast, it was not until the Native Land Court Act 1894 was passed – after more than two decades of Māori protest on the matter, as discussed in chapter 11 – that they were provided with any legal support for the collective management of their lands through incorporation and the election of committees. Under section 122 of this Act, the Court was empowered, with the consent of the majority of owners of any block, if the Crown had not already acquired an interest, and the majority of owners of a number of adjoining blocks agreed, to order an incorporation if satisfied that this would be to their advantage. Under section 123, the owners could then nominate a committeee of three to seven persons (not necessarily themselves) to administer the land. The committee could by majority decision and with the approval of the Commissioner of Crown Land for the district effect an alienation (section 126), with the proceeds paid to the Public Trustee who would distribute the moneys after deducting expenses for himself and the committee and any fees payable to the Crown (sections 128 and 129). Enabling Māori to incorporate ostensibly provided them with greater agency to collectively manage their land, but as the Tribunal observed in *He Kura Whenua ka Rokohanga*, it also served the Crown's land purchasing objectives for two key reasons. Firstly, incorporations were easier to deal with than having to collect each individual owner's signature as was the case under the memorial system. Secondly, under the legislation, elected committees could alienate land without the consent of the majority of owners, while 'the Crown could also continue to buy individual interests in

368. 'Rules and Regulations of the Native Land Court', 7 March 1895, *New Zealand Gazette*, 1895, no 18, p 442.

369. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 726.

incorporation land from owners who, at law, did not need the consent of others, or the committee.'[370] By this stage, Te Raki Maori were demanding more systemic reform of the land laws and the abolition of the Native Land Court altogether, and the option of incorporation was not adopted.

9.5.2.7 *Introduced law and rules of succession and the impact on titles*

The claimants raised as a major Court-related grievance the laws governing succession to the Court-awarded interests of Māori landowners. They argued that the Crown breached Tiriti principles by applying English succession laws to the land interests of Māori landowners when it enacted section 30 of the Native Lands Act 1865 and successive legislation. Section 30 directed the Court to ascertain 'who according to law, as nearly as it can be reconciled with Native custom' ought to succeed to the land interests of a deceased intestate owner. Section 30, counsel said, left the Native Land Court 'with the discretion to apply tikanga or a mix of tikanga and English succession principles'. Instead the Court established the principle in an 1867 case (the *Papakura* case) that when Māori landowners died intestate, their land interests would be divided equally among their surviving children. This became the 'basic rule' relating to succession of interests in Māori land applied by the Court thereafter, which, counsel described as prejudicial in that it resulted in excessive fractionation of interests or shares.[371] Combined with the effects of the Native Land Act 1873, the outcome was rarely the demarcation of useable whānau or individual holdings on the ground, hindering the effective management of land by Māori themselves and facilitating the piecemeal purchase of interests. The claimants submitted:

> the Native Land Court's development and application of the principles of succession did not reflect the customary transmission of rights under tikanga, and in developing and applying those principles, breached the Crown's Tiriti obligations in respect of Maori being able to retain their lands as long as they wished and also in respect of the guarantee of tino rangatiratanga.[372]

The claimants alleged that the Crown was further culpable in having failed, when the Native Land Court 'explicitly and consistently breached the initial legislative directive to reconcile its decisions with Native custom . . . to ensure that the Court was brought into line and did indeed observe custom.' Because Fenton's attitude suited the Crown's agenda of individualising title to Māori land and undermining Māori social structures, it did not intervene to protect the tikanga of Te Raki Māori regarding succession, and thus breached the terms and principles of te Tiriti.[373]

370. Waitangi Tribunal, *He Kura Whenua ka Rokohanga*, Wai 2478, p 22.
371. Claimant closing submissions (#3.3.225), pp 146–152.
372. Claimant closing submissions (#3.3.225), p 149.
373. Claimant closing submissions (#3.3.225), p 147.

Counsel for Ngāti Tautahi ki Iringa argued in closing submissions that 'the Crown's imposition of succession principles on Māori was also a breach of Article III of te Tiriti'.[374] Counsel cited the 'disastrous outcomes suffered by the Claimants, and many other if not all Te Raki Māori, as a result of the English law of succession on intestacy', and argued that 'where Māori were disadvantaged, the principle of equity required that there be active intervention to restore balance'.[375] This theme of a fundamental disconnect between Ngāpuhi tikanga and the Court's principles and processes was echoed in evidence prepared for the Te Aho Claims Alliance by Associate Professor Manuka Henare, Dr Angela Middleton, and Dr Adrienne Puckey. They noted that decisions on matters including succession were based on precedent decisions made by judges who brought with them 'attitudes and presumption from Britain and its legal system', which frequently distorted adjudication of the interests of tūpuna in the district.[376]

The matter of succession was raised by the Crown in 1860 during the proceedings of the Kohimarama rūnanga, when McLean expressed a preference for the settlement of succession through wills.[377] No further consultation with Māori on the matter appears to have taken place. Succession was not dealt with in the Native Lands Act 1862, but section 30 of the Native Lands Act 1865 provided that when an owner died intestate (without a will), the Native Land Court was empowered to decide who, 'according to law as nearly as it can be reconciled with Native custom', were entitled to succeed to 'hereditaments', that is, according to Bennion and Boyd, both land owned by Māori under their customs and usages, and land clothed with English title (which today is defined as 'Maori freehold land').[378] Section 45 of the Act provided that 'any Native' who claimed a right 'by Native customs' to succeed to ownership of any Native land, or part of it, might apply to the Court for determination of his or her claim. The Native Land Act 1873 had a similar section: 'any person' might apply to succeed to the interests of a deceased intestate owner holding land under a Court-derived title, when the Court would inquire into the application and in the wording of the statute decide who 'according to Native custom' ought to succeed (section 57). Subsequent legislation contained similar provisions.[379]

374. Closing submissions for Wai 1957 (3.3.335), p 38.

375. Closing submissions for Wai 1957 (3.3.335), p 39.

376. Manuka Henare, Angela Middleton, and Adrienne Puckey, 'He Rangi Mauroa Ao te Pō: Melodies Eternally New' (doc E67), pp 416–419, 420, 424–425.

377. Native Secretary, 2 August 1960, AJHR, 1860, E-9, p 20.

378. Bennion and Boyd, *Succession to Maori Land*, p 4. The authors state that the use of the term 'hereditaments' shows that the Court struggled to find a term for what was a new form of property for Māori.

379. An exception was the Native Succession Act 1881, which provided that succession to land still held by Māori custom was to be decided according to custom, but succession to 'hereditaments' or land held under a title derived from the Crown was to be guided by the law of New Zealand. This provision was shortlived, evidently because of Māori opposition, and an amending Act in 1882 revised the reference to succession of land held by a Crown-derived title; it would henceforth be decided 'according to the law of New Zealand as nearly as can be reconciled with Native custom'. Bennion and Boyd, *Succession to Maori Land*, p 7.

However, Chief Judge Fenton, in his very short 1867 judgment on *Papakura – Claim of Succession*, interpreted the 1865 Act to mean that 'English law shall regulate the succession of real estate among the Maoris, except in a case where a strict adherence to English rules of law would be very repugnant to native ideas and customs'. He was concerned that Crown grants should not be undermined at time of succession, and that land that had been 'clothed with a lawful title' should not revert to 'the tribal tenure'. He emphasised that it would be the duty of the Court, in administering the Act, 'to cause as rapid an introduction amongst the Maoris, not only of English tenures, but of the English rules of descent'. The ordinary law, primogeniture, should apply, but with a key exception: 'the descent of the whole estate upon the heir-at-law could [not] be reconciled with native ideas of justice or Maori custom'.[380] Bennion and Boyd point out that Fenton did not give any detailed reasons for deciding this way, apart from his comment that primogeniture would not reconcile with 'native ideas of justice or Maori custom'.[381] He explicitly decided not to incorporate Māori customs related to succession, nor apply the British practice of primogeniture (the right of succession belonging to the eldest male child; or to the eldest female if there was no male heir). Instead, all children would succeed equally and from both parents, and would do so irrespective of their residence or the size or the location of the block or blocks of land involved.[382]

Chief Judge Fenton's principle, the Tūranga Tribunal stated, was not consistent with tikanga: '[b]y tikanga any right to land required occupation in order to take effect. Descent was insufficient on its own.'[383] Sir Edward Taihakurei Durie made a related point in his paper, 'Custom Law', noting that Māori land tenure focused on land use (rather than land ownership).[384] Rights to use land for hunting, gathering, planting, building, and residing derived from 'membership within the community', which was gained 'primarily by birth', but 'also by adoption, incorporation [for instance, through marriage] and participation'.[385] In Te Raki, according to the evidence of Drs Henare, Petrie and Puckey, it was the 'fundamental rule that land rights emanated from a specific ancestor' and were established by continuous occupation (ahi-kā-roa). Take waenga, especially current or recent cultivations, formed the strongest basis of claim for land-use rights, while claims based on the unopposed taking of other resources were also important. Resource-gathering practices typically included bird or rat snaring, taking eels and establishing pā tuna or eel weirs, taking fish and seafood, flax, timber or any other useful produces of the land. Thus, the rat and kiwi-snaring paths, the eel streams, flax swamps, and groves of particular species of tree came under this category of mana or ownership. Consequently claimants in Land Court hearings often referred to their

380. Native Land Court, *Important Judgements Delivered in the Compensation Court and Native Land Court, 1866–1879* (Auckland, 1879), pp 19–20.

381. Bennion and Boyd, *Succession to Maori Land*, p 6.

382. See Native Land Court, *Important Judgements*, p 20.

383. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, p 500.

384. Eddie Taihakurei Durie, 'Custom Law', Treaty Research Series (Wellington: Treaty of Waitangi Research Unit, 2013), p 66.

385. Durie, 'Custom Law', pp 62, 66–67, 68.

forebears' use of resources in quite specific terms, since 'all recognised resources were deemed to have "owners" or kaitiaki who had the right to access and control their use'. They added that it was 'essential that the right to take resources be known and acknowledged'.[386] All this evidence speaks to use rights being passed to the next generation in accordance with tikanga.

In respect of the last wishes of rangatira holding mana over particular lands it was also important to indicate publicly who was to inherit the mana whenua after his or her death. Ōhākī, the final instructions given before death, 'can be defined in English as a legacy (koha or oha)', and '[l]ike other gifts or acts of tuku, it was necessary for the ohaki to be heard by all the hapu involved to be valid'.[387] Henare, Petrie, and Puckey pointed also to the lesser importance traditionally in Te Tai Tokerau of senior male lineage tracing, rather than female descent lines, citing the lines of Rahiri, Kaharau, Hine-a-maru, Waimirirangi and a 'host of others within the [inquiry] rohe'.[388] It was not uncommon for men to reside with their wives' families, but the rights to the land remained with the wives.[389] Evidence given by women in the Native Land Court about boundaries, whakapapa, and the origin of place names showed that they had been taught these things, just as their male relatives had.[390]

Whānau and hapū sometimes sent their children to live with their relatives in other hapū to ensure they inherited use rights in that area. As the Tūranga Tribunal explained:

> When a marriage took place between members of different hapu, one person would move to live with the other person's kin. While the children of such a union would normally remain living with the kin-group where they were brought up, it was not uncommon for them to shift for a time to the rohe of the other parent, or a grandparent, renewing whakapapa connections and gaining access to a different resource complex.[391]

A significant aspect of the tikanga governing land tenure, therefore, was that it 'prevented the fractionating effect of devolution by descent alone'.[392]

Ironically, the English practice of primogeniture also served to prevent fragmentation of the landed estate of families. Professor Williams has observed that in the judgment Fenton did not discuss 'the anti-fragmentation principles of the English law of succession', nor did he make any 'allowance for mana, for the status of members of a hapu, or for ahi ka [unbroken occupation] . . . of land'.[393] In

386. Henare, Petrie, and Puckey (doc A37), pp 331. 336–338.
387. Henare, Petrie, and Puckey (doc A37), pp 346–347.
388. Henare, Petrie, and Puckey (doc A37), p 347.
389. Henare, Petrie, and Puckey (doc A37), pp 347–350. The authors cite evidence given in the Native Land Court and to Papatupu Block Committees.
390. Henare, Petrie, and Puckey (doc A37), p 349.
391. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 1, pp 18–19.
392. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, p 500.
393. Williams, *Te Kooti Tango Whenua*, p 180.

He Maunga Rongo, the Tribunal suggested that Fenton was 'anxious that land, once under Crown grant, should not be reclaimed by tribal law at the point of succession'.[394] In other words, the succession rules devised by Fenton were again directed towards the breaking up of collective ownership and tribal estates.

The rules of succession were therefore established by the Native Land Court which was empowered by legislation to decide on applications for succession. In 1871, Sir William Martin warned that their application would eventually generate a grievance. In his view, the Native Land Court should not interfere with Māori custom.[395] But Bennion and Boyd found that '[e]ven a cursory glance through land court minute books of last century suggests that its approach to succession orders generally followed Fenton's 1867 ruling. Interests in land were regularly split equally among all the children of the deceased' – though exceptions might be made to reduce the number of successors, either to facilitate alienations or to limit future fragmentation of the land.[396] Armstrong and Subasic gave evidence that in practice the Native Land Court continued to apply Fenton's *Papakura* rule.[397]

We have received no evidence to indicate that Te Raki Māori were at any stage consulted over nor their acceptance secured for the major change in succession law and the Court practices that followed the chief judge's ruling. In his evidence for Ngāti Tautahi ki Te Iringa, claimant Wiremu Reihana described the outcome of the Court's succession rules, which continued into the twentieth century:

> In the past, the mana of a rangatira over the land was usually passed down to the eldest son of that rangatira. The English succession laws destroyed this tradition and this resulted in the extreme fragmentation of our land interests. The English laws meant that land interests were succeeded to by every child of the deceased. My grandfather's interests should not have been succeeded to by individuals but kept together and held by one person who had the mana to receive the lands. However, this did not occur. By individualising title and by allowing for all the children of the deceased to succeed, we now have hundreds of owners in tiny blocks of land, making it difficult to manage the blocks properly.[398]

As noted earlier, the acknowledged results of the new succession rules and processes included fragmentation of the land, fractionation of ownership, and title congestion in the lands that Māori managed to retain. While the full extent and impact of these problems continued to expand and deepen into the second half of the twentieth century, they became evident to the second generation of owners to hold land under the inheritance system that had been grafted onto their own.[399]

An early example of the development of title congestion in Te Raki was the 4,767-acre Punakitere 2 block in Hokianga. Upon the award of a memorial of ownership

394. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 724.
395. Martin, 18 January 1871, AJHR, 1871, A2, pp 4–5.
396. Bennion and Boyd, *Succession to Maori Land*, p 8.
397. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 813.
398. Wiremu Reihana (doc T10(b)), p 53.
399. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 728.

in 1883, the block had 88 owners. On partition in 1897, Punakitere 2A of 500 acres had one owner, Punakitere 2B of 4,218 acres had 154 owners, and Punakitere 2C of 49 acres was awarded to the Crown. Punakitere 2B was further partitioned in 1901 into nine blocks: the Crown was awarded the 200-acre Punakitere 2B9, so that the remaining 4,018 acres were awarded in the form of eight blocks to a gross total of 260 owners; many owners almost certainly held shares in more than one block.[400] In brief, in 18 years, as the result of both Crown purchase and multiple successions, the average area held by each owner fell from 54.2 acres in 1883 to 15.45 acres (per gross owner) in 1901. Pakanae 2 showed a similar pattern: succession orders increased the number of owners from 66 in 1882 to at least 90 by 1889, and 250 by 1920 (we discuss this block further in chapter 10).[401]

Moreover, and following a similar pattern to that observed elsewhere, the number of succession hearings increased rapidly as the transformation of interests in land into individually owned and tradeable shares initiated by the Native Land Act 1873 took full effect.[402] In Te Raki as a whole, the number of succession and partition cases rose from 126 in the period from 1881 to 1889 to 266 in the succeeding decade, although declining from 43.2 per cent to 38.4 per cent of all cases.[403] The Native Land Laws Commission commented in its 1891 report on the sheer number of succession cases nationally: 'deaths are occurring at the rate of at least fifteen hundred a year. To these there will be certainly three thousand successors. Even now the undecided claims to succession are exceedingly numerous. Frequently the applicant dies before his claims to succession are heard'.[404]

This rise in cases may have reflected the fact that succession embedded itself fairly quickly in Māori practice, as the Tribunal has previously observed.[405] The Court's wide application of the rule created an impression among Māori that it was important to succeed to have their land rights recorded. Even if they no longer lived on the land, succession preserved their link to a block in the eyes of the Court (and the Crown), and their children could in turn succeed to their share.

For Te Raki overall, Thomas recorded that for 75 known blocks in the inquiry district titled during the period from 1880 to 1889, the average number of *original* owners was 22.1, but for 61 known blocks titled during the period from 1890 to 1899, the number of awardees rose sharply to 55.2.[406] A contraction in the area of land owned by Te Raki Māori and a growing population were combining with imposed succession rules to generate difficulties that would practically preclude

400. Berghan, 'Northland Block Research Narratives' (doc A039(f)), vol 7, pp 364–365.
401. Clarkson, 'Pakanae and Kokohuia Lands, 1870–1990' (doc A58), pp 9–10, 81–82; Thomas, 'The Native Land Court' (doc A68), pp 158–159.
402. See, for example, Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 451.
403. Thomas, 'The Native Land Court' (doc A68), p 190.
404. W L Rees, James Carroll, 23 May 1891, AJHR, 1891, G-1, p xvii (cited in Bennion and Boyd, *Succession to Maori Land*, p 9).
405. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, p 500.
406. Thomas, 'The Native Land Court' (doc A68), pp 17, 24.

any efforts to develop the lands involved. Assets, the Tūranga Tribunal observed, were being transformed progressively into liabilities.[407]

By the 1890s, the Crown was well aware of the difficulties that title congestion, fractionation of ownership, and unstable and disintegrating titles posed. However, before 1900 it did little more than offer some tentative remedial steps.[408] The Native Land Court Act 1894 made initial provision for the exchange of interests between two Māori owners. However, the Tribunal in *He Maunga Rongo* has pointed out that regulations under the Act seemed 'to limit exchanges to any two Māori owners owning land in severalty, or owning undivided interests in different blocks'.[409] As noted earlier, the 1894 Act also empowered the Court, with the consent of a majority of owners, to order the establishment of Māori incorporations.[410] However, there is no evidence that incorporation was a mechanism utilised by Te Raki Māori before 1900, and this innovation appears to have been largely ineffective in mitigating the effects of title congestion.[411]

Finally, we note that we do not make findings on the long term implications of legislation and legal decisions on succession in this volume of the report. We instead address this matter in our forthcoming volume concerning claim issues related to the twentieth century.

9.5.2.8 *Indefeasible titles?*

The Tribunal has previously drawn attention to the fact that Māori were disadvantaged in the colonial economy not only by the inadequate titles they received under the Native Lands Acts, but also under the new conveyancing system the New Zealand state adopted in 1870. With the enactment of the Land Transfer Act 1870 and the introduction of the Torrens system, land ownership in New Zealand became based upon certificates of title and the registration of titles in a public records system. As Boast has explained, a certificate of title 'is meant to, and to a significant extent actually does, give to the landowner a virtually unchallengeable ("indefeasible") title.'[412]

The Torrens system, devised by Robert Richard Torrens, underpins real property law in New Zealand and Australian states, and a number of other jurisdictions. It is premised on the belief that the defects of the British system, centred around the common law rule 'that no person could confer on a mortgagee or purchaser a better title than they possessed', could be remedied.[413] The Torrens system seeks to provide

407. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, p 494.
408. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, pp 499–503; Native Land Court Act 1894, s 122.
409. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 727.
410. Native Land Court Act 1894, s 122.
411. Thomas, 'The Native Land Court', p 194, fn 450.
412. Boast, *The Native Land Court*, p 203.
413. Hinde, McMorland, and Sim, *Land Law in New Zealand* (Wellington: Lexis Nexis, 2003), vol 1, p 227.

> security of title by means of state guarantee, simplicity by use of standardised forms in language readily understood by the layman, accuracy by the use of precise survey data, the reduction of costs by simplification of conveyancing procedures, expedition by streamlining and constantly revising recording procedures, and suitability to circumstances by relating our land registration system directly to our social and economic structures.[414]

Māori landowners were not well placed to secure land transfer titles. Relatively few held their land under Crown grant. From the outset, there were limits placed on the number of owners who could receive a Crown grant for any one block under the Crown's Native Land legislation. Under section 15 of the 1862 Act, where a certificate of title had been issued in favour of no more than 20 owners, the Governor could endorse the certificate of title with the Public Seal of the Colony, with the same effect as a Crown grant.[415] With the introduction of the ten-owner rule under the Native Lands Act 1865, the number of owners who could receive a grant was halved. Under sections 29 and 46 of the 1865 Act, certificates of title would be forwarded to the Governor who could issue a Crown grant for the land. In our inquiry, Crown counsel described this process for acquiring a Crown grant 'as an optional step, since in most respects a certificate of title provided all the security and certainty Māori owners needed'. On the other hand, Crown grants imposed additional obligations such as rates and land tax, and land held under them could be seized for the repayment of debts[o].[416]

Section 80 of the Native Land Act 1873 maintained the requirement that the modified customary title could be converted into freehold title only if the owners numbered 10 or fewer, despite the introduction of memorials of ownership.[417] This provision required that no more than 10 Māori owners of land under a memorial of ownership apply to the Court for 'declaration that they may in future hold the same in freehold tenure'. If the Court was satisfied that the owners understood the effect of converting their title, and that the owners' relative interests had been recorded, it could transmit the memorial to the Governor with a recommendation that a Crown grant be issued.[418]

Māori land held under Crown grant was brought under the Torrens system by the Land Transfer Act 1870 Amendment Act 1874. However, Māori owners were still required to apply to the Land Court under section 80 of the 1873 Act. Māori land subject to a Land Court title order under the 1873 Native Land Act became subject to the provisions of the Land Transfer Act from that date, and the district land registrar (appointed under that Act) was required to register dealings with such land on the provisional register book of the district until a Crown grant for

414. Department of Statistics, *The New Zealand Official Yearbook, 1978* (Wellington: Department of Statistics, 1978), p 282.

415. Section 18 of the 1862 Act provided that an owner listed on the certificate of title, or someone who had purchased an interest in the land, could apply to the Governor for a Crown grant.

416. Crown closing submissions (#3.3.406), pp 52–53.

417. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, p 440.

418. Native Land Act 1873, s 80.

the land was registered.[419] Under the Native Land Court Act 1886, duplicate orders of the Court were to be forwarded by the chief judge to the Minister of Lands, at which point the owners were entitled to 'have issued to them a warrant under "The Land Transfer Act, 1885, 'for the issue of a certificate of title for the land' (sections 20–22). Section 73 of the Native Land Court Act 1894 (a section which was over a page long) rendered practically all titles determined by the Native Land Court up to 1894 automatically subject to the Land Transfer Act.[420] When the Court ascertained the title of 'Native land' from that time, the registrar of the court was to forward the order to the district land registrar, who 'shall as soon as may be thereafter' issue a certificate of title to those named in the order and enter the order on the provisional register. At that point the provisions of the Land Transfer Act 1885 applied to the land, though the registration remained provisional until a certificate of title was issued.[421] But while the Native Land Court Act 1894 provided that every order affecting land could be registered, it did not require it (section 30).

Despite these legislative attempts to implement a state guarantee for Māori land, the 1980 Royal Commission on the Māori Land Courts found that a separate system developed alongside the Torrens system, 'for recording the details, including ownership, of Māori land within the records of the Maori Land Court'. The commission noted that there was 'no statutory justification for this procedure'. It had always been intended that as soon as land in customary ownership had been investigated, 'this land should be made subject to the Land Transfer Act and a certificate of title issued under the Act pursuant to a Crown grant'.[422] However, it observed that many orders were not forwarded for registration because of unpaid fees, or the absence of an acceptable survey.[423] Another issue the commission identified was 'the failure of the parties involved to have the orders lodged in the Land Registry Office'.[424] Boast has stated that the relationship between the Land Transfer Acts and the Native Lands Acts was 'far from clear'. He cited the conclusion of Young, Belgrave, and Bennion that district land registrars 'often refused to accept transfer documents for registration on titles or because the title prohibited or prevented registration'. The Registrar-General could also be required to defend transactions because statutory requirements were contradicted or not met.[425] The problem, Boast adds, remains a serious one 'to this day'.[426]

419. Land Transfer Act 1870 Amendment Act 1874, ss 9–10.

420. Royal Commission on Maori Land Courts, AJHR, 1980, H-3, p 39.

421. Section 73 further stated that, until a certificate of title was issued, the existing Native Land Court certificate, memorial of ownership or other instrument of title, or duplicate copies, should be embodied in the Provisional Register; the chief judge was to forward such documents periodically to the district land registrars for this purpose.

422. Royal Commission on Maori Land Courts, AJHR, 1980, H-3, p 39.

423. Royal Commission on Maori Land Courts, AJHR, 1980, H-3, p 40.

424. Royal Commission on Maori Land Courts, AJHR, 1980, H-3, p 39.

425. Grant Young, Michael Belgrave, and Tom Bennion, *Native and Maori Land Legislation in the Superior Courts, 1840–1980* (Auckland: School of Cultural Studies, Massey University, 2005), p 36; cited in Boast, *The Native Land Court*, p 203.

426. Boast, *The Native Land Court*, p 203.

A further problem was a disconnect between the statutory language of the Land Transfer Act 1885 and subsequent Native Land legislation that sought to bring Māori land under the Torrens system.[427] Section 67 of the Land Transfer Act 1885 stipulated that certificates of title under the Act would be 'valid and effectual against the title of any other person' where no other person was in adverse or actual occupation of the land.[428] But this provision only extended to land brought under the Act by an 'applicant proprietor'. In its discussion of the Waiohau fraud in the *Te Urewera* report, the Tribunal observed that this provision did not include titles 'brought under the Land Transfer Act by an order of the Native Land Court', as the Supreme Court determined in its 1905 decision in *Beale v Tihema Te Hau*.[429] The Tribunal concluded that it was difficult to accept that the Crown deliberately denied Māori land the protections of section 67, and the continued requirement that Māori apply for a freehold title despite the provisions of the 1886 and 1894 Native Land Court Acts 'may have been an oversight, reflecting carelessness with Maori interests'.[430] The same year, a Privy Council judgment spelt out the impact of the doctrine of indefeasibility on title deriving from freehold orders of the Native Land Court. As the Tūranga Tribunal pointed out, the Privy Council reversed the decision of the New Zealand Court of Appeal on three Tūranga cases: in a single consolidated judgment', it found that unless there had been fraud, no irregularity in the land court's processes could disturb the registered proprietor's title.[431]

The result of this divergence of the two systems for recording titles, the 1980 royal commission concluded, was that 'the benefits of the land transfer system [were] replaced by a cumbersome, inefficient system of records of Maori land and its ownership which put the Maori people in their land dealings at a considerable disadvantage compared with Europeans'.[432] Registration of titles in the Native Land Court did not offer certainty of title, and without such certainty, the lands involved were not acceptable as security.[433] As the Tribunal observed in *He Maunga Rongo*, 'multiple title was hard enough for lenders to cope with. Unregistered multiple titles were worse.'[434] In short, security of title was a fundamental requirement for participation in the commercial economy, but neither the titles made available to Māori nor the system of registration offered that certainty. The commission found that this problem had persisted into the twentieth century. As late as 1979, the number of unregistered partition orders in the Tokerau Maori Land District stood at 3,630 (21 per cent of the national total) and the number of unsurveyed partition

427. Waitangi Tribunal, *Te Urewera*, Wai 894, vol 3, p 1396.
428. Land Transfer Act 1885, s 67.
429. See the Te Urewera Tribunal's discussion of *Beale v Tihema te Hau and Attorney General* (1905); Waitangi Tribunal, *Te Urewera*, Wai 894, vol 3, pp 1394–1396.
430. Waitangi Tribunal, *Te Urewera*, Wai 894, vol 3, p 1396.
431. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, p 466.
432. Royal Commission on Maori Land Courts, AJHR, 1980, H-3, p 38.
433. Royal Commission on Maori Land Courts, AJHR, 1980, H-3, p 40.
434. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 770.

orders at 2,411 (25 per cent).[435] For the Tokerau district, the proportion of all Māori land titles that remained unsurveyed stood at almost 52 per cent.[436]

Paul Thomas's evidence illustrates that during the first decade of the Court's operation many Te Raki Māori did seek Crown grants in exchange for their certificates of title. Between 1865 and 1875, 403 Crown grants were issued in our district for largely small blocks or sections, and only four Crown grants were issued for blocks of over 20,000 acres.[437] From 1875 when Māori land came under the Torrens system there was a sharp decline in the grants issued to Te Raki Māori, with only three issued that year and Thomas's evidence did not include any record of further grants issued.[438] It is not clear why this was the case. Te Raki Māori owners like those in some other districts, may have been suspicious of registration under the Land Transfer Act, whether because they feared, or could not afford the registration fees, or because they feared that it would facilitate the alienation of the dwindling area remaining in their ownership. One major outcome of Māori hesitancy, however, was that they were in effect excluded from the Liberal government's Advances to Settlers scheme. Māori freehold land did not qualify for assistance under the Government Advances to Settlers Act 1894. Māori had to get a Land Transfer Act certificate of title first – a somewhat daunting prospect, Boast suggests. Some may have achieved it, 'but in the nature of things this could not have helped very many families'.[439]

The economic and social consequences of the fact that such high numbers of Te Raki Māori land titles remained unregistered in the land transfer system would become increasingly manifest after the turn of the century. Yet it was not until the passage of the Te Ture Whenua Maori Land Act 1993 (section 123) that all orders made in the Māori Land Court affecting title to land had to be registered under the Land Transfer Act 1952. We will consider this issue further in the next volume of our report.

9.5.3 Conclusion and treaty findings

As we discussed earlier, there is some evidence to indicate that Te Raki Māori were open to changes to customary tenure, attracted by the security of possession that they were told Crown-confirmed titles would confer and the opportunity to develop whānau properties while undertaking limited alienations to buy goods, stock, ploughs, and other farm implements – and attract settlement as well. But as the hui convened by Arama Karaka Pī at Waimā in September 1863 in response to Grey's rūnanga scheme made clear, their preference was for a collective title offering equivalent security to that of an individual certificate of title or grant, and their expectation was for a title determination system and process under their own control. Those aspirations were rejected and actively undermined by a colonial

435. Royal Commission on Maori Land Courts, AJHR, 1980, H-3, p 45.
436. Royal Commission on Maori Land Courts, AJHR, 1980, H-3, p 42.
437. Thomas, 'The Native Land Court' (doc A68), pp 25, 35, 39.
438. Thomas, 'The Native Land Court' (doc A68), p 289.
439. Richard Boast, *Buying the Land, Selling the Land: Governments and Maori Land in the North Island 1865–1921* (Wellington: Victoria University Press, 2008), pp 260–261.

Legislature newly empowered to enforce its assimilationist goals and programme of accelerated land purchase.

Neither the titles offered under the ten-owner rule introduced in 1865, nor their replacement with the 'memorials of ownership' introduced in 1873 (renamed 'certificates of title' in 1880), offered the combination of security and flexibility Te Raki Māori were seeking. These titles had no basis in Te Raki Māori tikanga, nor did they approach the certainty of freehold titles. The one had the effect of legally dispossessing the hapū; the other crystallised title into a precise list of owners who held individual shares in the land, creating a new certainty not for hapū but for potential purchasers as to with whom to deal. We agree with the conclusion of the Tribunal in other inquiries that the intention was to compel Māori to sell lands that the Crown and colonists assumed could only be developed if in their own possession.

Under the system created by the Native Land Act 1873, groups or individuals could alienate their interests by partitioning out and creating a new title if the majority of owners in the original block consented to the partition.[440] This established a process that fell well short of collective consent because majority agreement could be achieved in a piecemeal fashion without prior discussion by the whole community of owners. Again, the undermining of collective control cannot be seen as other than deliberate. Over the next two decades, several legislative provisions were passed, the trend of which was to reduce the number of owners who had to consent to a partition and sale, favouring Crown and private purchasers while substantially weakening protections for Māori. It was not until 1894 that an apparent (but largely unattractive and unutilised) opportunity for incorporation was belatedly offered.

Dissatisfaction on the part of Te Raki Māori was made clear in the deliberations of several pāremata and in their representations to politicians and to the Native Land Laws Commission of 1891 which concluded that, after all the difficulties and costs involved in proving ownership, Māori were 'met by the absolute uncertainty of the title thus laboriously secured'. The commission went on to find that it was 'doubtful whether a single title resting upon the Native Land Act of 1873 and its many amendments can be upheld'.[441]

By simultaneously empowering Māori as individuals but disempowering communities, the memorials of ownership proved to be especially destructive of collective ownership and management. Te Raki Māori, as both individuals and collectives, lost the right and opportunity to choose how their lands might be best managed to serve the twin purposes of community stability and economic advancement. We agree with the assessment of the Tūranga Tribunal that a system that 'constrained choice and removed community decision making in this way was unquestionably designed to force sales'.[442] It was also a system imposed upon Māori largely without consultation and against their will.

440. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, pp 401.
441. W L Rees, James Carroll, 23 May 1891, AJHR, 1891, G-1, p xii.
442. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, p 528.

Accordingly, we find that:

- The Crown introduced laws offering a title that failed to give legal expression to collective tenure and to accord with Te Raki Māori preferences. Such failures breached te mātāpono o te houruatanga/the principle of partnership and te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect and the guarantee of te tino rangatiratanga.
- The titles awarded to Te Raki Māori under nineteenth-century Native Land legislation and through the Native Land Court failed to provide the same certainty, stability, and protection as titles awarded in respect of general land and duly registered under the Land Transfer Act. The failure of the Crown to provide an equivalently robust titling regime for Māori as that applying to the settler population (and which failed to equip whānau and hapū to participate in the colonial economy to the same degree) breached te mātāpono o te mana taurite/the principle of equity.

9.6 How Did the Court Operate in Te Raki, 1865–1900?

9.6.1 Introduction

As we noted in section 9.2.3.3, the claimants made a number of specific allegations in respect of the Native Land Court's operation in our inquiry district and its appropriateness for determining title to Māori land. Claimants argued that the Court's investigations were perfunctory and its records indecipherable or not maintained (despite the Government having an obligation to do so). They also criticised what they saw as the 'adversarial' approach of the Court and its negative effect on their tūpuna, whom they described as being pitted against each other in its proceedings.[443] The claimants argued that judges of the Native Land Court lacked an understanding of tikanga and te reo commensurate to the sensitive and significant tasks before them. Perhaps the claimants' most encompassing allegation was that the Court was not a fair and impartial judicial body, but instead effectively served as part of the executive arm of Government, sharing its biases and objectives.[444] Claimant counsel advanced a conclusion similar to that reached by the historians who contributed expert evidence to the Whanganui Land inquiry: both sides of the debate agreed that the Court had been established 'to further particular Crown policy objectives' and that the judges of the Court 'shared those objectives and were frequently anxious to promote them.'[445]

The claimants argued that the Court's deficient orientation, processes, and mechanisms breached the treaty principle of active protection and the guarantee of equality contained in article 3.[446] As we also noted earlier, the Crown did not respond specifically to the majority of these allegations, except to refute the

443. Claimant closing submissions (#3.3.225), p 88.
444. Claimant closing submissions (#3.3.225), p 88.
445. 'Agreed Historian Position Statement on Native Land Court Issues – March, April, and May 2009' (Wai 903 R01, #6.2.5), p 74.
446. Claimant closing submissions (#3.3.225), p 88.

argument that the Native Land Court was not an independent tribunal. It also submitted that allegations of collusion between judges and the Crown were 'exceptional and based largely on supposition'. Furthermore, Crown counsel suggested: 'The fact that the judges agreed with the Crown's assumptions about the rightness of tenure reform, and the assimilation of Māori, is not enough to identify them with the Crown.'[447]

In this section we are concerned primarily with the constitution of the Native Land Court and the manner in which it conducted title investigations. We focus, in particular, on the roles and qualifications of judges and assessors, the notification and scheduling of sittings and hearings, and Court record-keeping. In general, we consider whether the practical operation of the Court complied with the Crown's treaty obligations.

9.6.2 The Tribunal's analysis

9.6.2.1 *The operation of the Court in Te Raki: judges and assessors*

In the following section, we briefly consider what is known about the identities, experience, and attitudes of the judges who presided over Court hearings in Te Raki during the critical period of the 1870s. We also explore the position of assessors in the Court structure and the role they played in the title determination process.

9.6.2.1.1 The Native Land Court judges

Historian Professor Keith Sorrenson has observed that the judges should be considered products of their time who shared a set of assumptions and orientations:

> We should not assume that the judges came to their task with open and empty minds, ready to view the Māori customary scene objectively and on Māori terms. . . . Above all, the judges were men with a mission, not merely to interpret and record Māori custom but to free it from the constraints of time and set it on the path of evolution.[448]

There was no body of precedent to which the early Native Land Court judges could refer or on which they could rely. The Court was directed to be guided in its judgments by Māori custom, but Pākehā judges were ill equipped to be deciding matters of tikanga. Although some of the first judges were chosen for their local knowledge and considered themselves to be experts on Māori matters, men like Judge Maning brought their English cultural imperatives to the business at hand.

447. Crown closing submissions (#3.3.406), p 8.

448. M P K Sorrenson, 'The Lore of the Judges: Native Land Court Judges' Interpretations of Māori Custom Law' JPS, vol 124, no 3 (2015), p 224. For an exploration of some of Fenton's ideas, see M P K Sorrenson, 'Folkland to Bookland: F D Fenton and the Enclosure of the Mōri "Commons"', NZJH, vol 45, no 2 (2011), pp 149–169.

Chief Judge Fenton directed his judges to follow 'the original principles of equity' until they had established a common law.[449] Soon, a set of rules had been developed for determining which groups had rights in a particular area of land and its resources. These principles of tenure were later identified by Judge Norman Smith in his seminal work on Māori Land Court practice as the take of discovery, ancestry, conquest, and gift.[450] Most weight was given to evidence of physical occupation. Dr Belgrave has pointed out that although 'loosely based on the evidence of custom' given in Court, the identification of take and precedents was 'driven as much by policy considerations'.[451] Alternative interpretations of custom based in other foundational concepts such as whanaungatanga were ignored as the Native Land Court set about simplifying the complexities of customary tenure.

Appointees to the Native Land Court lacked not only expertise in tikanga but also legal training.[452] In his major study of the Native Land Court, Professor Boast noted that of the 17 judges active in Te Raki during the latter part of the nineteenth century, only five had studied law. In his view, '[t]he lack of legal expertise on the bench was . . . undoubtedly a problem'.[453] The multiple changes to Native Land legislation during the period heightened the importance of a thorough and up-to-date knowledge of the law.[454] While some judges were undoubtedly men of integrity and considerable capacity, others allowed their personal views, inclinations, and prejudices to colour their approach to their duties.

Frederick Maning served as a judge of the Native Land Court in the north between 1865 and 1876. Maning, who had married and had four children with Moengaroa of Te Hikutū, saw himself as knowledgeable on matters of custom but also as a major agent of social change, and the Court as initiating 'a revolution . . . which must of necessity displace barbarism and bring civilization in its stead, for the difference between a people holding their country as commonage and holding it as individualized real property is, in effect, the difference between civilization and barbarism'.[455]

Maning's biographer John Nicholson quoted from an 1880 letter written by Maning to Samuel Locke (variously a land purchase agent, resident magistrate at Taupō, and politician) in which he averred that 'any machine of any shape that will get the land out of the hands of the Natives in the first instance is just what we

449. 'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws', minutes of evidence, AJHR, 1891, G-1, p 55 (cited in Riseborough and Hutton, *The Crown's Engagement with Customary Tenure in the Nineteeth Century*, p 59).

450. Norman Smith, *Native Custom and Law Affecting Native Land* (Wellington: Maori Purposes Fund Board, 1942).

451. Belgrave, 'Maori Customary Law', p 35.

452. Fenton evidence, 19 March 1891, 'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws', AJHR, 1891, G-1, p 55.

453. Boast, *The Native Land Court*, pp 118–119.

454. Bryan Gilling, *The Nineteenth-century Native Land Court Judges: An Introductory Report* (Wellington: Waitangi Tribunal, 1994), p 24.

455. Maning to Fenton, 24 June 1867, AJHR, 1867, A-10, pp 7–8.

required'.[456] Although he indicated that he would be prepared to issue a tribal title, with one exception, he never did so.[457] According to Boast, he was highly critical of section 17 of the Native Lands Act 1867, but later he was noteworthy for sometimes insisting on listing all owners in the memorial of ownership contrary to the stated preference of the applicants before him and the wishes of Crown purchase officers (see section 9.6.2). He was quite prepared to ignore provisions of Native Land legislation with which he disagreed; this was apparent in his refusal to conduct the 'preliminary inquiries' required by the Native Land Act 1873.[458]

Nicholson described a man to whom the transformation of the Native Land Court from a consultative mechanism into an authoritative instrument appealed, as it reflected his existing biases and autocratic streak.[459] Maning asserted that there was 'No other authority but myself' and resisted any interference in the operation of his Court or his opinions, with little respect for the contribution of assessors, or indeed, the opinions of Crown purchase officers (as we will discuss further).[460] Armstrong and Subasic argued that Maning's views coloured his approach as a Native Land Court judge, evident in his rigorous opposition to any expression of rangatiratanga, his dismissal of Māori assessors as irrelevant, his contempt for the Māori custom that was supposed to guide his decisions, and his desire to reduce Māori land ownership to the bare minimum necessary for subsistence. In their view, he was strongly prejudiced – more so than most of his fellow judges – against Māori chiefly authority and any expression of Māori collective will, and bitterly critical of any attempt by Māori or the Government to limit, restrict, or impugn the integrity and independence of his Court.[461] Boast shared that critical view, referring to Maning as 'an embittered bigot, prejudiced against Maori to an astonishing degree'.[462]

For their part, Te Raki Māori were acutely aware of Maning's views. It was for those reasons that rangatira involved in the dispute over the ownership of Puhipuhi (discussed later) did not want Maning to preside over the title hearings.[463] Although Maning's portrait still hangs in the wharenui of one Hokianga marae, it seems that his attitudes towards the local people hardened after the death of his wife and her brother, Hauraki, and soured with age.[464]

456. Maning to Locke, 11 July 1880 (cited in John Nicholson, *White Chief: The Story of a Pakeha-Maori* (Auckland: Penguin Books, 2006), p 186).
457. Maning to Fenton, 24 June 1867, AJHR, A-10, p 8.
458. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 683–684.
459. Nicholson, *White Chief*, p 187.
460. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 322.
461. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 722–725.
462. Boast, *The Native Land Court*, p 138.
463. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 722–725. They noted that many Māori were in considerable debt to Maning. If and whether such indebtedness influenced any of his decisions as judge is not clear, although the potential for conflicts of interest certainly existed.
464. David Colquhoun, 'Frederick Edward Maning' in *The Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, https://teara.govt.nz/en/biographies/1m9/maning-frederick-edward.

Judge Henry Monro, formerly a clerk in the Native Land Court, similarly believed that the extinguishment of customary ownership was necessary if Māori were to be 'civilized'. Monro had made his views clear to Fenton in 1871. He recognised that the Native Lands Act 1865, insofar as it sought to promote the individualisation of Māori land ownership, was contrary to the treaty and its recognition of the collective right that underlay the exercise of rangatiratanga, but claimed that such right 'was one too much at variance with the habits of a civilized community to be adopted by the colonists'. The Crown should consequently act as 'an instrument for the gradual exchange of the vague and imperfect occupancy tenure of the Maori tribes into the more definite and fuller proprietary tenure of individual citizens, whether Maori or European, which alone could be recognized by the law of a settled Civil Government'.[465]

Monro was certain that the purpose of the Native Lands Act 1865 was to promote the individualisation of land ownership and observed that, on this basis, 'it was decided that not more than ten names should be inserted in any Crown grant made in pursuance of an award by the Land Court'. He added that when making this provision, Parliament recognised the inconvenience certain to result from having to deal with a large number of owners and was eager to spare the Court and purchasers such trouble.[466]

Scholarly assessments of Monro vary considerably. In a report prepared for the Muriwhenua Land inquiry of 1997, historian (now professor of law) Claudia Geiringer found that he made no attempt to establish the rights of all owners, or to include all owners in memorials of ownership. Further, we received no evidence to indicate that he instigated any preliminary inquiries as required by the Native Land Act 1873. Monro (like Maning) appears to have instead relied entirely on the evidence presented in Court. He did not question the validity of that evidence and may have deliberately ignored the rights of some claimants. In contrast to Maning, in almost all cases, he accepted the wishes of applicants and purchase officers to limit the numbers named in blocks to 10 or fewer owners.[467] Armstrong and Subasic described him as 'little more than a Crown agent'; they observed that he was 'guided by Crown land purchase agents in matters of title adjudication', and argued that he 'colluded' with them in awarding title to those whom they identified.[468] Armstrong and Subasic cited Paraone Ngaweke's comments to Fenton, made during Monro's 1876 Hokianga sittings, that the judge was a 'wicked European . . . and a fool in judicial matters'.[469]

Boast, on the other hand, noted that in 1867 Monro offered some scathing criticism of the Government's conduct with respect to the Poverty Bay

465. Monro to Fenton, 12 May 1871, AJHR, 1871, A-2A, p14. Part of the letter was reprinted in AJHR, 1890, G-1, p21.

466. Monro to Fenton, 12 May 1871, AJHR, 1871, A-2A, p15.

467. Claudia Geiringer, 'Historical Background to the Muriwhenua Land Claim, 1865–1950', report commissioned by the Waitangi Tribunal, 1992 (Wai 45 ROI, doc F10), pp87–89.

468. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp48, 61, 704.

469. Paraone to Fenton, 7 July 1876 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p706).

(Tūranga) confiscations, awarded costs against the Crown, and 'was rebuked for his impertinence in presuming to criticise government policy'. Native Minister Richmond accused him of obstructing the 'pacifying of the country'. In Boast's assessment, Monro 'saw himself as a judge preserving a proper stance of judicial independence'.[470]

Like Maning, Judge John Rogan had no legal training at all. During the 1840s, he worked as a surveyor and Crown purchase agent in Taranaki, where he met and became a close friend of Donald McLean. In 1854, he was employed by McLean as a land purchase commissioner and in 1857 was assigned to Kaipara, where he oversaw several purchases. Rogan became the resident magistrate for Kaipara in 1864 and served as the president of the Kaipara courts under the Native Lands Act 1862.[471] While relatively little is known about his performance as a judge, especially in Te Raki itself, he was reportedly respected by Kaipara Māori and appears to have understood the need to maintain good relations with rangatira.[472] In particular, Rogan was careful not to offend the prominent rangatira Te Tirarau, in light of his influence in the north.[473] Rogan's good reputation among Māori evidently extended beyond Kaipara, as rangatira involved in the Ōtāua case specifically asked for him to join Maning to resolve the conflict there. In contrast to Maning, Rogan was known for his flexibility and apparent willingness to accommodate Māori views.[474]

As lawyer and historian Dr Bryan Gilling has observed, the Native Land Court 'was brought into being by legislation; it has been directed and channelled at every turn by legislation; its powers and methods of operation have been circumscribed and shaped by legislation and executive superintendence'. It was for this reason, he argued, that the Court was subject to 'a unique degree of ministerial control'.[475] Certainly, the judges (and assessors) were appointed by the Governor by warrant (section 6 of the Native Lands Act 1865) and by the Governor-in-Council under section 8 of the Native Land Act 1873. We agree, too, that the procedures of the Native Land Court were heavily prescribed by legislation – although not necessarily effectively so.

It is, however, difficult to establish direct 'ministerial control' of judges in the decisions they made. There could be close communication between the executive and the judiciary and between the Native Department and court officials. As we discuss (at section 9.6) in the case of Hauturu, Chief Judge Williams contacted Native Minister Bryce to ask whether the government still wished to acquire the island and recommended if so that restrictions on alienation be placed on the

470. Boast, *The Native Land Court*, pp 194–195; Richmond to Monro, 21 August 1867 (cited in Boast, *The Native Land Court*, p 194).

471. Boast, *The Native Land Court*, pp 127–128; Gilling, *The Nineteenth-century Native Land Court Judges*, p 8.

472. Boast, *The Native Land Court*, pp 128, 133.

473. T B Byrne, *The Unknown Kaipara: Five Aspects of its History 1250–1875* (Auckland: T B Byrne, c 2002), p 363.

474. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 362.

475. Gilling, *The Nineteenth-century Native Land Court Judges*, pp 2, 5.

title;[476] and Judge J S Clendon assisted in the Crown purchase of Omaunu 2 (see chapter 10, section 10.4.[477] However, we have received no evidence of direct interference in the judgments of the court. No restrictions were entered were put in the title at Hauturu at the request of the owners.

On the other hand, we do think the Crown had an obligation to ensure that the law was administered by competent judicial officers who had the requisite knowledge of tikanga and the skills to navigate the increasingly complex set of rules established by land legislation. While it may have been impractical to require nineteenth-century judges to have expertise in tikanga and Māori custom, in our view, this shortfall required the empowerment of Māori to determine title to their own lands, as had been contemplated at the time, and as both Māori and even some Pākehā commentators and politicians would continue to advocate throughout the later part of the nineteenth century. At the least, the assessors should have had a deciding role in guiding the Court's decisions as to customary rights, as they had under the 1862 legislation. We discuss whether this happened and the role of assessors in general in the following section.

9.6.2.1.2 The role of assessors

Assessors who sat on cases in our district included Hōne Mohi Tāwhai, Neri Taruhia, Tamaho Te Huhu, Winiata Tomairangi, Wiremu Tipene, Maihi Parāone Kawiti, Hoterene Tawatawa, Te Hemara Tauhia, Te Keene, Hone Peeti, Arama Karaka Pī, Te Hira Awa, Riwhi Hongi, Tamati Huingariri, Himi Marupo, Wiremu Kaire, Hikuwai Tangi, Te Maka Hori Ngere, and Wepiha Pī.[478] In their submissions, claimants noted that '[t]he main avenue provided for the participation of Te Raki Maori experts [in Native Land Court proceedings] was the role of the Native Assessor', but that their involvement was 'limited under the 1865 Act and only diminished over the period under consideration [1865 to 1900]'.[479] Assessors therefore made only a minimal contribution to the shaping of the Court's decisions, its understanding of tikanga, and the development of precedent. The Crown, on the other hand, claimed that the Native Lands Act 1865 and the Native Land Act 1873 were 'quite clear about the pivotal role the assessor was expected to play in the work of the Court'. With respect to the argument advanced by claimants that, under the Native Lands Act 1865, assessors at best could veto the decision of a judge, the Crown insisted that 'The power to veto decisions is anything but subordinate', but rather represented 'equality and a requirement for consensus'. Crown counsel did acknowledge that under the Native Land Court Act 1894, the role of assessors was reduced, but suggested that by this time most of Northland's customary land had already passed through the Court.[480]

476. Johnson, 'Report on the Crown Acquisition of Hauturu' (doc E8), pp 14–15.
477. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1150, 1154.
478. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 392, 418, 423, 560, 726, 942, 914, 1178, 1540–1545; Thomas, 'The Native Land Court' (doc A68), p 29.
479. Claimant closing submissions (#3.3.225), p 127.
480. Crown closing submissions (#3.3.406), pp 41–43.

The legislative provisions relating to assessors underwent several important changes during the 1860s and 1870s. As discussed earlier, the Native Lands Act 1862, with respect to the composition of the courts that would be created under it, did no more than specify that each 'shall be under the Presidency of a European magistrate'. Loveridge quoted Native Minister Bell to the effect that each court though 'presided over by a European magistrate, will be mainly composed of Native Chiefs'.[481] That composition was confirmed by the proclamations of 21 April 1864 that established the Kaipara North and Kaipara South courts, while the four Māori appointed (two to each court) were not assessors but judges of 'equivalent status with the Resident Magistrate, save that he was the presiding officer'.[482]

The 29 December 1864 regulations, which were gazetted for the practice and procedure of the restructured Native Land Court, provided for one chief (European) judge, other (European) judges, and such native assessors 'as may be from time to time appointed by the Governor'.[483] No assessor was permitted to sit on a case in which he had a personal interest. These provisions were carried forward into the Native Lands Act 1865: section 6 provided for the selection and appointment by the Crown of judges and Māori assessors, while section 12 empowered both to act judicially and provided that, with respect to every decision and judgment, each judge and at least two assessors had to 'concur'. This seemed to imply that assessors could not outvote a judge, nor could a judge outvote assessors. The balance changed again two years later. Section 16 of the Native Lands Act 1867 empowered a judge to sit with one assessor. The previous requirement for two had been found, according to Native Minister Richmond, 'inconvenient, and attended with considerable expense. It was desirable', he added, 'to retrench to the utmost extent, as the courts did not sustain themselves'.[484] That decision suggested, in our view, that the Crown did not greatly value the contribution assessors might make.

Evidence as to the degree of influence assessors were able to exercise in title investigations is generally sketchy. However, previous Tribunal reports have been critical of the subordinate position created for Māori in that role. As the Tribunal found in the Tūranga inquiry, whereas under the Native Lands Act 1862 assessors were regarded officially and acted as judges, their status was downgraded under the Native Lands Act 1865 by which they held their positions at the pleasure of the Governor.[485] While judges also held office subject to maintaining 'good behaviour', and if need be, their number could be reduced by the Governor-in-Council, the position of assessors was more tenuous. The Hauraki Tribunal considered the assessors to have been only intermittent participants in title hearings

481. Bell minute, 'Native Lands Bill', 5 November 1862, BPP, vol 13, p 215 (cited in Loveridge, 'The Origins of the Native Lands Acts and Native Land Court' (doc E26), p 190).

482. Loveridge, 'The Origins of the Native Lands Act' (doc E26), pp 212, 212 n

483. 'A Proclamation Bringing "The Native Lands Act 1862 into Force within the Whole of the Colony', 29 December 1864, *New Zealand Gazette*, 1864, no 51, p 465; 'A Warrant making Rules for Regulating the Sittings of Courts under the "Native Lands Act 1862"', 29 December 1864, *New Zealand Gazette*, 1864, no 51, p 467.

484. 'Native Lands Bill', NZPD 1867, vol 1.2, p 1135.

485. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, p 413.

and an inadequate substitute for Māori control over the investigation process.[486] In *He Whiritaunoka* and in *Turanga Tangata Turanga Whenua* the Tribunal also questioned the rule prohibiting assessors from participation in hearings affecting lands in their own districts. This meant that local hapū were unable to have any direct input into the decision-making process, diluting the potential contribution of assessors as to matters of tikanga.[487]

The Central North Island Tribunal reached slightly different conclusions. It was noted in *He Maunga Rongo* that assessors were at times significant participants in the process. The Tribunal also observed that assessors, despite being drawn from outside the district, had knowledge of tikanga that other members of the Court lacked, enabling them to ask pertinent questions about such matters during title investigations.[488] Nonetheless, the Tribunal was generally sceptical about the limited and politically contingent space overall for assessors, and critical as to the inadequacy of the court system when compared to true Māori aspirations of controlling title determination themselves. Despite their active participation in title investigations, such 'limited Maori involvement in a Pakeha-created process was no substitute for real Maori control over the process'.[489] The Central North Island Tribunal concluded that '[a]ssessors played a role in a court system designed by the Crown, and their role in that system was defined by the Crown and, particularly after 1865, was subservient to that of the Pakeha judge.' It was hardly an equivalent to determination of customary ownership by rūnanga and komiti.[490]

As Boast has noted, considerable variation existed in the effectiveness and reputation of assessors, with some being considered conscientious and hardworking by contemporary Māori, and others less well thought of. Many assessors themselves, such as Ngāti Whanaunga leader and conductor of Native Land Court cases at Cambridge, Hamiora Mangakahia, also displayed a keen awareness of the shortcomings of the system they were working under and were vocal in expressing their concerns.[491]

The status and role of assessors was discussed by several of the rangatira from Te Raki and elsewhere who responded to Haultain's inquiry of 1871. Pāora Tūhaere proposed doing away with assessors altogether: 'They are of no use', he suggested, 'and have little or nothing to say to the cases that are being tried; they sit like dummies, and only think of the pay they are going to get.' He claimed that assessors 'always support the side in which they have friends or other interest'.[492] Others argued that some judges, among them Monro, overruled assessors.[493] Wiremu Pomare also suggested that most assessors 'sit there and say nothing, because they

486. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 2, p 777.
487. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, pp 385–386; Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, p 449.
488. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, pp 495–500.
489. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 497.
490. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, pp 497–498.
491. Boast, *The Native Land Court*, pp 138–139.
492. Te Wheoro and Paeora Tuhaere, 18 February 1871, AJHR, 1871, A-2A, p 26.
493. Henry Tomoana, evidence, 31 May 1871, AJHR, 1871, A-2A, p 37.

know nothing; they are like the pictures in a shop window, only put there to be looked at', acknowledging at the same time, that '[g]ood assessors can be of great assistance to the Judges in different cases where Maori custom is in question.'[494] For his part, Eru Nehua objected to 'the invariable selection of chiefs as assessors. They [assessors] should be men of good judgment. . . . Let the Maori elect the assessors, and the Europeans give them the power.'[495] Hemi Tautari, on the other hand, claimed that Māori 'approve generally of assessors sitting with and assisting the Judges.'[496]

While the views of Te Raki rangatira are not entirely clear, it does appear that they objected not to the presence of assessors, but to their selection and their clearly circumscribed role. According to Haultain, many Māori felt that they were of little use, being 'too much in awe of the Judge', and did 'not exercise any influence on the judgment'. However, most of those who responded to his inquiries agreed that assessors should be retained, citing a desire 'for more general employment in the administration of those laws that apply to themselves'.[497] It would seem that the confidence of Te Raki Māori in the Court system was, on the eve of the Crown's drive to acquire land in Northland, less than robust and that, in their view, the position of assessors in the Court's processes required strengthening.

Maning's attitude indicates that assessors had little-to-no influence in his Court. Responding to Sir William Martin's draft Native Land Court Act in 1871, he argued that there were many cases in which an assessor was not required and an unnecessary expense. In his view, their employment should be left to the discretion of the judge but an abrupt change in the system 'would not, perhaps, be advisable'.[498] Maning described assessors as 'gormandising hogs' and, as Armstrong and Subasic argued, considered Māori customary law as 'little more than a set of despotic, "crude and barbaric" customs based on mere force' which he required no assistance in interpreting.[499] Maning claimed that he never consulted with them on 'any advice on matters of business', stating, 'I know better than that'.[500]

The first Vogel Ministry (1873 to 1875), in which McLean served as Native and Defence Minister, decided to dilute the role of assessors further. Section 15 of the Native Land Act 1873 specified that an assessor 'may assist in the proceedings [of the Court] but not otherwise' and that his 'concurrence shall not be necessary to the validity of any judgment or order'. The use of the word 'may' clearly implied that assessors sat at the discretion of the presiding judge, who did not need their agreement. Following sharp criticism from Māori, the Native Affairs Select

494. Wiremu Pomare, statement, undated, AJHR, 1871, A-2A, p 35.
495. Eru Nehua, evidence, undated, AJHR, 1871, A-2A, p 34.
496. Hemi Tautari, statement, undated, AJHR, 1871, A-2A, p 30.
497. Haultain to McLean, 18 July 1871, AJHR, 1871, A-2A, p 7.
498. Maning, notes on draft, 2 September 1871, AJHR, 1871, A-2A, p 23.
499. Maning to Webster, not dated (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 56).
500. Maning to Webster, not dated (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 370–372, 801–802).

Committee recommended that the position of assessors be reinstated.[501] This was done under section 5 of the Native Land Act Amendment Act 1874 which again specified that an assessor was to 'assist in the proceedings' and that 'there shall be no decision or judgment on any question judicially heard . . . unless the Judge presiding and at least one Assessor concur therein'. In its submissions to us, the Crown claimed that section 5 conferred on assessors the power of veto.[502] Boast agreed that section 5 restored the former equality between judge and assessor, and that judges and assessors had 'joint authority'.[503] In Parliament, it was claimed that the amendment would give 'a great deal more confidence to the Natives in the decisions of the Court'.[504] That it might empower assessors to veto decisions of the Court was not raised.

That position was clarified in 1878 in accordance with the recommendation of the earlier 1874 Native Affairs Select Committee that 'provision be made when differences of opinion occur'.[505] Section 2 of the Native Land Act Amendment Act (No 2) 1878 thus provided that '[w]hen any Native Assessor appointed under the provisions of the Native Land Act 1873 shall differ in opinion from the Judge presiding, a memorandum of such Assessor's dissent, and the reasons therefore, shall be entered on the records of such Court.'[506] That provision appears not to have attracted any comment during the Act's passage through Parliament, we suspect because it was assumed that such opinions would be filed and forgotten.

Over the following years, the provisions regarding assessors see-sawed but ultimately came to rest on a clearly subordinate position. Section 11 of the Native Land Court Act 1880 provided that one or more assessors 'shall sit at every Court and assist in the proceedings, and the concurrence of at least one Assessor shall be necessary to the validity of any judicial act or proceeding of the Court'. Section 9 of the Native Land Court Act 1886 provided under 'Part III: Jurisdiction' that a Court comprised one or more judges and one or more assessors 'as the Chief Judge may direct'. This meant that the Court could comprise two judges and one assessor. However, the Act also stated that 'the assent of one Assessor shall be necessary to the validity of a decision of the Court'. The same section provided that 'In all other respects the jurisdiction, powers, and authorities vested in the Court may be exercised by a Judge.' Finally, section 5 of the Native Land Court Act 1894 provided that the Native Land Court consisted of judges 'together with such Assessors, as the Governor may from time to time determine', and section 18 provided that 'a judge sitting alone may exercise all the powers of the Court'. Although an assessor would 'assist' in certain specified circumstances, his concurrence in the judgment was not required.

The Native Land Court minute books in Te Raki often fail to specify whether questioning was conducted by a judge or an assessor. As a result, as was the case

501. See report on petition of Mohi Mangakahia and 19 others, AJHR, 1874, I-3, p 1.
502. Crown closing submissions (#3.3.406), pp 41, 43.
503. Boast, *The Native Land Court*, p 136.
504. 'Native Land Bill', 27 August 1874, NZPD, vol 16, p 986.
505. Report on petition of Mohi Mangakahia and 19 others, AJHR, 1874, I-3, p 1.
506. Report on petition of Mohi Mangakahia and 19 others, AJHR, 1874, I-3, p 1.

in the central North Island, little is known about the precise role they played, what weight was accorded to their opinions, and how any differences of opinion between a judge and an assessor were resolved.

Only one instance of an assessor exercising a veto was brought to our attention. Title to Hauturu (Little Barrier) had been determined by Judge Rogan in 1880, but the matter proceeded to a rehearing in 1881 when section 11 of the Native Land Court Act 1880 applied, requiring agreement between judge and assessor. In this instance, Fenton and Wiremu Nero Te Awaitaia arrived at opposed positions over the award of title. The latter emphasised ancestry and whakapapa, stating:

> This is my word to the tribes present. This Court, the Native Land Court, gives the law according to the ways of the Europeans. Now, I hold according to ancient custom, according to genealogy. All the evidence on both sides has been written down. I consider that I know the truth, and that the Kawerau are the rightful owners. That is all I have to say.[507]

By way of response, Fenton insisted that occupation took precedence: 'All know, and Hemara [the claimant concerned] knows quite well, that titles founded on ancestry are rejected in presence of actual facts', he announced. In light of this difference of opinion, the case had to be reheard, as we discuss in section 9.8.2.[508] Professor Boast, having analysed extensive evidence related to the operation of the Native Land Court, concluded that 'the assessors were not a token presence; in fact they can be seen sometimes to have played an active role in . . . cases, questioning witnesses, issuing separate judgments occasionally, and even making site visits', but that '[f]or the most part we do not really know what role the assessors played'.[509] The law fluctuated on the matter; when section 5 of the Native Land Act Amendment Act 1874 and section 11 of the Native Land Court Act 1880 were in force, the agreement of assessors was certainly necessary for a valid Court judgment. However, even then failure to agree could be circumvented – namely, by the parties concerned accepting the judge's ruling despite the assessor's objections, or by arriving at some out-of-court agreement that the Court could approve.[510] Te Raki Māori efforts, from the late 1870s onwards, to persuade the Crown to strengthen the role of assessors or to empower rūnanga and komiti to conduct their own title investigations suggests that they thought their interests were not being protected. Nor can we ignore the prejudice freely expressed by judges such as Maning. We conclude that, in practice, it is most likely that assessors played a subordinate role to judges and, that when differences of opinion emerged, judges had open to them options to circumvent the requirement for the assessors' agreement.

507. Te Awataia, 13 May 1881, Hauturu rehearing, Kaipara MB 3, p 435 (cited in Peter McBurney, 'Responses to Statement of Issues Relating to the Mahurangi Sub-region' (doc A36(c)), p 4).

508. Fenton, 13 May 1881, Hauturu rehearing, Kaipara MB 3, p 435 (cited in McBurney, 'Responses to Statement of Issues Relating to the Mahurangi Sub-region' (doc A36(c)), p 4).

509. Boast, *The Native Land Court*, pp 135–140.

510. See Preece to Under-Secretary, Native Office, 12 February 1876, AJHR, C-6, p 12.

For much of the period under consideration, the Native Land laws confirmed that inferiority of position.

9.6.2.2 *The operation of the Court: title investigations*

In this section, we are concerned primarily with the conduct of title investigations under the Native Lands Act 1865 and the Native Land Act 1873. We focus first on the matter of notification and scheduling of sittings and hearings. We then consider the impact of rules respecting who could bring applications for title determination; whether the Court complied with all the obligations imposed upon it by Native Land legislation, and whether Te Raki Māori were disadvantaged if and where it failed to do so. Of particular importance is the issue of the Court's responsibilities and actions when it came to endorsing out-of-court arrangements and the degree to which it was influenced by Crown purchase agents in this matter. In this assessment, we are again faced with the difficulty that the Court maintained inadequate records. Nevertheless, the evidence available allows us to draw some conclusions.

9.6.2.2.1 Notification and scheduling of hearings

Timely and accurate notification of hearings was a critical matter since failure to attend the Native Land Court sessions could mean forfeiture of interests in blocks up for title determination. Claimants argued that the rules and procedures relating both to the notification of claims and hearings and to the conduct of Court hearings were not fair and reasonable. Further, they argued that the Crown, although aware of the difficulties, failed to resolve them. They noted that section 21 of the Native Lands Act 1865 conferred on the Court considerable discretion over how notices of applications were publicised, but that in practice it relied almost solely on the *Gazette*. The often-sparse information offered, inaccuracies, misleading block names, misspelt names of applicants, and limited distribution of the *Gazette* among widely dispersed Te Raki Māori communities raised questions over whether such reliance was justified and whether all owners were informed in an adequate and timely manner.[511]

For its part, the Crown claimed that '[i]t became the practice to publish . . . notifications [of hearings] in the gazettes and to send copies to interested parties as well', and further, that Haultain's 1871 inquiries did not disclose any 'great concerns' over the notification process. Counsel concluded that 'there is no evidence of systemic failure on the part of the Native Land Court to notify claims being heard by the Court in the inquiry district.'[512] In support of its contention, the Crown cited historian Tony Walzl's study of 112 court cases between 1865 and 1915 in the Whāngārei area. Walzl, the Crown noted, did not – during cross-examination – identify a single instance of a person or group claiming that they had been

511. Claimant closing submissions (#3.3.225), pp 153–157.
512. Crown closing submissions (#3.3.406), pp 31–34.

excluded from a list of owners because they were unaware of the relevant hearing; nor was he aware of any rehearing being granted for the same reason.[513]

We note, first of all, that Mr Walzl's report, using the very limited record of relevant Native Land Court proceedings that exists, centred on the award of titles, and Crown and private purchases.[514] During cross-examination, he made it clear that he did not examine the matter of notification.[515] More generally, detailed information relating to notifications is not available, but the inquiry conducted by Haultain did attract some comment from Te Raki rangatira on the matter. Eru Nehua, for example, suggested that 'Gazettes and Maori newspapers should be circulated more generally amongst the Natives. None ever come to my hapu, or to Ngunguru or to several other places along the coast.'[516] Haultain himself suggested that applications for hearings 'might be transmitted through the Magistrates of districts, and the *Gazette*s containing the notices should be largely and promptly circulated'.[517] That suggested a concern over their existing distribution.

Sir William Martin suggested in his draft Native Land Court Act of 1871 (clause 22) that a judge, on receipt of an application for an investigation of title be required to 'send notice thereof in writing to each of the hapu named in the application, or otherwise believed by him to be interested, and shall also give notice of such application in such other manner as shall give publicity thereto.'[518] Maning, commenting on the draft, rejected the need for an enhanced notification procedure; in his view, the 'present law and practice' were 'quite satisfactory and sufficient'.[519] In the event, section 35 of the Native Land Act 1873 placed the responsibility on the applicants to ensure that others knew that title to land in which they might also claim interests was being determined. The section required applicants for hearings to distribute a copy of such application 'to each of the tribes hapus or persons named in the application, or believed by the applicants to be interested in any portion of the land comprised in the application', and to satisfy the Court that they had done so. Section 36 provided for the insertion in the *Kahiti* or the *Gazette*, notices of claims and all sittings of the Court for investigation of titles.

In practice, applicants proved unable or unwilling to meet the requirements of section 35. Chief Judge Fenton, together with Judges Maning, Monro, Rogan, and Smith, asserted, however, that no real difficulty existed:

513. Crown closing submissions (#3.3.406), p 34.

514. Tony Walzl, 'Overview of Land Alienation around Whangarei City', report commissioned by Crown Forestry Rental Trust, 2015 (doc U1).

515. Tony Walzl, transcript 4.1.22, Te Renga Parāoa Marae, pp 508–509.

516. Crown closing submissions (#3.3.406), pp 31–32. For Eru Nehua's comments, see AJHR, 1871, A-2A, p 35.

517. Haultain to McLean, 18 July 1871, AJHR, 1871, A-2A, p 8.

518. Martin, proposed draft Bill, AJHR, 1871, A-2, p 11; see Gerald Hensley, 'Theodore Minet Haultain', in *The Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, https://teara.govt.nz/en/biographies/1h12/haultain-theodore-minet; G P Barton, 'William Martin' in *The Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, https://teara.govt.nz/en/biographies/1m21/martin-william.

519. Maning, notes on draft, 2 September 1871, AJHR, 1871, A-2A, p 23.

> Under the repealed Acts, notices of all claims containing the names of the claimants, the name of the piece of land claimed, and its localities and boundaries, and the time and place of hearing, besides being published in the *Gazette*s, were circulated by the Chief Judge, by a not expensive process, in such a manner that no Native in the district where the land was situated, was at all likely to be uninformed of any claim made, or of the time and place at which it would be heard. These notices by the Chief Judge will still have to be circulated under this Act, and past experience has shown that they would be sufficient without requiring the Native claimants to circulate notices, to do which sufficiently many would be unable and all unwilling. . . . It should be added that the Judges are not aware of any objection to the system of advertisement heretofore in practice.[520]

Section 5 of the Native Land Act Amendment Act 1878 (No 2) abolished section 35, leaving notification to the Court, which continued to rely on the *Kahiti* and the *Gazette* while also distributing notices to resident magistrates, assessors, claimants, and counter-claimants.

The difficulties described by Haultain appear to have persisted despite the sanguine opinion of Fenton and his judges. In 1876, Rewi Manuariki requested that notices be published well in advance of hearings so that his people would know when and where to attend and so make preparations.[521] A report in the *Auckland Star* in 1894 recorded that Māori were dissatisfied with 'the hurried way in which the Court has been notified, numerous important applications having been omitted altogether [from the *Kahiti*]'.[522] While the evidence is sparse, there is sufficient information to suggest that notifications of applications for title investigations were not always accurate, timely, and well circulated. The *Kahiti* appears not to have been distributed among all Māori communities, a failure of considerable consequence during the 1870s, when titling was proceeding rapidly. Further, we could locate no evidence that the Crown explored alternative means of distribution. Indeed, in 1878 Fenton acknowledged that notice 'in remote areas of the country' was 'imperfect' and likely to remain so indefinitely.[523] Clearly, there was potential for serious prejudice; as noted earlier, for example, it is the oral tradition of Te Uri o Te Aho that Maungataniwha and Te Pupuke were brought through the Court for title determination without their knowledge.[524] We agree with the conclusion reached in *Te Urewera*; namely, that while no evidence of systemic failure was identified, where failure did occur, the effects could be 'catastrophic'.[525]

Claimants also raised concerns over the scheduling and location of Native Land Court hearings.[526] Armstrong and Subasic listed the Native Land Court sittings

520. AJLC, 1874, no 1, p 6.
521. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 822.
522. 'Native Land Court', *Auckland Star*, 7 May 1894, p 3.
523. Fenton to Native Minister, 16 May 1878 (cited in Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 446).
524. Pairama Tahere (doc G17), pp 68–69.
525. Waitangi Tribunal, *Te Urewera*, Wai 894, vol 3, p 1054.
526. Claimant closing submissions (#3.3.225), p 158.

conducted in Northland during the nineteenth century, together with their start dates. Hearings in Te Raki were frequent during the early 1870s, with one being held every two weeks between 1870 and 1872, but declining to one every six weeks between 1873 and 1876 as the number of applications for title investigations contracted. That schedule, observed Armstrong and Subasic,

> might not seem excessive, and would not have been had Maori living at Hokianga, for example, been required only to attend courts held in that locality (at least 4 during this period). But that was not the case. Because of whakapapa connections and the complex of customary rights existing across the district many Maori were required to attend a majority, if not all of these hearings . . .[527]

Although in the early 1870s sittings were generally held during the summer months, pressure arising from the Crown's purchasing programme meant hearings were also scheduled for less convenient months of the year, including those of planting and harvesting and mid-winter. On occasion, the sitting schedule was even more intensive. For example, in July 1873 Maning held six sequential hearings – in different places – to deal with a backlog of cases that had accumulated while he was out of the district.[528]

In most sessions, all the blocks listed for investigation were scheduled for the first sitting day, which might require claimants to wait several days, or even weeks, before their lands were considered.[529] The hearings Monro conducted in the Hokianga during mid-1875 drew in Māori from a wide area, compelling travel over ill-formed 'roads' and imposing great strain on both accommodation and food supplies. According to Civil Commissioner Henry Tacy Kemp, some of those who endured the mid-winter sittings in the Hokianga pressed the Government to ensure that future sittings took place at 'more seasonable' times of the year, but without result.[530] The passage of a large number of blocks through the Court in mid-1875, which were immediately acquired by the Crown, seems to indicate that scheduling was driven by the Crown's needs rather than those of Te Raki Māori. In *He Whiritaunoka*, the Tribunal suggested that the difficulties involved in scheduling were structural, and that if Māori had a greater involvement in the title adjudication process, or if they had been running their own process, ways of working around the imperatives of people's lives and communities would have been found.[531] We agree with that assessment.

527. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 818–819.
528. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 819.
529. David Armstrong and Evald Subasic, response to statement of issues (doc A12(b)), p 29.
530. H T Kemp to Fenton, 30 July 1875 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 821).
531. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 446.

9.6.2.2.2 Initiating title investigations

How lands in customary ownership were brought before the Court for investigation is a key issue for claimants.[532] Under the Native Lands Act 1862, any 'Tribe Community or Individuals of the Native Race' could lodge an application for a title investigation; under the Native Lands Act 1865 and the Native Land Act 1873, '[a]ny Native' could apply; under section 16 of the Native Land Court Act 1880, applications had to be signed by '[a]ny three or more Natives', a requirement deleted by section 17 of the Native Land Laws Amendment Act 1883; while section 17 of the Native Land Court Act 1886 merely provided that 'Natives' could apply.

The Crown submitted that none of those provisions prevented applications being made by, or on behalf of, an iwi, hapū, or whānau. It initially conceded that enabling individuals to deal with land without reference to iwi or hapū 'undermined traditional tribal structures which were based on collective tribal and hapū custodianship of the land'.[533] In closing submissions, however, counsel argued that most titles were determined on the basis of prior arrangements agreed to by claimants.[534] In essence, the Crown's later submission was that where individuals applied to the Court, they did so with the knowledge and consent of their co-owners: there was, it concluded, 'little direct evidence of individuals in Northland spearheading applications contrary to the wishes of the wider hapū'.[535]

We note first that none of the relevant Acts included a provision under which any application for collectively owned land required the express sanction of all owners, an omission that opened an opportunity for the unscrupulous and opportunistic among both owners and purchasers to circumvent collective opposition to Court processes. In effect, the lack of such a provision disempowered communities and whānau. Secondly, under the Native Lands Act 1865 (section 83) and the Native Lands Act 1867 (section 38), the Crown itself could, where the lands concerned were subject to purchase agreements, apply to the Court to have ownership determined. That power was carried over into the 1873 legislation. In other words, where its interests were concerned, the Crown could direct the Court to investigate ownership and do so without the knowledge or consent of the owners concerned. While section 13 of the Native Land Purchase and Acquisition Act 1893 empowered the Governor-in-Council to 'direct [the] Native Land Court to ascertain title to Native land proposed to be acquired', the Crown never found it necessary to invoke this statute (see chapter 10).

The ability of individuals to bring lands before the Court without the knowledge or sanction of all the owners featured prominently in the many criticisms of Native Land legislation at the time. In his review of the Native Land Court, Sir William Martin observed:

532. Claimant closing submissions (#3.3.225), pp 89–90.
533. Crown statement of position and concessions (#1.3.2), pp 108–109.
534. Crown closing submissions (#3.3.406), p 69.
535. Crown closing submissions (#3.3.406), pp 28–29.

> Formerly the majority could protect itself, and no action was taken until a considerable amount of agreement had taken place. Now the owners feel that they have no rest. Any single Native may give notice in writing that he claims to be interested in a piece of Native land, and thereupon the Court shall ascertain the interest of the applicant and of all other claimants in the land, and order a Certificate to be issued . . . Capitalists who desire investments can have no difficulty in finding the single man needed, and the majority are forced to submit to the burthen or risk the loss of their property.[536]

In his 1871 report to McLean, Haultain similarly observed that the power of an individual to demand a title investigation had given rise to a number of abuses. These included unfounded claims, and claims made 'without the assent, or even the knowledge, of other persons or of hapus most concerned'.[537] During the parliamentary debates on the proposed 1873 legislation, Sewell also highlighted what he termed the 'vicious principle' of 'giving power to a single Native to drag the tribal right into Court'. By the operation of clause 47 and the system of memorials of ownership, he added, 'the tribal right was *ipso facto* disintegrated; the tribe ceased to be a tribe, and became individualized'.[538]

These criticisms support the claimant contention that the Crown actively sought to undermine chiefly authority, collective decision-making, and tikanga by empowering individuals to act independently of iwi and hapū and, in particular, by allowing individuals to initiate title investigations without effective safeguards for the community. The capacity of individuals to bring collectively owned lands for title investigation made it almost impossible to keep them out of the Court process, undermining any attempt to retain land in customary title.

9.6.2.2.3 Out-of-court arrangements

Native Land Court judges in Te Raki, with the exception of Maning, were fully prepared, indeed actively disposed, to accept out-of-court arrangements regarding ownership. For their part, claimants acknowledged that, 'in some cases', out-of-court arrangements provided for a 'degree of Maori communal and chiefly agency', but argued that these supposed agreements 'should not have relieved the Court of its legislated duty to investigate the full extent of ownership'.[539]

The Crown placed more significance on this 'convention', submitting that by leaving it to Māori to prepare lists of owners, the Court permitted them 'an important degree of self-management and control of this aspect' of its operation.[540] In effect, Te Raki Māori were 'making the decisions about how customarily shared, overlapping, and usufructuary rights to particular areas of land

536. Martin, 'Memorandum on the Operation of the Native Lands Court', 18 January 1871, AJHR, 1871, A-2, p 4. Martin proposed a remedy in sections 21 and 22 of his draft Native Land Court Act: Martin, proposed draft Bill, AJHR, 1871, A-2, p 11.
537. Haultain to McLean, 18 July 1871, AJHR, 1871, A-2A, p 8.
538. 'Native Land Bill', 25 September 1873, NZPD, vol 15, pp 1369–1370.
539. Claimant closing submissions (#3.3.225), p 117.
540. Crown closing submissions (#3.3.406), p 35.

would be managed'.[541] In the Crown's submission, out-of-court arrangements thus constituted 'an acceptance of the authority of chiefs and deference to communal decision-making'. On the other hand, the Court 'did not blindly accept uncontested claims'.[542] It was 'normal for the Court to assure itself that any arrangements described to the Court were supported by the community'.[543] Crown counsel acknowledged that the Court had a statutory duty to investigate the full extent of ownership, but maintained that 'deference to community desires and a preference for consensus were appropriate in the circumstances'.[544] As a result, the Court 'generally only intervened when there were objections or contested claims'.[545] Whether the Court had the discretion to eschew that statutory duty, how it determined that out-of-court arrangements represented community desires, and whether it was entitled to rely on the evidence presented by those claiming to be 'representatives' were all matters on which the Crown did not elaborate or offer specific evidence.

The Native Lands Act 1865 made no direct reference to out-of-court arrangements, but the ten-owner rule meant that agreements often had to be reached over both ownership and the names of those to be recorded on the certificate of title. There was thus a tension embedded in section 23: on the one hand, the Court was required to ascertain 'the right title estate or interest' of *all* claimants to a particular block but, on the other, could not award a certificate of title to more than 10 owners in blocks of 5,000 acres or less. Owners were therefore practically obliged to reach agreement over those to whom particular blocks would be awarded, while the Court was obliged to limit the number to not more than 10. In such cases, the important question is whether the Court did, in fact, assure itself that the arrangements presented to it enjoyed the support and approval of all those interested in the land concerned. There is little evidence that it did so, in the absence of counter-claimants or pre-title investigation (as would be required by the 1873 legislation).

For example, in the case of the 1866 Waiwera–Puhoi block hearings, Thomas concluded:

> The Court accepted without exception the pre-hearing arrangements made by Te Hemara and his small party of applicants. The hearings themselves were brief and did not resemble a thorough investigation into the history and customary rights of the area.[546]

No counter-claimants appeared and little cross-examination took place. It took the Court just two days to determine the titles of 11 of the 13 blocks involved.

541. Crown closing submissions (#3.3.406), pp 37–38.
542. Crown closing submissions (#3.3.406), p 40.
543. Crown closing submissions (#3.3.406), p 36.
544. Crown closing submissions (#3.3.406), p 39.
545. Crown closing submissions (#3.3.406), pp 37, 69.
546. Thomas, 'The Native Land Court' (doc A68), pp 28–29. Thomas relied on Peter McBurney, 'Traditional History Overview of the Mahurangi and Gulf Islands Districts', report commissioned by the Mahurangi and Gulf Island Collective Committee and Crown Forestry Rental Trust, 2010 (doc A36), pp 418–439.

The Legal Status of 'Voluntary Arrangements'

Section 46 of the Native Land Act 1873: voluntary arrangement to be recognised
In carrying into effect the preceding sections, or any of the sections hereinafter contained regarding partitions, the Court may adopt and enter of record in its proceedings any arrangements voluntarily come to amongst themselves by the claimants and counter-claimants, and may make such arrangement an element in its determination in any case concurrently or subsequently pending between the same parties. In every such record there shall be entered the names of the persons with whose consent, and the names of the persons by whom any claim shall have been settled by any such arrangement.

Section 47 of the Native Land Act 1873: memorial of ownership, schedule, form 1
After the inquiry shall have been completed, the Court shall cause to be inscribed on a separate folium on the Court Rolls a Memorial of ownership in the Form No 1 of the Schedule hereto, giving the name and description of the land adjudicated upon, and declaring the names of all the persons who have been found to be the owners thereof, or who are thenceforward to be regarded as the owners thereof under any voluntary arrangement as above mentioned, and of their respective hapu, and in each case (when so required by the majority in number of the owners), the amount of the proportionate share of each owner. Every such Memorial shall have drawn thereon or annexed thereto a plan of the land comprised therein, founded on the map approved as hereinafter mentioned, and shall be signed by the Judge and sealed with the seal of the Court.

In Thomas's assessment, the Waiwera–Puhoi hearings marked the start of what would become an increasingly common pattern in Te Raki: the willingness of the Court to issue titles based on limited investigations, particularly when a sale was contemplated.[547] In the Whāngārei district, Tony Walzl also found that the Court commonly approved arrangements as presented and did so after brief hearings and without any effort to ascertain whether all owners had agreed.[548]

As discussed earlier, the Native Land Act 1873 attempted to solve the problem of undisclosed trusts by instituting the memorial of ownership system. Section 47 of the Act provided for the names of all owners to be recorded; however, the practice of nominating only a handful of owners continued. Section 46 also allowed the Court to adopt 'voluntary arrangements' between claimants and counter-claimants, which often had the effect of limiting the number of names recorded on the memorial of ownership.

547. Thomas, 'The Native Land Court' (doc A68), p 29.
548. Walzl, 'Overview of Land Alienation' (doc U1), pp 44–51, 68–76.

The effect of section 46 and requirements of section 47 were disputed between Judge Maning and Crown Purchase Officer Preece during a Court sitting in the Ahipara Court in November 1875. During the Court's investigation of Orohana (6,562 acres) at Mangonui (outside the district) four claimants admitted that there was a large number of other owners of the block but requested that their names alone be entered on the memorial of ownership.[549] Armstrong and Subasic gave evidence that Preece also urged Maning to award the title to 'a few willing vendors who had received tamana payments'.[550] However, Maning insisted that he was obliged under section 47 to record the names of all owners on the memorial of ownership. In turn, Preece insisted that Maning was in error, at the same time arguing that the award of title to those who had accepted tāmana would 'facilitate the purchase of the land by the Government'.[551] Maning, supported by District Officer Webster, argued that the purpose of the 1873 Act was 'to put it out of the power of Native Chiefs or others to alienate the lands of the commoners of their tribes, or defraud them of the proceeds of the sales; things which have been reported to have been done very frequently of late'.[552] To Preece's argument that section 46 of the Act allowed the Court to approve 'voluntary arrangements', Maning maintained that it referred only to arrangements among contending parties of claimants – that is, it did not apply where a single claimant group reached such an arrangement among themselves.[553]

While Preece was anxious to acquire land as expeditiously as possible, Maning sought to protect the authority of his Court against Preece and other Crown officials who challenged his control.[554] Preece demanded that the matter be referred to the Attorney-General, while Maning sought a more authoritative decision from the Supreme Court. Both men wrote to McLean on 13 November 1875, defending their position. Preece assured him that the owners had all agreed to the purchase and the division of payments. He set out his view that,

> in cases of sale when the owners have assembled and the money is to be paid there and then, it is far better that the owners should name representative men from the various hapus to be named in the Memorial rather than encumber the same with the names of all the owners some of whom have only an infinitesimal interest.[555]

549. David Armstrong, 'The Native Land Court and Crown Purchasing in Te Waimate-Kaikohe in the Nineteenth Century', 2016 (doc AA52), p 14.

550. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 708.

551. Maning to Fenton, 9 November 1875 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 709).

552. Maning to Fenton, 9 November 1875 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 709).

553. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 709.

554. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 712.

555. Preece to McLean, 13 November 1875 (cited in Armstrong, 'The Native Land Court and Crown Purchasing' (doc AA52), p 15).

Maning threatened to resign in response and told McLean, in unequivocal terms, that if the arrangement involving allegedly self-appointed 'representatives' was sanctioned, sale would be concluded by a few owners, leaving the others unable to compel a fair distribution of the purchase money.[556] After receiving these reports, the Native Department resisted Maning's call for an inquiry, or an investigation by the Supreme Court fearing, as David Armstrong put it, 'that this might lower Maning and/or Preece, two important public officials, in the estimation of Maori'.[557] In the end, the matter was referred to the Solicitor-General, who supported Maning's interpretation of the law. Henry Halse, the Native Secretary, wrote to Preece on 30 November 1875 informing him of the Solicitor-General's view that

> The 46th section empowers the Court to adopt voluntary arrangements come to between the claimants and the counterclaimants and the 47th section requires that the names of all the owners, or who under such arrangement as before mentioned *are to be regarded as the owners* shall be inserted on the Memorial of Ownership. [Emphasis added.][558]

He further explained that the issue 'was not a case of claim and counterclaim but a mere question of the concurrence of the Native Owners as to the division of certain purchase money to be hereafter paid by the Government'. In this case, the parties were all claimants, and Maning was correct 'in declining to accept the names of selected representatives to appear in the Memorial of Ownership as the owners of the land'.[559] Chief Judge Fenton informed Maning the following year that he considered this question of law settled, and that a further inquiry would not be held for 'reason of state'.[560]

This dispute reflected the poor wording of sections 46 and 47 of the 1873 Act which indicated a failure on the part of the Crown to draft legislation, crucial to the recognition of rights of all owners, with sufficient precision and care. However, it also undoubtedly derived from the tension created by Maning's autocratic temperament when faced with Preece's wish to expedite his purchase arrangements through his Court. As such, the opinion of the Solicitor-General seems to have had little wider application. The practice of accepting out-of-court arrangements continued, at least until the Atkinson Government strengthened the rules in 1890 to require such arrangements to be put into writing and signed by all concerned, and the Court to check the authenticity of the signatures and the bona fides of the

556. Maning to McLean, 13 November 1875 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 712–713).

557. Armstrong, 'The Native Land Court and Crown Purchasing' (doc A A52), p 15.

558. H Halse to Preece, 30 November 1875 (Armstrong and Subasic, supporting papers (doc A12(a)), vol 9, p 2:1599).

559. H Halse to Preece, 30 November 1875 (Armstrong and Subasic, supporting papers (doc A12(a)), vol 9, p 2:1599).

560. F D Fenton to Maning, 11 March 1876 (cited in Armstrong, 'The Native Land Court and Crown Purchasing' (doc A A52), p 15).

arrangement itself.[561] We received no evidence on the practical workings of this innovation. The Tūranga Tribunal has also pointed out that the danger of persons being left off lists meant that there had to be a guaranteed right of appeal, but this was not available until 1894.[562]

Mr Thomas commented on this matter at some length, observing that

> A perusal of various sources including Paula Berghan's many but brief block histories suggests that often during this period only a small handful of individuals would appear before the Court and apply for title over the land. There were often no other claimants present. The Court frequently heard their evidence without much cross-examination or inquiry. It would seem that there was often no explicit discussion of the critical question of whether the applicants represented wider groups and individuals or claimed sole rights over the land. The Court's main concern was whether anyone in the courtroom explicitly and openly opposed the main applicant's evidence and claims. If the answer was no, as it frequently was, the Court immediately ordered a certificate of title to be issued to the main applicants and, if they so requested, to a handful of other individuals whom they recommended.[563]

As a result, there is little evidence that out-of-court arrangements were based on a consensus reached by all interested owners and that Te Raki Māori exercised a significant measure of influence over the Court. This was the point made by Maning when he warned McLean, in November 1875, that Court sanction of arrangements in which only a handful of owners were named in order to facilitate the transfer of blocks exposed those left off the memorial of ownership to also being left out of the distribution of the purchase money. In his view, many northern Māori did not want titles awarded to 'representatives' but were too intimidated to oppose them. Importantly, he advised McLean that the majority of owners relied on the Court and the law to recognise their interests.[564] The implication was that, in Maning's view at least, by accepting uncritically prehearing or out-of-court arrangements, the Court failed to meet those expectations and to protect the interests of all Māori, but rather advanced the interests of the few.

9.6.2.2.4 Preliminary investigations

In addition to the doubtful protection to be found for claimants in section 47, the 1873 Act contained a number of provisions that could have assisted in ensuring that those with verifiable claims were not being left out of Court arrangements; however, there were serious defects in how those protections worked in practice.

In an attempt to meet the criticisms of the effect of the land laws levelled by Ngāpuhi, other Māori, and many Pākehā commentators, McLean included several provisions requiring preliminary or prehearing investigations into Māori land

561. Waitangi Tribunal, *Te Urewera*, Wai 894, vol 3, pp 1370–1371.
562. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, pp 450–452.
563. Thomas, 'The Native Land Court' (doc A68), p 27.
564. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 712–714.

ownership. Sections 21 and 22 provided for the appointment of district officers who were supposed to furnish the Court with an independent view on matters of customary right.[565] To that end, they were to prepare (with the assistance of the assessors and 'the most reliable chiefs') a reference book showing the tracts of land owned by different hapū of the district at 1840. Other duties included assisting in identification of any land brought before the Court for title determination that had already been alienated (sections 23 to 26) and land that ought to be reserved (sections 36 and 37). District officers were directed to inform the judge of

> any objection they may be cognizant of to the hearing of any such claim, or any difficulty or counter claim they may be aware of as existing against any portion of the land . . . and in any such case, the Judge shall suspend all further proceedings in the Court relative to the hearing of the claim until such objections are disposed of or removed.

Section 38 also directed judges to conduct 'preliminary inquiries . . . with a view of ascertaining whether the application to bring the land under the Act is in accordance with the wishes of the ostensible owners thereof'. If satisfied that an application had been made in good faith, the judge would then approve the undertaking of a survey. These investigations and the preparation of such reports, it seems reasonable to conclude, would have included the question of whether out-of-court arrangements represented a consensus reached among all those with interests in the lands in question, and whether groups or individuals with legitimate rights were being excluded.

No district officers were appointed in Te Raki, however, until 1874, and by this time 325,200 acres or 47.5 per cent of the known area in customary ownership in 1865 had already gone through the Native Land Court and the blocks awarded to an average of four owners.[566] There is no evidence that any 'reference books' were prepared, and little evidence that preliminary investigations were conducted in a thorough and systematic way.[567] In January 1875, Native Minister McLean rebuked Webster, Hokianga's district officer (appointed in December 1874), for having failed to prepare reports on the Otangaroa and Te Patoa blocks.[568] He conceded that this had not been possible given the recent nature of his appointment but instructed:

> In future, however, in all instances where Natives are about to bring their lands under investigation before the Native Land Court, or intend to dispose of them to the Government, you will be required to make a full preliminary inquiry, so as to be able to state whether the survey can be proceeded with without affecting the peace of the district. The Native Lands Act 1873, so clearly lays down the duties of District Officers,

565. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, pp 398–399.
566. Thomas, 'The Native Land Court' (doc A68), pp 17, 24. Gilbert Mair was appointed for Bay of Islands, H T Kemp for Kaipara, and William Webster for Hokianga: Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 682.
567. Thomas, 'The Native Land Court' (doc A68), pp 87–88.
568. Armstrong, 'The Native Land Court and Crown Purchasing' (doc A A52), p 17.

that I am only to direct your notice to its provisions, and to request you give them your particular attention.[569]

Armstrong concluded, however, that Webster made only the 'most cursory inquiries into the Waimate Taiamai lands'.[570] Given the size of the area to be covered, and the pace and scale with which blocks were being brought through the Court, it is difficult to see how the inquiries of Webster and his fellow officers could have been effective. It seems that they were more concerned with safeguarding the interests of the Crown than of Māori. Under-Secretary for Native Affairs T W Lewis later acknowledged that 'the Act of 1873 was not carried out in all its provisions', in particular those relating to district officers and preliminary inquiries. While such officers did attend hearings, they did so only 'to watch the proceedings on behalf of the Government in connection with the Government titles'.[571] That conclusion is largely supported by the evidence in Waimate–Taiāmai where Webster's assessment during the passage of blocks through the Court was, in all instances, a simple one of 'no objection'.[572]

Maning was strongly opposed to conducting preliminary inquiries; he questioned the value of district officers and generally refused to undertake them himself as required by section 38 of the Native Land Act 1873. Maning argued that the size of the districts and the dispersed Māori population rendered the requirement unworkable.[573] Beyond the practical difficulties, he was also opposed to the concept in principle, predicting in 1871, when the idea was mooted by Sir William Martin, that it would 'render the office of Judge contemptible'. In his view, such 'impertinent' and 'extra-judicial' inquiries would only result in 'one-sided and for the most part false evidence' likely to warp judgment when the case actually came into Court. Maning claimed that he never permitted 'any Native to say one word to me on the merits of any claim until it comes before me in Court, and the result has been excellent'.[574]

He continued to question the value of preliminary investigations and survey when section 38 passed into the law, arguing that this would cause rather than prevent conflict.[575] Informed by Fenton that he had no discretion in the matter, Maning continued to criticise the notion, although it seems he did occasionally and reluctantly undertake the duty. But in light of the opposition expressed by Maning and other Native Land Court judges, the Native Office decided that the

569. McLean to Webster, 20 January 1875, in H H Turton, comp, *An Epitome of Official Documents Relative to Native Affairs and Land Purchases in the North Island of New Zealand* (Wellington: Government Printer, 1883), section C, p 47.

570. Armstrong, 'The Native Land Court and Crown Purchasing' (doc A A52), p 17.

571. T W Lewis, evidence to Owhaoko and Kaimanawa Native Lands Committee, 20 July 1886, AJHR, 1886, I-8, p 66.

572. See Armstrong, 'The Native Land Court and Crown Purchasing' (doc A A52), pp 17, 40, 42–43, 45, 47–48, 50, 54, 65–66, 68.

573. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 686–687.

574. Chief clerk, Native Land Court, to McLean, 18 September 1871 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 683).

575. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 685.

matter of preliminary inquiries and surveys was best left to the district officers.[576] Section 6 of the Native Land Act Amendment Act (No 2) 1878 relieved the judges of any obligation in this regard, unless there was an 'urgent or particular' reason for a preliminary inquiry.

We conclude that the Crown's claim that Te Raki Māori helped to shape the decisions reached by the Native Land Court is based on insubstantial foundations. Only if the Government had implemented in full the provisions of the Native Land Act 1873 relating to district officers, insisted that judges carry out the provisions of the Act, if judges had scrutinised out-of-court arrangements, and if they had carried out the prescribed preliminary investigations would another conclusion have been possible. It is clear to us that this did not happen with any consistency, and that was largely because the Crown failed to provide any oversight of the judiciary's compliance with the statutory scheme under which the Native Land Court was operating. Any investigations conducted by the Court remained limited.

9.6.2.2.5 Court and Crown officers

Purchase agents, Crown and private, were familiar with the broad requirements of the Native Land laws and ingratiated themselves, if they could, with officials of the Native Land Court. They were ever ready to exploit any rivalries among Māori over land claims, skilled in identifying those disposed to accept advance payments, and prepared to trade on any lack of understanding among Māori of the law and legal processes. Armstrong and Subasic have noted that Crown purchasing agents attended title investigations, at times gave evidence, and sought to persuade the Court to award titles to those who had accepted advance payments. We give examples later in this chapter.

The success of purchase agents in influencing Court decisions appears to have been mixed; we cannot know for certain the extent of their sway because we cannot go behind Court rulings in that way. Maning's dislike of interference in his Court made him an unlikely puppet of the Native Land Purchase Department, although he shared its goals. He was strongly critical of the payment of tāmana before title had been investigated and could resist the efforts of its recipients, encouraged by Crown purchase agents, to nominate 10 or fewer owners to expedite sales, sometimes insisting on inserting the names of all owners into memorials of ownership.[577] In the case of Tukuwhenua, for example, in January 1875 Maning named 10 owners on the memorial of ownership and entered the names of an additional 42 owners on the reverse, contrary to the wishes of the Crown's purchase agents.[578] It may be partly for this reason that Brissenden expressed a preference for Rogan, requesting the Native Minister send him to assist Judge Maning with the substantial backlog of cases, since he was

576. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 688–689.
577. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 705.
578. Armstrong, 'The Native Land Court and Crown Purchasing' (doc AA52), p 11.

> the only gentleman who can act in Judge Maning's place, who will give the utmost satisfaction to the natives, being the man of their unanimous choice, and who many of them assert, knows in some instances more of their rights than they do themselves. I therefore beg the Native Minister will select Judge Rogan to act for the Government in the north, feeling sure he will be able to pass the whole of the land through in six months. In making this request I represent the wishes of the Maori people from Helensville to the North Cape.[579]

However, after consulting with Fenton, McLean instead sent Monro to Hokianga, where he conducted a series of cases involving Brissenden's identification of owners whom he had paid tāmana.[580] Monro apparently had none of Maning's qualms and was disposed to award titles to those individuals who had already accepted payments on the land under investigation. Armstrong found that Monro awarded all but one (Arawhatatotara 2) of the 18 blocks he adjudicated in Hokianga, from March 1875, to 'representatives' charged with effecting sale to the Crown. According to Armstrong, Monro's decisions were inconsistent with the requirements of the Native Land Act 1873, and were made despite the Court being advised of the claims of other (named) owners. Armstrong argued that these decisions reflected the Court's wish to facilitate and expedite alienation, protests by some owners notwithstanding – a general assessment with which we agree.[581]

Brissenden acknowledged the helpful attitude of Monro advising McLean that:

> I cannot refrain from expressing to you the obligation I feel myself under to Mr Munro [*sic*], as presiding Judge of the Native Land Courts held by him at Ohaeamue [*sic*], Mangonui, and Herd's Point. In every instance he has shown the greatest consideration for me, while on behalf of the Government he has carefully and patiently investigated the numerous difficult and tedious cases brought before him. None failed to pass unless those for which the surveys and maps were not completed.[582]

For his part, Maning was highly critical of Monro's decisions. Writing towards the end of 1875 to William Webster, who earlier in the year had been appointed district officer for the northern district, Maning claimed that Monro had been 'led by the nose' and had

> willingly and deliberately ignored the rights of nine-tenths of the owners of almost every case he had to do with and left men at the mercy of a few Rangatira sharks and the consequence is that as the right owners have not signed the transfers or been named in the grants the Government have not got a single valid title in the North, it is fortunate the natives do not know it, but if they do there will be a second Hawke's Bay

579. E Brissenden to Native Minister, 2 January 1875(cited in Armstrong, 'The Native Land Court and Crown Purchasing' (doc AA52), p 10).
580. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 706.
581. Armstrong, 'The Native Land Court and Crown Purchasing' (doc AA52), pp 10–11.
582. Brissenden to McLean, 3 July 1875 (cited in Geiringer, 'Historical Background' (Wai 45 R01, doc F10), pp 52–53; see also Preece to McLean, 3 July 1875, AJHR, 1875, C-4, p 2.

affair, with the difference that the natives will be right. I warned Munro [*sic*] . . . of the consequences of what he was doing but he kept on.[583]

Distributed widely and carelessly, tāmana increased conflict and threatened the smooth functioning of the Court.[584] The practice can be seen as challenging its independence and threatening to usurp its role.[585] Undoubtedly, these factors lay behind much of Maning's antagonism towards government officers in pursuit of a goal he otherwise supported. His criticisms notwithstanding, he was prepared to do purchase agents 'small favours', as he informed McLean, and nor did he refuse them 'any trifling assistance'.[586] The prevalence of blocks issued to a handful of owners in the 1870s indicates that Maning acceded to the practice of limiting the numbers in spite of his railings against it and occasional insistence on a fuller complement of owners being recorded on the memorial of ownership.

The evidence is insufficient, however, to support the charge that judges colluded with purchase agents; that is, cooperated in some secret or unlawful way in order to deceive or gain an advantage. But it is hardly necessary to go so far to question the independence of the Native Land Court and its judges in a general sense. The prime purpose of the Court, after all, was to facilitate the purchase of Māori land – a goal which the judges fully endorsed – and as Sorrenson has observed, the 'notion of an independent court is more lore than law'.[587] By failing to act consistently on the knowledge that named owners represented the interests of wider groups, the Court opened itself to a charge of furthering Crown goals at the expense of Māori rights. The Court continued to fail to scrutinise out-of-court arrangements, and establish and record the names of all owners on the memorial of ownership (under section 47), while the underlying problem remained that the naming of all owners did not in any case express collective ownership. As Armstrong and Subasic have observed, 'It did not reflect the concept of tribal ownership or control, or provide for collective decision-making. Rather, it was the means whereby individualisation could be brought to a new plane of perfection, and chiefly and tribal authority might be further eroded.'[588]

9.6.2.2.6 Registering owners: the overall picture

The evidence presented to us indicates that post-1873 title hearings were frequently (although not invariably) brief and often superficial, that the Court continued to approve prehearing arrangements, and that it continued to award titles to a few

583. Maning to Webster, undated (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 704).

584. See Maning to Webster, 14 June 1874 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 690).

585. Thomas, 'The Native Land Court' (doc A68), pp 82–83.

586. Maning to McLean, 11 September 1874 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 705).

587. Sorrenson, 'The Lore of the Judges', p 231.

588. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 49.

individuals.[589] Over the period from 1875 to 1880, embracing years of intense titling activity in Te Raki, 202 blocks were titled. According to Thomas's analysis, 152 were awarded to 10 or fewer owners and only 15 to more than 20 owners.[590] The average number of awardees was just under eight per block – even then a figure inflated by the award of several blocks to large numbers of owners.[591] The 1,465-acre Omapere block in Te Waimate–Taiāmai is something of an exception as it was awarded to 235 owners in January 1879.[592]

Over half of blocks titled during this period contained fewer than 500 acres, and 59 were 100 acres or less. However, the number of smaller blocks titled does not entirely explain why the number of owners included in the Court's orders was generally so low during this period. Blocks under 500 acres only accounted for 17,335 acres of the 255,860 acres titled. Paul Thomas gave evidence that a considerable portion of this land was concentrated in a few large titles; 11 blocks greater than 5,000 acres came before the Court and accounted for over 101,856 acres of the area titled.[593] But there was no clear pattern of titles to larger blocks recognising a wider community of owners; for instance, the 9,281-acre Kauaeoruruwahine block in Hokianga was awarded to eight owners, and the 5,700-acre Manganuiowae block to only four owners, both during June 1875.[594] Despite the apparent requirement under the Native Land Act 1873 that all owners be registered, the number of blocks awarded to single individuals and the low average number of named owners clearly indicates that this did not happen, and that the interests of most Te Raki Māori were never legally recognised, defined, and recorded.

Between 31 May and 24 June 1875, at Herd's Point, Monro, with impressive efficiency, investigated applications for a series of blocks, including 19 with an aggregate area of 65,514 acres.[595] The Court reached its decisions on all 19 during a maximum of 18 sitting days (excluding weekends). All but two of the blocks were awarded to fewer than 10 owners. The exceptions were Pakanae 3 and Pukehuia which were awarded to 10 and 18 owners respectively. Omahuta (7,770 acres) was awarded to four individuals, although the Court was aware that four related hapū held interests in the block; Otangaroa was divided into four portions, and Otangaroa 4 (3,296 acres) was granted to a single individual despite the Court being advised that a number of hapū held rights to it; and Punakitere (7,557 acres) was awarded to a single individual, despite the Court again being advised that others claimed rights to the land. While Maning observed that the 5,700-acre Manganuiowae block belonged 'to every native north of Auckland almost', Monro awarded it to three Te Rarawa hapū, Tahawai, Kaitutai, and Ngatipato. They nomi-

589. Thomas, 'The Native Land Court' (doc A68), pp 87–88.
590. Thomas, 'The Native Land Court' (doc A68), pp 88–89.
591. Thomas, 'The Native Land Court' (doc A68), pp 88–89.
592. Thomas, 'The Native Land Court' (doc A68), pp 88–89; Berghan, 'Northland Block Research Narratives' (doc A39(e)), p 76.
593. Thomas, 'The Native Land Court' (doc A68), p 74.
594. Data relating to Native Land Court title investigations and Crown purchasing from 1865 onward (#1.3.2(c)); Thomas, 'The Native Land Court' (doc A68), appendix C.
595. Thomas, 'The Native Land Court' (doc A68), pp 107–110.

nated four persons as owners, an arrangement to which the Court, without further investigation, agreed.[596]

In his analysis of Crown purchasing in Waimate–Taiāmai ki Kaikohe, David Armstrong recorded that during the period from 1866 to 1875, Maning dealt with six blocks and Monro with 18. Of those 24 blocks, 21 were awarded to fewer than 10 owners. Only in the case of Arawhatatotara 2 (Monro) and Tukuwhenua (Maning) were the blocks apparently awarded to the full community of owners (40 and 52 respectively).[597] In brief, the Court was fully aware that there were many more people with interests in the various blocks but, with minimal or no investigation, awarded all but two of them to small numbers of individuals or hapū 'representatives', who held no legal responsibility with regard to the underlying ownership.

We turn now to a handful of the many examples illustrating the difficulties associated with the Court process that have been alleged by Te Raki claimants as designed to facilitate Crown purchases: among them, the use of advance payments, lack of investigation by district officers and the Court, brevity of hearings, and confirmation of prehearing arrangements without adequate scrutiny, resulting in awards to small numbers of owners.

For example, Coralie Clarkson in her detailed case study of the 13,642-acre Pakanae block was unable to locate any evidence that preliminary investigations were conducted by the district officer (Webster) before it was brought through the Court in 1875. The title hearing lasted less than a day and Pakanae 1 (9,064 acres) and Pakanae 3 (3,150 acres) were awarded to just a few owners each, despite evidence indicating that many others held interests in the land.[598]

Five blocks in the Mangakāhia taiwhenua (Pekepekarau, Waerekahakaha, Opouteke, Kairara, and Oue), with an aggregate area of 80,000 acres, were awarded to a single owner (Kamariera Te Wharepapa) and sold to the Crown within months. Dr Rigby described these transactions as the Crown's largest group of purchases from a single vendor in Te Raki and a major factor in the success of its purchasing programme.[599] The hearings were brief. No counter-claimants appeared and there was little focus on customary rights. For example, the minutes to the Waerekahakaha title determination merely noted that all parties in the courtroom agreed that Te Wharepapa would be the only name on the memorial of ownership for the block.[600]

596. Berghan, 'Northland Block Research Narratives' (doc A39(d)), vol 5, pp 110–111; (doc A39(e)), vol 6, pp 62–63, 195–196; (doc A39(f)), vol 7, p 362; for Maning's comment, see Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 692.

597. See Armstrong, 'The Native Land Court and Crown Purchasing' (doc AA52), pp 10–11, 55–56.

598. Thomas, 'The Native Land Court' (doc A68), pp 94, 96; as previously indicated, the Pakanae investigations are also discussed in detail by Coralie Clarkson, 'Pakanae and Kokohuia Lands' (doc A58), chs 2–3.

599. Barry Rigby, 'Validation Review of the Crown's Tabulated Data on Land Titling and Alienation for the Te Pararahi Inquiry Region: Crown Purchases 1866–1900', 2016 (doc A56), p 4; Thomas, 'The Native Land Court' (doc A68), p 99.

600. Thomas, 'The Native Land Court' (doc A68), p 101.

Included in the Court's title determinations at this time (in February 1876) was the 3,968-acre Oue block. This, too, passed through the Court without contest or any degree of scrutiny of the arrangements that had been made between J W Preece and Te Wharepapa, who was said to be acting on behalf of several others to whom advance payments had been made. Preece explained to the Court that the block had been subject to a pre-treaty claim by Reverend Baker but that the Crown now sought to acquire it and had recently made payments to extinguish ongoing Māori interests to the area. One hundred acres were to be reserved; the rest was to go to the Crown. Producing invoices, Preece told the Court that the agreement required the award of the block to Te Wharepapa as the sole owner so that he could make the transfer. Te Wharepapa then confirmed Preece's account. No other witnesses were called. The block was awarded as Preece requested, and the purchase was finalised the following day.[601] As Thomas noted, Te Wharepapa does not appear to have claimed that he held sole rights over Oue, and 'it had long been clear to Crown officials that many different groups claimed rights in the area' (for instance, see our discussion of the 1862 Mangakāhia conflict in chapter 8). However, the Court failed to 'inquire into the long and complex history of this land' and simply complied with the request of 'the soon-to-be buyer and seller' to award title in such a way so as to ease its transfer into the hands of the Crown.[602]

We discuss the Crown's purchase of Te Kauaeranga and Ngaturipukunui in chapter 10 but briefly note here the award of these two blocks to a single owner, Te Tirarau Kūkupa, in July 1877. On his death, they passed to Taurau Kūkupa and Tito Tirarau.[603] However, when Native Land Purchase Officer Patrick Sheridan entered negotiations to purchase the blocks in November 1892, questions arose about the limited ownership. Hira Te Taka and 65 others who identified as Te Uriroroi petitioned Parliament that Tirarau's people had agreed to his name being entered on the title in order to obtain advances on the Kauri timber. Taurau Kūkupa was considered to be acting as the trustee for the Parawhau hapū, and Tito Tirarau for the Uriroroi hapū: 'Each one of those trustees had been appointed by their respective tribes.'[604]

The petitioners asked Parliament to return the block to the Native Land Court so they could prove their customary ownership.[605] While the purchase was not overturned, the Te Ngaere and Other Blocks Native Claims Adjustment Act 1894 was passed, directing the Native Land Court to establish whether persons other than the registered owners had any equitable claims in the blocks and were entitled to share in the purchase money, a portion of which the Crown had retained. During the Bill's second reading, Robert Stout (MHR City of Wellington) acknowledged that 'there were many cases . . . in which Maoris who were equitably entitled to lands, or to moneys coming from lands, had been entirely deprived of

601. Berghan, 'Northland Block Research Narratives' (doc A39 (e), pp 269–270; Thomas, 'The Native Land Court' (doc A68), p 102.
602. Thomas, 'The Native Land Court' (doc A68), p 102.
603. Berghan 'Northland Block Research Narratives', vol 4, doc A39(c), pp 334–335.
604. Berghan 'Northland Block Research Narratives', vol 4, doc A39(c), p 339.
605. Berghan 'Northland Block Research Narratives', vol 4, doc A39(c), p 339.

their rights through the way in which the Native Land Court had admitted that only certain members were owners of a block.'[606] The inquiry found that 32 persons were entitled to payment for their shares.[607]

9.6.2.2.7 The Puhipuhi title investigation: a case study

In their submissions, claimants identified the Puhipuhi title investigation as an example of how Native Land Court processes could result in long and complex hearings. During these hearings, they said, disagreements among Māori over ownership were exacerbated by unclear, confusing, and sometimes contradictory rulings. They identified Judge Maning as especially problematic in this regard.[608] Ngāti Hau claimants, in particular, argued that the Court 'ultimately failed to provide . . . an effective mechanism by which to settle their dispute', and they highlighted 'the inadequacies of the available process to assimilate the nuances and complexities of Māori land tenure'.[609] The Crown, on the other hand, submitted that the majority of Northland's cases passed through the Court by agreement among the parties involved, and described contentious cases like Puhipuhi as 'the exception'.[610]

Puhipuhi is a case worthy of close attention because it raises a series of significant and recurring issues concerning the Court's operation in the inquiry district. These include Maning's decisions; the appropriateness of the Native Land Court and its processes for determining customary ownership; and the Crown's response to the claimants' desire for a rehearing. There is also the question of the Crown's efforts to acquire this particular area and its resources. This question is touched on only lightly here but fully explored in chapter 10.

The 25,000-acre Puhipuhi block lies inland and north of Whāngārei and southeast of Kawakawa.[611] At the time of the first Native Land Court hearing concerning the block in 1873, the principal claimants were Maihi Parāone Kawiti of Ngāti Hine, Eru Nehua of Ngāti Hau, and Hoterene Tawatawa of Ngātiwai. It was Eru Nehua who initiated the investigation of title as part of a plan for the development and management of Ngāti Hau's lands. A boundary survey, undertaken in July 1871, prompted what turned into a protracted and bitter struggle for the ownership of an area containing kauri gum, standing kauri, and fertile land. In a letter to Fenton, Hoterene Tawatawa claimed that Nehua and others were 'stealing' land that belonged to his hapū, while Te Tane Takahi of Ngāti Te Rā made a similar complaint to Native Minister Donald McLean.[612]

606. 'Ngaere and Other Blocks Native Claims Adjustment Bill,' 5 September 1894, NZPD, vol 85, pp 461–462.
607. Thomas, 'The Native Land Court' (doc A68), pp 213–218.
608. Claimant closing submissions (#3.3.225), p 90.
609. Closing submissions for Wai 246 (#3.3.249), p 80.
610. Crown closing submissions (#3.3.406), p 37.
611. Berghan, 'Northland Block Research Narratives' (doc A39(f)), p 265; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 721–735.
612. Tawatawa to Fenton, 5 June 1871 (Armstrong and Subasic, supporting papers (doc A12(a)), vol 9, p 2:1447); Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 721.

The initial application for an investigation of title for all of the Puhipuhi lands was lodged by Eru Nehua, Riri Taikawa, and Whatarau Ruku, of Ngāti Hau. Objections by counter claimants from Ngāti Hine, Ngātiwai, and Ngāti Te Rā followed. In advance of the hearing in 1873, a dispute erupted over the right to extract gum, a clear indication of the rivalries involved and the difficulties they might pose for any determination of ownership. The case was to be heard by Judge Maning, prompting concerns from Takahi, Tawatawa, and Hori Wehiwehi among others over his impartiality.[613] Maning vehemently denied their allegations. The Native Office was disinclined to take this sort of complaint seriously and so he duly presided over the case, heard at Kawakawa in August 1873.

The Court minutes do not appear to have survived, while no other reports of the proceedings could be located. The only record comprises Maning's own accounts and evidence adduced during subsequent hearings of 1875, 1882, and 1883. According to Maning, Maihi Parāone, Kawiti, and Eru Nehua each claimed ownership of the entire block. He recorded that the claimants generally behaved in an 'unseemly' manner, 'swearing exactly what they considered would suit their parties but without the slightest apparent regard for the truth', and observed that Nehua, in particular, seemed bent on provoking armed conflict.[614] Mark Derby gave evidence that after the Court finished hearing evidence over the course of one day, Maning called a meeting at his residence.[615] Derby considered that Maning's decision to gather the principal claimants following the hearing in this way was 'curious in light of his previously stated opposition to rangatira contributing to court-ordered decisions'.[616] A possible explanation, Derby suggested, was that 'Maning recognised 'that he needed to enlist the support of key rangatira in order for any judgment on the division of the land to be accepted by them'. In this situation, the Court was often unable to resolve disputes, and as Darby observed, 'had to fall back on seeking chiefly agreement before it could "impose" its authority'.[617]

Nehua and Maihi Parāone said that Maning concluded the meeting by informing them that he would provide his judgment after he returned home to Hokianga.[618] According to both rangatira, the Judge had delivered a written recommendation in which he proposed an award of 14,000 acres to Ngāti Hau, 6,000 acres to Ngāti Hine, and 5,000 acres for Ngātiwai, Ngāti Manu, and Ngāti Te Rā.[619] However, in his later communications with Fenton in 1877, Maning provided a rather different account of what he had proposed. He maintained that

613. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 722–725.

614. Maning to Fenton, 26 June 1877 (Berghan, supporting papers (doc A43), vol 2, p 961).

615. Eru Nehua, Maihi Paraone Kawiti, Horotene Tawatawa, the native assessors Hirini Taiwhanga and Wi Taua were present: Derby, 'Fallen Plumage' (doc A61), p 72.

616. Derby, 'Fallen Plumage' (doc A61), p 74.

617. Derby, 'Fallen Plumage' (doc A61), p 74.

618. Derby, 'Fallen Plumage' (doc A61), p 75.

619. Derby notes that no version or copy of the letters sent to Nehua or Maihi Paraone appear in the archival records, and they were unable to be located. A letter may also have been sent to Tawatawa, but this was not subsequently mentioned in his later evidence: Derby, 'Fallen Plumage' (doc A61), p 75.

> The Court at length after much pains and consideration made an order [in writing] that the block should be divided by regular survey into three portions of nearly equal area (defined by the Court on the survey plan) but considerably different in value – the portion awarded to Eru Nehua is the most valuable, being the southern end of the block which he resides on, and has considerably improved, and has the best land. The northwestern division was awarded to M. P. Kawiti, and the northeastern, to the Ngatiwai tribe, and the expense of the subdivision was ordered to be divided between the three parties.[620]

Regardless of the particulars of his recommendation, Maning did not complete the process of making a formal title determination. Derby pointed out that the identification of three parties and the proposed division of land might have served as a starting point for later hearings, but did not have the force of law.[621] As a result, the case was adjourned to allow time for a survey of the different portions to be made.[622]

This outcome from the 1873 hearing satisfied none of the parties involved. A month after the initial hearing, Maning met with Nehua and wrote to Maihi Parāone seeking agreement from the rangatira on the division of the land. During these exchanges, according to Derby's evidence, Maning likely tabled another option for the division of land, by which the rangatira would each be given shares in various subdivisions.[623] In his letter to Maihi Parāone, Maning also appears to have suggested that he might pursue an agreement for an equal division of the land between the three parties.[624] There is no evidence that Maning offered these proposals to Hoterene Tawatawa, who wrote to the Native Minister in November 1873 seeking the Government's intervention in the Court's process.[625]

The result of these events, Derby considered, was that the parties 'were left with sharply divergent understandings of the immediate outcome of the 1873 hearing'.[626] Nehua believed he had been allocated the largest share, while Maihi Parāone understood that he had been given the right to renegotiate an equal share in the block. Derby gave evidence that tensions between the two rangatira continued

620. Maning to Fenton, 26 June 1877 (cited in Derby, 'Fallen Plumage' (doc A61), p 75); Derby notes that Maning reiterated this claim again in a 1879 letter to Fenton: Maning to Fenton, 8 July 1879 (cited in Derby, 'Fallen Plumage' (doc A61), p 76).

621. Derby, 'Fallen Plumage' (doc A61), p 76.

622. Maning to Fenton, 8 July 1879 (cited in Derby, 'Fallen Plumage' (doc A61), p 76).

623. Derby, 'Fallen Plumage' (doc A61), pp 77–84. Derby explains that 'Maning's grounds for allocating these shared interests in each division appear to reflect the complex nature of the various customary interests in Puhipuhi, and to have aimed at overcoming opposition from contesting claimants. Maning seems to have attempted a solution that roughly resembled an equal three-way division, while ensuring that Nehua (whose efforts at farming the Taharoa lands Maning evidently respected) gained substantially more in "value" than the other principal claimants': Derby, 'Fallen Plumage' (doc A61), p 78.

624. Derby, 'Fallen Plumage' (doc A61), p 80.

625. Tawatawa asked McLean 'to put a stop to further encroachment upon my land – Te Puhipuhi. And also other pieces of land belonging to me which Eru Nehua is endeavouring to obtain possession of': Tawatawa to Native Minister, 12 November 1873 (cited in Derby, 'Fallen Plumage' (doc A61), p 82).

626. Derby, 'Fallen Plumage' (doc A61), p 83.

over the subsequent two years before the block was back before the Court in February 1875. During this time, Nehua refused to permit a survey of the internal boundaries of the block, and as a result 'the matter could not progress to the issue of certificates of title'.[627] Maning later recorded that during the 1875 sitting he had dismissed the case and that 'furious and dangerous dissension' again ensued.[628] Derby commented that by the end of 1875, Nehua and Maihi Parāone's 'mutual distrust and rancour made further direct negotiations between them apparently fruitless'.[629]

Over the ensuing years, Ngāti Hau and Ngātiwai made four applications for a further Court hearing and determination of title to Puhipuhi, all of which were declined, primarily on the basis that the claimants were unable to reach agreement among themselves as to an allocation of land.[630] Derby detailed the ongoing correspondence Maihi Parāone and Nehua maintained with Government officials over 1877 and 1878. Both rangatira 'claimed to be abiding by Maning's 1873 Native Land Court proposal and each accused the other of defying that proposal'. For Ngātiwai, Tawatawa supported Kawiti's understanding of the 1873 proposal, and alleged in 1878 that Nehua unjustly claimed a majority share of the block.[631] In the meantime, correspondence between Maning and Crown officials indicated 'that they believed that the Native Land Court could not be effective until the chiefs themselves reached some accommodation'.[632]

After a failed attempt at mediation by Resident Magistrate E M Williams in March 1878, Wiremu Kātene (former MHR Northern Maori) wrote to the Civil Commissioner, George Clarke junior, suggesting that the 'main cause' of the dispute was the Court's failure to excise the southern portion of the block occupied by Nehua and his whānau, with the result that Ngāti Hau were threatening to sell all their interests in the whole of Puhipuhi.[633] Maihi Parāone had also made a threat to 'subdivide the land myself and sell my portion to the Pakeha'.[634] Derby argued that for several years the Crown had prevented such sales by declining a further title investigation, and after Civil Commissioner Kemp informed the Native Minister in October 1878 of the value of the timber on the block, the Government began taking active steps to purchase Puhipuhi.[635] As we discuss further in chapter 10, the Crown proclaimed the block as being under negotiation for purchase in November 1878, and made tāmana payments to Eru Nehua, Hoterene Tawatawa, and Maihi Parāone over the following months (see section 10.4.2.3.2).[636]

627. Derby, 'Fallen Plumage' (doc A61), p 84.
628. Maning to Fenton, 8 July 1879 (cited in Derby 'Fallen Plumage' (doc A61), p 93).
629. Derby, 'Fallen Plumage' (doc A61), p 87.
630. Derby, 'Fallen Plumage' (doc A61), pp 105, 106.
631. Derby, 'Fallen Plumage' (doc A61), p 98.
632. Derby, 'Fallen Plumage' (doc A61), p 104.
633. Derby, 'Fallen Plumage' (doc A61), pp 98, 101–102, 104.
634. M P Kawiti to H T Clarke, 18 November 1877 (cited in Derby, 'Fallen Plumage' (doc A61), p 96).
635. Derby, 'Fallen Plumage' (doc A61), pp 105, 114–116, 117.
636. Derby, 'Fallen Plumage' (doc A61), pp 121–122, 128–131; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 728–729.

In June 1879, after the Crown considered it had acquired Ngāti Hau, Ngātiwai, and Ngāti Hine's interests in the block, Native Minister John Sheehan advised Fenton that there was 'now no reason why the title (withheld in consequence of the dispute between Marsh Brown and Eru Nehua) should not issue.'[637] However, Derby observes that '[h]aving secured the right to buy Puhipuhi, the Crown showed no further urgency to complete the purchase', and little action was taken for two years.[638] In the interim, both Nehua and Maihi Parāone filed an application for an investigation of the Puhipuhi title in February 1880, and Maihi Parāone, Nehua, and Tawatawa again submitted a joint application in March.[639] Derby considered that these joint applications indicated that:

> by 1880 all three groups of claimants were eager to resolve the matter of title to Puhipuhi, which had been uncertain and a source of tensions for almost a decade. This would allow them to see the Crown purchase of Puhipuhi completed, with the hope of European settlement to be established in the vicinity, bringing greater economic opportunities and infrastructure such as roads and railway. It would also allow them to collect the balance of their payments for the land, to pay off debts or to develop their remaining land.[640]

A hearing was held before Judge John Symonds in April 1882. The Crown decided not to apply to have its interests cut out in return for its advances, preferring to wait until the whole block could be acquired.[641] Nonetheless, a close eye was kept on proceedings via Native Land Court clerk and interpreter J H Greenway. Shortly before the Court delivered its judgment, Greenway sent a telegram to the Native Land Purchase Department predicting that some 'outside claimants' would prove their case 'as against those the Govt have already negotiated with and partly paid'. In that event, Greenway would 'endeavour to have Govt claims secured. Eastern and north-eastern portion of block most valuable on account of Kauri.' Noting that lawyers for private purchasers were offering more than the Government,[642] Under-Secretary Gill instructed Greenway not to apply for the Government's interest to be defined until the time for rehearing had lapsed, but to forward the Court's judgment to him as soon as it was delivered.[643]

The 1880 judgment differed markedly from that proposed by Maning. Describing the evidence as 'most conflicting and unsatisfactory', Symonds recorded that he and assessor Perini Mataiwhaea had 'had some difficulty arriving at a decision.'[644] Ngāti Hine's claim, based on conquest, was not accepted because their witnesses had disagreed as to its extent, and they were not included in the

637. Sheehan to Fenton, 21 June 1879 (cited in Derby, 'Fallen Plumage' (doc A61), p 128).
638. Derby, 'Fallen Plumage' (doc A61), pp 128–129.
639. Derby, 'Fallen Plumage' (doc A61), pp 136–137.
640. Derby, 'Fallen Plumage' (doc A61), p 137.
641. Derby, 'Fallen Plumage' (doc A61), p 151.
642. Greenway to R Gill, 21 April 1882 and 29 April 1882 (Derby, 'Fallen Plumage' (doc A61), p 151).
643. Derby, 'Fallen Plumage' (doc A61), pp 141–152.
644. Symonds, judgment, 26 April 1882 (cited in Derby, 'Fallen Plumage' (doc A61), pp 152–153).

award. The lion's share (16,000 acres) went to Ngātiwai, Ngāti Manu, and Ngāti Taka and the remaining 9,000 acres to Ngāti Hau.[645] Greenway then read out to the assembled claimants the amount of the Government's previous advances.[646]

Objections followed from all claimant groups concerned. On 29 April 1882, Iwi Taumauru and others of Te Atihau, wrote to Native Minister Bryce asking for a rehearing of the case. They described themselves as 'disinterested onlookers' and whose claims had not been upheld in the 1873 decision. However, they were concerned that the Court's award of the northern portion of the block to Ngāti Manu, Ngāti Te Rā, and Ngātiwai would result in their own wāhi tapu, pā, and cultivations and fences being incorrectly awarded to those groups.[647] Derby observed that while they appear to have abandoned their claims to the block in the Court, 'they evidently wished to see wāhi tapu and other sites of significance to them protected'.[648]

That same day, Nehua and other members of Ngāti Hau, who had refused to submit a list of owners, also sent a petition to Native Minister Bryce. They too asked for a rehearing and objected to the Court's decision as including their pā, wāhi tapu, and cultivations in the area awarded to Ngātiwai.[649] Derby observed that the dates of Nehua and Taumauru's petitions both 'complied with section 47 of the 1880 [Native Land Court] Act which specified that rehearings had to be applied for within three months of the original hearing'.[650] Maihi Parāone rejected the judgment as well, raising the issue that he had already been paid advances but had not been awarded ownership of any part of the block. He wrote to Bryce twice in May 1882 requesting a rehearing.[651] Ngātiwai also petitioned the Government, but their objection concerned the per-acre price of six shillings that had formed the basis of their advances (we discuss this and further petitions concerning the Crown's tāmana payments in chapter 10).[652]

A rehearing of the case was eventually granted one month after a confrontation between Ngāti Hau and Ngātiwai at Ruapekapeka in June 1882.[653] Derby noted in his evidence:

> About 100 Ngāti Hau based at Pehiaweri, near Whangarei, travelled to Ruapekapeka on the northwestern boundary of Puhipuhi, and confronted a larger party of Ngāti Wai and their whanaunga. This expedition then became an occasion for utu, as the

645. Derby, 'Fallen Plumage' (doc A61), pp 152–153.
646. Derby, 'Fallen Plumage' (doc A61), p 153.
647. I Taumauru and others to J Bryce, 29 April 1882 (cited in Derby, 'Fallen Plumage' (doc A61), p 155).
648. Derby, 'Fallen Plumage' (doc A61), p 155.
649. Derby, 'Fallen Plumage' (doc A61), p 156.
650. Derby, 'Fallen Plumage' (doc A61), p 156.
651. Derby, 'Fallen Plumage' (doc A61), pp 156–157.
652. Derby, 'Fallen Plumage' (doc A61), p 157
653. Derby, 'Fallen Plumage' (doc A61), p 159.

> Ngāti Hau proceeded to destroy waerenga (clearings for cultivation) and to burn fences.[654]

Both sides were armed, but the confrontation was resolved without bloodshed following the intervention of resident magistrate James Clendon. Derby noted that the reasons for granting a rehearing are unclear, but that the threat of further trouble over the block and the glaring inconsistencies in the Court's decision were likely factors. The Crown's desire to purchase much of the block with a clear title was another consideration.[655] As Bryce had indicated earlier, the Crown decided the best course would be to allow a rehearing, after which the purchase of the entire block might be aggressively pursued. An offer by Maihi Parāone to refund the advances he had received was refused for that reason.[656]

The rehearing took place in 1883, and the Court awarded 2,000 acres to Ngātiwai and co-claimants, 3,000 acres to Ngāti Hine, and 20,000 acres to Ngāti Hau. Rehearing Judges O'Brien and Mair and native assessor Hipirini Te Whetu noted 'the very unsatisfactory quality' of some of the evidence presented, adding: 'It has unfortunately become so common an occurrence to interweave false statements with the truth that the court is often at a loss what to accept and what to reject.'[657] The judgment concluded that there were 'material contradictions in the evidence of certain witnesses' over the different hearings. Testing the claims against those made previously was 'the safest rule to follow' and on that basis, the Court continued,

> We think that Eru Nehua has been consistent throughout in his claim and in his prosecution of it. But we do not find that the other parties have. On the contrary, we find at the former hearing one party abandoning his claim, and another party supporting a claim in the N' Tera, N'Manu and N'Wai which he now disputes, and further waiving any claim to the Northern part of this block.[658]

Te Atihau had failed to establish any claim, and in the Court's opinion, it was 'a pity that they should have incurred the expense of prosecuting . . . what they had deliberately abandoned and withdrawn on the former hearing'. The evidence of 'some occupation' by Ngāti Hine and Eru Nehua's admission in favour of Maihi Parāone Kawiti was thought to 'justify . . . admitting them [Ngāti Hine] to an interest' in the block. Ngāti Tera, Ngāti Manu, and Ngāti Wai were also awarded an interest 'on the evidence of occupation of a portion – a small portion of the block', even though that evidence had not been as 'satisfactory' as the Court might have wished.[659] A total of 20,000 acres, later designated as Puhipuhi 1, went to Eru Nehua and his co-claimants of the Ngāti Hau, descendants of Kahukuri; 3,000

654. Derby, 'Fallen Plumage' (doc A61), p159.
655. Derby, 'Fallen Plumage' (doc A61), p160.
656. Derby, 'Fallen Plumage' (doc A61), pp160–161.
657. Judgment, 26 May 1883 (cited in Derby, 'Fallen Plumage' (doc A61), p167).
658. Judgment, 26 May 1883 (cited in Derby, 'Fallen Plumage' (doc A61), p167).
659. Judgment, 26 May 1883 (cited in Derby, 'Fallen Plumage' (doc A61), p168).

acres (Puhipuhi 2) were awarded to Maihi Parāone Kawiti and Ngāti Hine; while the northern portion, Puhipuhi 3 of 2,000 acres, went to the descendants of Para, Taurere Kautu, and Te Pari.[660] According to the *New Zealand Herald*, 'The universal opinion is that the judgment is just, and strictly in accordance with the evidence, and has consequently given great satisfaction.'[661] The rehearing brought an end to investigations into the ownership of Puhipuhi, clearing the way for the Crown to pursue its purchase programme.

The case of Puhipuhi is illustrative of a wider pattern in the Native Land Court's title investigation and rehearing process. There were serious difficulties in converting complex rights based on different take into a simplified, individualised title, especially when evidence was constructed to serve the claims of the contending parties. The Native Land Court may not have caused conflict between the different hapū, but it is an oft-repeated allegation that the adversarial nature of the institution that had been created exacerbated divisions. Had the Court not existed, hapū and rangatira may well have reached their own accommodations as to who held rights and where. Even at the time, it was recognised that mediation involving the chiefs themselves was likely to deliver a better outcome than the Court could at Puhipuhi, and after the 1883 judgment had disallowed Kawiti's claim, it was Eru Nehua who had acknowledged his interests. In the meantime, there had been more than 10 years of contention and expense.

The various parties involved in the Puhipuhi case had been obliged to expend precious time and resources to prove their interests and defend them from others. Attending repeated and protracted hearings had the potential not only to put strain on hapū and iwi relationships, but depleted their already limited financial resources, undermining the sort of development plans being attempted by Nehua. This was a costly, disruptive, divisive, and effectively compulsory process. The 1883 ruling was apparently accepted by all claimant groups, but whether as a reasonable compromise or out of exhaustion is moot.

The contrast between Maning's original and revised divisions of Puhipuhi, the Native Land Court's 1882 decision, and the award finally made in 1883 raises some serious questions about the ability of the Court to sift and assess evidence with a view to reaching a just and consistent result.[662] Armstrong and Subasic concluded that the 'inconsistency in how the various Land Courts assessed the matter of ownership' suggested that 'the matter resembled a lottery'.[663] While we are not in a position to relitigate the findings of the nineteenth-century Native Land Court, this is a conclusion with which we have some sympathy. Certainly, the inconsistencies of judgments imposed by a Court dominated by judges ill-equipped in matters of tikanga and case law brought the institution into discredit amongst those obliged to abide by its decisions.

660. Derby, 'Fallen Plumage' (doc A61), p 168.
661. 'Kawakawa Native Lands Court', *New Zealand Herald*, 2 June 1883, p 5 (cited in Derby, 'Fallen Plumage' (doc A61), p 168).
662. Derby, 'Fallen Plumage' (doc A61), pp 167, 173.
663. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 735.

The intervention by the Crown's purchase agents and their payments of tāmana to some disputants also clearly aggravated the situation, while the blurring of lines of responsibility between the Court and the Crown's purchase agency in the person of Greenway is both notable and questionable, and will be discussed further in chapter 10.

9.6.3 Conclusions and treaty findings

In our view, it is unnecessary to establish collusion between Native Land Court judges and Crown purchase officers to raise questions about the independence of the Native Land Court. It was an institution that was created by a settler parliament to facilitate the transfer of land out of Māori hands into their own. This has been the conclusion of the Tribunal in other inquiries and is one that we share. The men who were appointed as judges actively promoted that goal. Their work and the laws they applied were unquestionably assimilationist. Politicians and judges both saw the individualisation of title as assisting Māori in their progress to civilisation but settler ownership of lands they regarded as otherwise unused was to their mind, essential to the development of the colony and indeed, a project ordained by God. The Native Land Court judges brought that cultural and economic imperative and their own flawed understandings of tikanga to their consideration of customary ownership, and little or no legal experience to interpreting legislation that had been carelessly drafted, often to the prejudice of those who had to abide by their decisions. As the Puhipuhi case also demonstrated, other officials connected to the court could be in close communication with the Native Department keeping an eye on its interests.

There was no legal requirement for applicants to demonstrate that they had the support of their own hapū – or the knowledge of others – in bringing lands through the Court for title determination. In the absence of counter-claimants, investigations were cursory and out-of-court arrangements by which a few owners only were named in the title were generally accepted without serious interrogation. Even Maning who made much of his refusal to be led by purchase officers into putting their preferred candidates into the title often acceded to the practice of naming just a few in the memorial of ownership for the sake of convenience but at risk to those whose interests were not recorded. Few protections were contained in the legislation and often these were poorly observed, while there were acknowledged but unaddressed issues with notifications and scheduling of hearings which increased the dangers of being left out while placing the onus on Māori to avoid that outcome.

We are also of the view that, if Māori had been empowered to reach decisions about their own lands themselves, many of these problems might have been avoided. That had been certainly contemplated at the time and was to be a consistent demand of Te Raki Māori in the years following the creation of the Native Land Court. We shall see that even when attempts were made to utilise their own komiti to resolve ownership disputes, ultimately the parties concerned were required to go through the Native Land Court for legal confirmation of title. And

with that requirement came the opportunity for challenge and the consequences of more disturbance of inter-hapū relationships, absence from kāinga, and costs.

The appointment of assessors to the Court was hardly the equivalent of the legal empowerment of Māori institutions and a largely disappointing expression of the Crown's duty to respect and give effect to tino rangatiratanga within a body of such key concern to their interests. This is not to say that assessors could not play an important role in the course of hearings and determination of cases, but it is hard to escape the conclusion that they were in a subordinate position, put there by legislation which wavered on the matter of their status but trended towards giving Pākehā judges the clear (and even sole) authority and by the attitudes freely expressed by those same judges about their Māori colleagues. We do not accept that out-of-court arrangements were a true expression of Māori agency, especially given the involvement of Crown purchase officers. Nor was the Court's endorsement of them, without an effective requirement for scrutiny within the Native Land legislation, an adequate discharge of the Crown duty to respect and support the exercise of tino rangatiratanga.

Finally, we note that without the requisite expertise and in the overriding imperative to simplify and fix rights that were inherently flexible, complex and fluid, the Native Land Court built up a body of precedent that distorted tikanga and was inconsistently applied.

We also concur in broad terms with the claimants' assessment that the Native Land Court which operated in the inquiry district was beset with procedural flaws and widely damaging to Māori communities. While the focus of our inquiry must be on the actions of the Crown and not the Court itself, we see those flaws as stemming from the structure that was created, the nature of the appointments made, the failures of legislation in its conception and drafting, and of the Government to ensure that provisions that might have offered a degree of protection were being implemented.

We find accordingly that:

- The failure of the Crown to create a body in which Māori (in Te Raki and elsewhere) had the determining role when deciding questions pertaining to their own lands was a breach of te mātāpono o te houruatanga/the principle of partnership; and in respect of the Court it created, its failure to ensure that assessors had equal status and authority to judges throughout the period under consideration was a breach of te mātāpono o te mana taurite/the principle of equity.
- The failure to ensure adequate notification of hearings and that the costs involved in the conversion of customary title were shared appropriately and fairly among the parties who benefited, Crown as well as Māori, breached te mātāpono o te houruatanga/the principle of partnership and te mātāpono o te mana taurite/the principle of equity.
- The Crown failed to monitor court processes to assure itself that the institution it had created was functioning in an appropriate manner and to ensure that statutes were appropriately rigorous, fully implemented, and effective.

Those failures breached te mātāpono o te matapopore moroki/the principle of active protection.

9.7 How and Why Did Te Raki Māori Engage with the Native Land Court and What Were the Consequences of Engagement?

9.7.1 Introduction

The engagement of Te Raki Māori with the Native Land Court, the benefits they expected, and the costs resulting from their participation featured prominently in the claims and submissions we received. Claimants argued that engagement with the Court was unavoidable if Te Raki Māori were to secure legally recognised and usable titles, protect their lands from rival hapū, and settle boundary disputes. It was submitted that Te Raki Māori expected such titles would facilitate their participation in the commercial economy and protect community ownership against excessive land loss.[664] They hoped secure titles would permit them to generate capital to invest in the development of their lands, other commercial enterprises, and community well-being.[665] Finally, titling of Māori lands would encourage Pākehā to settle among them, bringing the capital, services, technology, and employment opportunities that they sought, while allowing them to control the pace and scale of such settlement. Without any recognised alternative, their tūpuna were obliged to engage with the Native Land Court to realise these aspirations, although this did not imply approval either of the process, the forms of title issued, or the Crown's control of this sphere of governance. Te Raki Māori who chose not to engage with the Court, claimants argued, risked losing all right to lands, thereby rendering engagement practically obligatory.[666]

On the matter of costs, the claimants submitted that the expenses associated with participation in the Court were neither fair nor reasonable. They argued that Court-related costs restricted the ability of Te Raki Māori to secure legal recognition of their interests in land. They also submitted that the Crown, although aware of the burden being imposed, did little to mitigate the consequences, and that judges largely failed to exercise any discretion to reduce costs. The claimants acknowledged the difficulties involved in any effort to quantify such costs, but argued that the travel and accommodation expenses involved in attending the Court, and especially survey costs, imposed a heavy financial burden on many of their tūpuna. Even if the Government could be prevailed upon to assist with accommodation, travel, and living expenses, the costs were still levied on the lands involved.[667]

The Crown advanced a similar set of explanations for Te Raki Māori engagement with the Native Land Court. In its view, they included a desire on the part of iwi and hapū to define boundaries, to partition land among whānau for the

664. Claimant closing submissions (#3.3.225), pp 65–66.
665. Claimant closing submissions (#3.3.225), p 67.
666. Claimant closing submissions (#3.3.225), pp 65–77.
667. Claimant closing submissions (#3.3.225), p 174.

purpose of establishing farms and other land-based enterprises, to obtain a title from the Crown 'with which to transact', to secure the protection that a secure title offered when leasing land, and to attract European settlers and promote the growth of towns. While acknowledging that Māori had no alternative if they wished to secure legal titles, the Crown submitted that they were under no obligation to apply to the Native Land Court for an investigation into ownership.[668] The Crown noted that Te Raki Māori were fully able to keep significant tracts of land from passing through the Court, pointing to the largely successful Mōtatau rohe pōtae.[669]

With respect to costs, the Crown argued that Court fees may have been one of the lesser expenses associated with the process, especially in the case of undisputed claims; that whether fees were burdensome depended upon the number of owners involved in any particular block; and that, from 1873, lawyers were debarred from the Court or could appear only with the consent of the presiding judge. On the other hand, counsel acknowledged that survey costs could be high – indeed high enough to compel some owners to alienate land to meet them – but suggested that the absence of land sales immediately following titling indicated that survey costs did not always prompt alienation. As for indirect costs associated with Court hearings – that is, for travel, accommodation, sustenance, and medical attendance – the Crown noted that they varied widely from group to group and from individual to individual, and that they were impossible to calculate in any general way.[670]

In this section, we discuss why Te Raki Māori engaged with the Native Land Court, before examining the range of costs such engagement entailed.

9.7.2 The Tribunal's analysis

9.7.2.1 *Te Raki Māori Reasons for Engaging with the Native Land Court*

Te Raki Māori chose to engage with the Native Land Court for a range of reasons, not least a desire to secure Crown-guaranteed titles. They thought that achieving a recognised form of English-style tenure would enhance their mana and support their commercial and development aspirations. In his correspondence with Fenton, Maning emphasised what he saw as the intention of Māori to subdivide their lands into whānau farms, while noting that where a claim was made for a large block, it was 'almost invariably with the purpose of securing a Grant for the external boundaries in the first instance and subdividing it afterwards as soon as the owners can conveniently raise funds to pay the expenses of the subdivision.'[671]

Māori initial enthusiasm for what the Native Land Court was thought to offer is demonstrated by the large number of blocks brought through for title determination in the first years of its operation. Between 1865 and 1874, 469 blocks

668. Crown closing submissions (#3.3.406), pp 24–25.
669. Crown closing submissions (#3.3.406), pp 3, 26–27.
670. Crown closing submissions (#3.3.406), pp 48–50.
671. Maning to Fenton, 19 February 1872 (Armstrong, 'The Native Land Court and Crown Purchasing' (doc A A52), pp 18–19).

embracing 39.1 per cent of the known area in customary ownership in 1865 passed through the Native Land Court. Maning's views are supported by data for the period from November 1865 to July 1867, when title was sought for many small blocks. Of the 30 certificates of title issued in the Hokianga district, 14 were for areas of under 100 acres, and 11 for blocks between 100 and 1,000 acres. In the case of Whāngārei district, certificates were issued for 41 blocks, 20 of which were smaller than 100 acres, and 18 between 100 and 1,000 acres in size. In Mahurangi, title was sought for 12 blocks, 10 of them under 100 acres, and two between 100 and 1,000 acres.[672]

In his report on the Waimate–Taiāmai area, Armstrong argued that evidence for the period after 1865 confirmed that northern Māori sought whānau farms and were securing titles and selling some land to raise investment capital as part of a long-term strategy.[673] During the 1870s, Waimate hapū attempted to attract Pākehā settlement and the employment opportunities, trade, and services that would follow. Legally recognised titles to their lands were critical to that goal, and engagement with the Native Land Court the only means to secure them.[674] In their district-wide study, Armstrong and Subasic reached similar conclusions. They emphasised the initial eagerness of Te Raki Māori to use the Court 'as a means of achieving long-held economic and other ambitions. They sought title determination so that whānau could obtain farms, and in order to alienate such of their lands as deemed necessary to encourage the highly sought after Pākehā settlement and the establishment of urban centres.'[675]

Further, there is evidence from Walzl's research into Whāngārei that some local Māori sought titles so that they could levy rents upon settlers who had chosen simply to occupy lands, or in default of payment, evict them – a clear indication that Te Raki Māori understood the potential value of a legal title.[676]

Above all, engagement with the Court seemed to offer Māori the chance to establish a mutually advantageous relationship with both settlers and the Crown. They envisaged that this would deliver stability, security, and prosperity, and allow them to maintain a central place in the emergent economy. The realisation of those aspirations depended on the ability to utilise their land and its resources. In turn, capitalising land interests required the clear definition of ownership and boundaries and the award of legally recognised titles. Sale of some of their land would be required, and this was largely accepted in the expectation of a range of benefits. As Judge Rogan advised J C Richmond (then Minister of Customs), hapū 'endeavoured by the only means in their power that is by the sale of their land, to induce the settlement of Europeans amongst them.'[677]

672. 'Certificates Issued by the Native Land Court', 6 August 1867, AJHR, 1867, A-10(c), pp 3–5.
673. Armstrong, 'The Native Land Court and Crown Purchasing' (doc A A52), pp 18–20.
674. Armstrong, 'The Native Land Court and Crown Purchasing' (doc A A52), pp 19–20.
675. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 22.
676. Walzl, 'Overview of Land Alienation' (doc U1), p 75.
677. Rogan to Richmond, 20 June 1868 (quoted in Paul Thomas, 'The Crown and Maori in the Northern Wairoa, 1840–1865', report commissioned by Crown Forestry Rental Trust, 1999 (doc E40), p 207).

Their intention was, as it had been in the preceding decades, to share rights to land and the potential wealth that it offered, although in terms more fully integrated into the legal system that now dominated. It was necessary, in any case, for Te Raki Māori to conserve their own interests by controlling the pace and scale of Pākehā settlement. That possibility had been promised under Grey's rūnanga scheme and continued to exist under the Native Lands Act 1862, but became increasingly tenuous under the 1865 and subsequent legislation.

After the passage of the Native Land Act 1873, what appears to have been largely voluntary engagement with the Court became increasingly involuntary. Factors involved in this transition included section 34, which permitted individuals to bring title applications without community sanction; the undermining of traditional controls under the memorial of ownership system, which enabled purchase by attrition; and the use of tāmana as a strategy in purchase negotiations, requiring all of those who wished to defend their rights to attend Court to have them recognised and ultimately partitioned out. Engagement was inescapable if claims were to be heard and upheld.

Dissatisfaction soon developed among Te Raki Māori over unavoidable engagement with the Court and over its conduct and costs.[678] We examine the steps to resist the operation of the Native Land Court and assert control over their lands in the final decades of the nineteenth century in chapter 11, and we do not discuss them here. We note, however, the establishment by the Te Rohe Pōtae o Ngāti Hine as a boundary marking autonomous Māori land around Mōtatau, in 1874, within which engagement with the Native Land Court was prohibited.[679] The success of the rohe pōtae of Ngāti Hine and declining Crown interest in further purchase in the district saw a decline in applications for title determination from 1880 onwards; only 75 blocks with an aggregate area of 62,132 acres were titled during the period from 1881 to 1889, and 61 with a total area of 41,427 acres during the following decade.[680]

9.7.2.2 *The costs of Te Raki Māori engagement with the Native Land Court*

Participation in the Court process imposed a range of burdens on Te Raki Māori of which survey costs would prove the most onerous. The absence of comprehensive and reliable data for our inquiry district renders quantification difficult, while some costs do not lend themselves to quantification at all. Establishing whether the costs of engagement with the Native Land Court led some Te Raki Māori to sell land is also difficult, although we do offer some comments on that matter in the section dealing specifically with survey charges.

By 1870, Te Raki Māori were expressing dissatisfaction over the costs being imposed upon them. In his submission to Haultain in 1871, Eru Nehua claimed that 'many persons are deterred from bringing forward undoubted claims from

678. Thomas, 'The Native Land Court' (doc A68), chs 3–4.

679. See Peter Clayworth, 'A History of the Motatau Blocks, c1880-c1980', report commissioned by the Waitangi Tribunal, 2016 (doc A65).

680. Thomas, 'The Native Land Court' (doc A68), p17.

their inability to pay fees. They are frightened at the various payments they have to make. The payment fixed for a Crown grant should be sufficient.'[681] Wiremu Pomare also commented at length on the matter of costs. He advised Haultain:

> The Maoris don't at all approve of paying the fees of Court; these have only recently been insisted on; we were not aware it was laid down in the Act. I was one of the first Natives who passed land through the Court at Mahurangi; a block of 1,220 acres was investigated by Mr Rogan, but I did not pay any fees, and this seems to be a new custom. These changes are not clear to us. The Maoris would like all the laws connected with Natives and their lands translated and circulated, as newspapers are amongst the Europeans . . . We know nothing of the laws, they are never sent to us; they are stowed away in the pigeon-holes of the Government, and we never see them.[682]

Pomare's comments indicate that under the Native Lands Act 1862, Te Raki Māori did not incur expenses beyond those for survey; certainly, the Act did not contain a schedule of court costs, and the inclusion of one in the Native Lands Act 1865 clearly came as a surprise.

In his 1871 memorandum on the operation of the Native Land Court, Sir William Martin noted that 'the costliness of the Court . . . is bitterly complained of' and could be met 'by a scale of fees, accompanied by a proper taxation [itemisation] of costs'. Martin proposed a new scale that would limit the fees and duties payable 'to an amount necessary for the working expenses of the Court', and added,

> it seems worthy of consideration of the Legislature whether it is a wise economy to throw the whole of the expenses of the Court on funds so obtained, seeing that the action of the Court on principles herein set forth is a power capable of greatly benefiting both Colonists and Natives, and, indirectly, of diminishing the cost of Native and Defence Departments.[683]

The possibility of sharing Court costs between Māori and the Crown did not attract serious consideration, however. Haultain's view was that Māori 'of course, wish[ed] to avoid paying the fees of the Court', but he thought that they did not amount to much unless the case was 'a very protracted one'. On the other hand, he acknowledged 'the expenses outside the fees of the Court are often very heavy'.[684] Haultain went on to note that from 1865 to 1870, the Court had cost £29,225, while receipts had amounted to £17,625. From the resulting deficit of £11,600, £3,517 in outstanding fees had to be deducted. Haultain estimated the net cost over five years at £8,000, a sum for which over 2,000,000 acres of land had been titled and opened for settlement. Further, he clearly expected that the Native Land Court

681. Eru Nehua, 'Appendix to Return Relative to the Working of the Native Land Acts', 20 April 1871, AJHR, 1871, A-2A, p 34.
682. Wiremu Pomare, 'Appendix to Return Relative to the Working of the Native Land Acts', 20 April 1871, AJHR, 1871, A-2A, p 35.
683. 'Papers on Native Land Court and Natives Reserves Acts', no date, AJHR, 1871, A-2, pp 4, 16.
684. Haultain to McLean, 18 July 1871, AJHR, 1871, A-2A, p 7.

would shortly generate revenue in excess of its costs, while adding that he had not included the cost of the Survey Department, put at £10,497 over five years, since the provinces had acquired, 'by means of this department, maps of much greater value at the expense of the Natives.'[685] Included with Haultain's report was a summary of Court fees paid for the period from 1865 to 1870: of the £6,086 charged across the country, £3,517 (as noted earlier) remained as unpaid, strongly suggesting that Māori were experiencing difficulties in meeting the demands of the Court process. For Auckland Province, the corresponding figures were £4,073 and £2,149, so that 52.8 per cent remained unpaid.[686]

Although the costs may have been comparatively modest for uncontested hearings, for contested claims they could mount quickly, imposing a serious burden on those for whom their land constituted their only capital. A range of costs had to be met just to have a claim heard, including fees for witnesses and kaiwhakahaere (advisors) where they were involved, and fees for interpreters and legal counsel. A rehearing application cost £5. There were fees for certificates of title and memorials of ownership, for Court orders and inspections of papers, plans and inspection of plans, and after 1889, for the filing of documents.[687]

Wiremu Kātene (formerly MHR for Northern Maori) complained to the Native Land Laws Commission at the meeting held at Waimate North in 1891 that until recently it had cost £1 per day to appear in Court even though the case might go on for two months and, he continued,

> It might be a case in which I appear merely as an objector, and not as an applicant . . . The claimant in such a case has also to pay £5 a week, I have seen these things at the Court at Hokianga, both claimants and counter-claimants being called upon to pay the fees I mentioned.[688]

Hone Peeti also described the intersecting costs and pressures Māori experienced when attending Court sittings:

> We find that the fees to be paid are very oppressive indeed, and the people are also subjected to great trouble in having to attend the Court, travelling night and day from distant places, and they are at the same time reduced to great inconvenience through having to obtain food – perhaps fruit – sufficient to last them for the month or so that will elapse before they can return to their places of abode.[689]

These were not once-off expenses; Te Raki Māori were charged not just for the initial title investigation but for all orders of Court business: partitions, subdivisions, successions, and rehearings. During the 1870s, the number and duration

685. Haultain to McLean, 18 July 1871, AJHR, 1871, A-2A, p 9.
686. 'Appendix to Report Relative to the Working of the Native Land Acts', AJHR, 1871, A-2A, p 51.
687. Waitangi Tribunal, *Te Urewera*, Wai 894, vol 3, p 1265.
688. Wi Katene, 'Minutes of Meetings with Natives and Others and Correspondence', 2 April 1891, AJHR, 1891, G-1, p 21.
689. Hone Peeti, 'Minutes of Evidence', 2 April 1891, AJHR, 1891, G-1, p 61.

of Court sittings increased sharply as the Crown vigorously pursued purchase of Māori land. Armstrong and Subasic noted that sittings were held in locations stretching from Auckland to Ahipara and Whangaroa; and that at least some of them were scheduled in response to requests from the Crown's purchase agents. Some sittings drew in Māori from throughout the region, notably in Auckland, Haruru, and Kawakawa in 1871. Between 1870 and 1872, at least 19 sittings took place at Ahipara, Auckland, Awaroa, Hokianga, Kawakawa, Mangonui, Russell, and Whāngārei. As Crown purchasing accelerated, the number of sittings rose. Between 1873 and the end of 1876, at least 32 sittings took place, at Awaroa, Hokianga, Kaihu, Mangonui, Ōhaeawai, Russell, Kawakawa, Whangape, Whangaroa, and Whāngārei.[690]

Estimating the indirect costs (those not intrinsically connected to the Native Land Court by regulation) incurred by Te Raki Māori in the course of presenting claims or defending their rights is fraught with difficulty, but comment at the time indicates that travel, accommodation, and sustenance costs were often substantial. Applicants (and counter-claimants) were forced to follow the Court to distant locations, with damaging economic and cultural consequences.[691] Sittings during the winter months proved especially trying for Māori, who were often confined to rude and poorly serviced shelters and with inadequate food. Because they could not be sure when their interests would come before the Court, continued attendance throughout the sitting was vital if claims were to be advanced and recognised. Sittings could be cancelled and rescheduled, often at short notice, while hearings of claims also could be cancelled, postponed, or adjourned within a session, for example, should maps and plans not have arrived. In one reported instance in January 1879, almost 800 Māori camped around Herd's Point (Rāwene) as they attended a sitting of the Hokianga Court, but many applicants found that their cases were adjourned owing to the unavailability of plans.[692] This was a common occurrence, given the pressure of work on the first Inspector of Surveys and his department. The *New Zealand Herald*, reporting on complaints made at a meeting held in the Bay of Islands in April 1885, summarised that

> . . . they have not been well treated by the Governments of New Zealand, and there will be many grievances to air. The working of the Native Land Court is strongly denounced. The Natives complain that the Courts are fixed to be held at certain times and at certain places, but adjournment after adjournment takes place before any hearing takes place, and then, when a decision is arrived at and the ownerships are fixed, rehearings are granted, until the natives are fairly starved out, and unable to attend the Courts in support of their claims.[693]

690. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 818–819, 824.
691. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 822.
692. 'Hokianga', *New Zealand Herald*, 27 January 1879 (cited in Armstrong and Subasic, 'Northern land and politics' (doc A12), p 822).
693. 'Native Meeting at the Bay of Islands,' *New Zealand Herald*, 21 April 1885, p 6.

Contested hearings were often protracted, resulting in substantial food and accommodation costs while normal economic activities, including planting, harvesting, and food gathering were disrupted. The implications of Court-related absences were serious for those reliant upon small surpluses to sustain them through the lean months of the year. For example, Rewi Manuariki advised Fenton in 1876 that he and his people had had to travel to Whāngārei twice in connection with their Te Akokotiri claims, and that they were in want of food and had no friends in Whāngārei who could assist.[694] The frequency with which Te Raki Māori sought Government assistance to attend hearings attests to the financial burden Court hearings imposed on both attendees and those Māori communities acting as hosts. Where supplies were made available, the costs were usually levied on the land.[695]

Lengthy hearings in cramped, insanitary, and often cold conditions also exposed Māori to communicable diseases. Armstrong and Subasic observed that a succession of cases at Hokianga in mid-1875 'caused much suffering and expense'. Resident Magistrate Spencer von Sturmer advised McLean in May that there would be 'a scarcity of provisions at Hokianga before the end of the season, owing to the quantity [*sic*] from other districts attending the Land Court and the number of native "huis" held since the crops have been harvested'.[696] In 1882, von Sturmer again commented on the impact of hearings, advising Webster that the Court was sitting at Herd's Point, where Māori 'wandered about' in conditions that were 'miserable and dirty', while 'the storekeepers generally grumble for the Court is not a success for them as the Maoris have not a shilling to spend'.[697] Notoriously, the sessions exposed those in attendance to the predatory conduct of publicans, accommodation house proprietors, and storekeepers who waited for blocks to be awarded and sold, and there invariably would be significant sums of money no sooner received than spent.

There were costs associated with lost or curtailed economic opportunities as well, most obviously in the form of foregone income from wage labour and returns from gum digging and farming. Armstrong and Subasic suggested that by the 1880s, 'interaction with the Native Land Court had set back rather than aided the economic position of Te Raki Maori', with purchase prices paid for land having been 'quickly exhausted' due to the high incidental costs associated with the Court.[698]

The difficulties were well known but there is little evidence to indicate the Court (or the Crown) made any considered or systematic attempt to meet Māori wishes or suggestions over the timing and location of sittings; rather, hearings continued to be scheduled primarily to suit the Court's own convenience and to ensure that Crown purchases were finalised as rapidly as possible. As the Central North Island

694. Cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 822.
695. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 818–824.
696. Von Sturmer to McLean, 18 May 1875, AJHR, 1875, G-1, p 4.
697. Quoted in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 823.
698. Thomas, 'The Native Land Court' (doc A68) p 159.

Tribunal concluded, the problems associated with venues and the costs of hearings reflected the overall lack of Māori involvement in the design and conduct of forums charged with determining titles to land. Had there been such involvement, the Tribunal suggested, 'it is hard to imagine that they [Māori] would have placed the pressure on people and their economic and social well-being to the extent that the court did.'[699]

However, from 1880 onwards, the Court's rules did provide some potential relief from the financial burden of attendance; fees might be charged at the 'judge's discretion', and more explicitly under the Rules of the Native Land Court 1886, might be 'remitted or abated'. The 1886 rules also stated that they could accrue or be charged against the land concerned.[700] Whether judges ever waived fees for Te Raki claimants is unclear. Evidence from other inquiries suggests that they generally did not, and fees had to be paid up front.[701]

Native Minister Bryce had been sufficiently concerned over the expense of Native Land Court hearings that in 1883 he invited the Chief Judge James Edwin Macdonald to suggest ways 'of lessening the cost of determining titles which is at present, if rumour is to be believed, unreasonably large'. However, Bryce thought the problem lay not in the scale of fees, which he considered 'sufficiently low', but in the prolonged sittings and the cost of the lawyers and agents employed by the parties involved.[702] Macdonald noted that, in contested hearings, claimants and counter-claimants were often acting as proxies for purchasers, both private and Crown. In his view, the 'obvious remedy' was for the Crown to resume its pre-emptive right of purchase.[703] However, a much more limited action was taken. Under section 4 of the Native Land Laws Amendment Act 1883, lawyers, agents, and representatives were excluded from hearings, except where their presence was required by reason of 'age, sickness, or infirmity, or . . . unavoidable absence' of any party. The prohibition was short lived, however; they were allowed back into the Court, provided the judge consented, under section 65 of the Native Land Court Act 1886.

9.7.2.3 *Surveys and survey costs*

Claimants raised a number of issues relating to surveys. These included the poor standard of many early surveys, notably those conducted in the Bay of Islands and Hokianga; the inability of surveyed boundaries to take into account customary patterns of land ownership and rights; and an alleged lack of expertise on the part of many surveyors. The claimants argued that the Crown was aware of these problems from an early date but proved slow to effect improvements. Above all, the claimants raised the matter of survey charges, including the cost of remedying errors.[704]

699. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 518.
700. *New Zealand Gazette*, 1880, no 114, p 1706; *New Zealand Gazette*, 1885, no 35, p 719.
701. Waitangi Tribunal, *Te Urewera*, Wai 894, vol 3, p 1263.
702. Lewis to Macdonald, 26 May 1883, AJHR, 1883, G-5, p 1.
703. Macdonald to Bryce, 22 June 1883, AJHR, 1883, G-5, p 2.
704. Claimant closing submissions (#3.3.225), pp 164–173.

The Crown acknowledged that any sale of land by Te Raki Māori in order to meet 'excessive' survey charges indicated a failure on its part to implement a fair titling regime and to protect the interests of Māori. The Crown noted previous Tribunal inquiries had found that survey costs of between 10 and 20 per cent of the purchase price of the land were 'the norm,' and asserted that possible breaches, defined as instances in which land was alienated in order to meet 'excessive costs', would need to be identified on a case-by-case basis.[705] The implication of the Crown's argument appears to be that the 'norm' could be considered acceptable, but that costs greater than 20 per cent of the price paid were 'excessive'.

In this section, we examine the decision to impose survey costs on Māori, whether such costs should have been shared with or assumed in their entirety by the Crown, whether Te Raki Māori raised concerns over them, and the manner in which the Crown chose to respond; that is, whether it elected to control costs or focus on their recovery from Māori landowners. A second major set of questions deals with the accuracy of surveys, whether the Crown was aware of the difficulties associated with the survey of Te Raki lands, and the actions, if any, it took to mitigate any such problems.

We note, first, that systematic evidence relating to survey costs is not available for the Te Raki district.[706] The extent to which such costs led to the sale of land, the award of land to surveyors as payment, or the award of land to the Crown in lieu of survey charges are also matters that remain to be established fully. We observe, too, that it is difficult to generalise about the level of survey costs because they varied considerably on a per-acre basis and as a proportion of the price for which the land was sold. In the case of large blocks, for example, costs could be reasonable if the lands concerned were clear of dense bush, were relatively accessible, and especially if they were contiguous with already surveyed lands, while the costs associated with the survey of small blocks tended to be higher.

9.7.2.3.1 Early legislative requirements

The clear assumption was that Māori would be the major, if not sole, beneficiaries of Court-derived title, and under the Native Lands Act 1862 and 1865, they were required to meet survey charges in their entirety. This contrasts with the rules established for Pākehā purchasers of Māori land. For example, under the Land Claims Settlement Act 1856, those granted land for claims arising from pre-treaty transactions and those who purchased under FitzRoy's pre-emptive waiver scheme were required to commission surveys but were granted an allowance of one acre for every 10 shillings expended. It also contrasts with the reality on the ground; the major beneficiaries of Native Land Court activity were the Crown and settlers.

The Native Lands Act 1862 specified that the issue of a certificate of title first required a survey of the land concerned, although not before the Court had determined and registered ownership. For those who wished to secure certificates of

705. Crown statement of position and concessions (#1.3.2), p 119; see also Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 458; Waitangi Tribunal, *Te Kāhui Maunga*, Wai 1130, vol 2, p 359.

706. Thomas, 'The Native Land Court' (doc A68), pp 135–136, 249–250.

title or Crown grants, survey charges were therefore unavoidable. The Native Lands Act 1865 specified that surveys had to precede title investigations, while the requirement that Māori pay fully was carried forward into the new legislation, again without consultation and in the absence of consent. The Native Lands Act 1865 further provided that the Crown could, upon request, advance the cost of surveys, that surveys would be conducted by Crown-licensed private surveyors, that liens could be taken out over the lands involved, and that the Court could order the retention of a Crown grant by the surveyor concerned until his charges had been met.

Major changes with respect to the recovery of survey costs from Māori vendors were introduced in the Native Lands Act 1867 in a series of provisions a number of which were likely to have been incomprehensible to them. Section 6 established the office of Inspector of Surveys 'in order to secure the accuracy and consistency in surveys and plans' made under the Act, requiring him to certify survey plans prior to Court hearings. Section 31 revoked the right of surveyors to hold a Crown grant until their costs had been met, providing instead that it would be held by the Secretary of Crown Lands. Section 33 allowed Māori to charge their lands to meet moneys advanced by private persons to fund survey costs. Section 34 provided that no certificate of title or Crown grant would be issued without the consent of the person to whom the moneys were owed or until the charges had been met, although section 35 empowered the Court to order delivery of a Crown grant after the execution of a mortgage to the lender. Sales of mortgaged land could not be enforced, but owners who wished to alienate their lands had first to deal with the holder of a lien or a mortgage. The emphasis was quite clearly on the recovery of survey costs from Māori and not on their regulation or control. The Native Lands Act 1869 introduced a further change. Under section 11, no certificate of title would issue until a plan had been had been deposited in the Court.

The legal rights of Māori were also affected by other aspects of survey work. Notably, the decision to base surveys on an external frame of reference that a system of major triangulation would provide (discussed at section 9.7.2.3.3) resulted to the Trigonometrical Stations and Survey Marks Act 1868; this authorised the entry of government surveyors on any land and provided penalties for any obstruction and interference with stations and marks.

9.7.2.3.2 Impact of survey errors

Survey errors could prove costly, not only because they would require resurveys but also in terms of land 'lost'. Thus the effects were not solely monetary in nature: they went to the heart of ancestral connections and identity. Claimant Sheena Ross said this about her tūpuna's understanding of surveying:

> Our tūpuna did not use imperial measures such as acres to place a border around our lands. This is a foreign concept that we still struggle with today. In our korero, our lands are marked out by the landmarks that we see, rather than as a line on a piece of paper. It was only when colonisation came that these concepts were introduced. Our tūpuna would not have known what these concepts of measurement were when the

> surveyors came onto our lands to make their mark. And the effects of this are still filtering through today when we have many examples of lands that have been surveyed by government contractors and marked out on the plans, yet these areas marked out do not match the korero that was passed down to us. We suffer by having our lands chopped up and cut off so that the borders are much different than how they would have been in our tūpuna's day.[707]

The Native Lands Act 1865 (sections 25 and 26) had made no reference to the matter of survey accuracy; that was a matter left to those individuals contracted to undertake the work. In August 1866, Acting Chief Surveyor Sinclair advised Fenton of the importance of developing and publishing a set of rules for licensed surveyors operating under the Native Lands Act since the information that surveyors were supplying was 'generally of the most meagre kind and it is frequently with the greatest difficulty that the position of the blocks to be adjudicated have been identified'.[708]

Maning also complained that surveys were 'in many cases incorrect, and the difficulties, disputes, and suspicions arising from this cause alone have been most serious and obstructive to progress'.[709] In turn, Fenton raised the matter with Native Minister Richmond, complaining of 'the unsatisfactory state of the Government Survey' and the 'very defective surveys' conducted by one surveyor, describing the latter as 'very unconscientious' and indeed his plans 'in many cases . . . [are] scarcely more than sketches'.[710] Fenton's concern centred not on whether Māori were being unfairly affected or that survey charges were absorbing a large proportion of the returns from sales, especially during a period of depressed land prices, but on the likelihood that they would deter Māori from taking their lands through the Court and from subdividing land once titled.[711]

In mid-1867, surveyor Inspector of Surveys Theophilus Heale, in response to a request from Colonial Secretary Stafford, toured Northland and prepared a report on the state of its surveys. He was one of several officials to comment on the poor and confused state of surveys in the north – a legacy of the old land claims and early Crown purchases greatly complicating the task for Māori as they attempted to engage with the Native Land Court and the rules and costs that had been imposed. Among Heale's conclusions was an assertion that the Native Lands Act 1865 had exposed and highlighted 'the grossest of the defects in the old system'.[712] He pointed out that through various Acts, Parliament had accorded 'every Native the right to claim a grant from the Crown, which must for its own safety and

707. Closing submissions on behalf of Wai 1857 (#3.3.291), p 29.

708. Sinclair to Fenton, 3 August 1866 (quoted in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 400).

709. Maning to Fenton, 24 June 1867, AJHR, 1867, A-10, p 7.

710. Fenton to J C Richmond, 11 July 1867, AJHR, 1867, A-10, p 5.

711. See, for example, Fenton to J C Richmond, 11 July 1867, AJHR, 1867, A-10, pp 3, 4; Maning to Fenton, 28 June 1867, AJHR, 1867, A-10, p 9; Rogan to Fenton, 26 June 1871, AJHR, 1871, A-2A, pp 13–14.

712. Heale to Richmond, 2 August 1867, AJHR, 1867, A-10B, p [3].

credit ascertain the position and boundary of the land granted.' He argued that surveying, particularly the introduction of a system of major and minor triangulation in the North Island was work 'of a truly National character'. It provided an external frame of reference to which survey points could be fixed; this allowed not only for more accurate measurements but also for block surveys to be correctly located relative to each other. Heale noted that this would

> ultimately effect [*sic*] the value of every estate in the country, and lay the foundation for great future facilities in defining properties, planning public works, forming districts for political and municipal purposes, and for carrying out the far-seeing operations with a view to the future.

He went on to add: 'The Native land owner is already placed at a very great disadvantage in getting his land surveyed: rarely possessing ready money, he is obliged to find someone to survey his land on credit, and so often pays double what it costs a European.'[713]

Heale continued to press his concerns. In March 1871, he advised Fenton that Māori 'dreaded' every act of survey as portending loss of lands and that surveyors were 'hunted off the land whenever seen'. In place of a system of general survey, 'wholly detached surveys' were conducted; a system that was 'open to every kind of objection', was 'enormously expensive', produced inaccurate results, and yielded surveys that could not be entered on a record map.[714]

As the Crown prepared to embark upon an extensive purchasing programme of Māori land as an integral part of the economic development plan for the colony, it was anxious that this objective should not be impeded. With this in mind, Native Minister McLean directed Haultain to investigate the conduct of surveys and associated costs as part of his general inquiry into the working of Native Land laws. After consulting Māori and Crown officials, Haultain concluded the prevailing system of employing private surveyors in Auckland Province had been the source of considerable difficulty for Māori. Reporting to McLean in July 1871, he noted that 'The uncertainty of speedy payment causes the surveyors to demand excessive prices for their work', while Māori had been put to the expense of having their lands resurveyed before the Court would entertain an application for title investigation. In some instances, opposing claimants each employed their own surveyors for the same or part of the same block of land because they would not trust their opponent's agent to lay down the boundaries they specified.[715]

Bay of Islands Resident Magistrate Robert Barstow, whom Haultain had consulted, noted that in some instances licensed interpreters had pressed Māori to allow surveys in return for kickbacks from surveyors. Land purchase agents generated further problems by advising Māori that surveyors' fees need not be paid until the land had been sold. Often blocks were not passed through the Court or

713. Heale to Richmond, 2 August 1867, AJHR, 1867, A-10B, pp 4, 5.
714. Heale to Fenton, 7 March 1871, AJHR, 1871, A-2A, p 19.
715. Haultain to McLean 18 July 1871, AJHR, 1871, A-2A, pp 5–6.

'A Hopeless Confusion of Titles'

Triangulation surveys lagged in Auckland Province. They had been introduced in Canterbury, Otago, and Wellington in 1849, 1856, and 1866 respectively, but were not used in Auckland until 1871.[1]

An 'approximate' return published in 1873 indicated that in Auckland Province, with an area of 17,000,000 acres, no major triangulation had been finalised and none was in progress, while minor triangulation had been completed for just 50,000 acres. For Wellington Province, by way of contrast, major triangulation had been completed over almost 2.5 million of its 7,000,000 acres with a further 1.43 million acres in progress, while minor triangulation had been completed in respect of 2,000,000 acres with a further 426,240 acres in progress.[2]

1. 'Conference of Chief Surveyors', 12 April 1873, AJHR, 1873, H-1, p 14.
2. AJHR, 1873, H-1, pp 4, 13.

were not sold, but the surveyors pressed for payment, leading some owners to give promissory notes. When such notes were not honoured, action in the Supreme Court, with all the attendant expenses, not uncommonly followed. Barstow recounted how the adventurer and settler, Charles De Thierry, tricked an ageing Tāmati Waka Nene into authorising a survey of Te Puna (at Kerikeri) that left him facing a bill of over £300. Barstow also claimed that rangatira Mangonui had been 'compelled to sacrifice' a 7,000-acre block at 'Pungahairi' (Pungaere, also near Kerikeri) for £300, partly on account of survey charges amounting to £150.[716] Haultain suggested that such evils could be avoided if the Government were to assume the entire responsibility for surveys while Māori would continue to meet the costs.[717]

Heale also condemned the practice of pressuring Māori into signing promissory notes to compel payment through the Supreme Court as 'a reproach and a disgrace to the community'. The lands involved were frequently 'sold under execution at insignificant fractions of their value' and often secured by the surveyors involved.[718] Among those who found themselves summonsed were Honi Pama and Te Mariri, who had commissioned the survey of land on Rakitu and on Great Barrier Island for an agreed price of fivepence per acre, but had been charged 1s 6d per acre instead.[719]

716. 'Notes of conversation with Mr Barstow', 4 February 1871, AJHR, 1871, A-2A, p 47.
717. Haultain to McLean 18 July 1871, AJHR, 1871, A-2A, pp 5–6.
718. Heale to Fenton, 7 March 1871, AJHR, 1871, A-2A, p 20; see also 'Notes of Conversation with Mr Barstow', AJHR, 1871, A-2A, p 47; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 779.
719. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 778.

Heale continued to make his views known directly to McLean, offering scathing criticism of surveying practices in the 'Northern districts' and predicting that unless surveys were conducted upon the basis of 'a sound practical system of triangulation', the outcome would be a 'hopeless confusion of titles'. He again noted that leaving the employment of surveyors to applicants to the Court had worked 'disastrously,' and this practice had arisen out of the earlier experience of northern Māori and their resulting 'extreme jealousy of Government surveyors'.[720] A year later, Heale reported that the position had not materially altered, again referring to the work that needed to be undertaken before the surveys of the Northern districts could be put upon a 'satisfactory basis'.[721]

In his 1872 report, the Secretary for Crown Lands, W S Moorhouse, also commented at length on the 'unreliable' state of surveys in the colony as a whole. He focused in particular on the Crown's liability for compensation for having failed in its obligation to produce accurate surveys as part of its contract with grantees. He referred to the 'present disorder', and set forth a number of far-reaching proposals for reform, commencing with the appointment of a Surveyor-General and the establishment of a central 'Survey Office'. But he also dwelt at some length on the survey of lands owned by Māori, how they had been inequitably affected, and how the work of the Native Land Court was being put at risk as a result. He noted:

> the usefulness of . . . [the Native Land Court] as at present administered is very much impaired by the fact that access to the Court, and the survey, and the ultimate Crown grant, all require the expenditure of money generally beyond the means of the Native, who, in order to bring his land into English tenure, has first to engage himself in the expense of a survey, then to incur considerable Court fees, for all of which, in addition to other unavoidable expenses not regulated by any Statute, his grant, when at last executed is impounded. To make these payments, the Native proprietor is generally compelled to borrow money upon conditions frequently equivalent to a material surrender of his proprietary independence; and therefore his first transaction connected with English tenure is remembered as having been the certain precursor of the complete and rapid extinction of his property. Thus the Native, to a great extent, is becoming chary of approaching an institution which has many times been the means of impoverishing his own race, and which, under existing conditions, has indirectly encouraged operations by the European, of a character alike demoralizing to himself and the Native.[722]

A table included in the report offered an 'Approximate Return of Native Crown Grants executed but not yet delivered to Grantees on 6th May 1872'. For Auckland Province, the number of grants stood at 336 of which 112 were listed as 'detained in

720. Heale to McLean, 5 July 1871, AJHR, 1872, G-21, pp 4–5.
721. Heale to McLean, 25 June 1872, AJHR, 1872, G-21, p 3.
722. Moorhouse to Gisborne, 'Report of the Secretary for Crown Lands', 9 July 1872, AJHR, 1872, C-2, pp 4–5; see also Untitled, *Daily Southern Cross*, 15 October 1872, p 2.

Government Crown Lands Office for Surveyors' liens.'[723] In our view, the number of unreleased Crown grants illustrates the pressure that Māori owners were facing to meet the costs of putting their lands into a title system demanded by the Crown for the purpose of furthering colonisation.

Moorhouse's proposed solution was for the Crown to undertake all surveys of land for Māori, free of charge, together with the remission of all Native Land Court and Crown grant fees. Such an approach, he suggested, would better serve government goals, expediting the transfer of land out of Māori ownership by enabling them to acquire 'marketable' or vendible English titles. 'The surveys of Native lands generally', he observed, 'have hitherto been remarkably loose, and the mere commencement of inevitable embarrassment, expense, and litigation.'[724] While his proposals would require the Crown to assume considerable costs, Moorhouse insisted that the expenditure 'would be more than balanced by the incalculable quantity of indirect profit, which must naturally follow the incorporation of the Native estate into the English system.'[725]

In a further report prepared for the Colonial Secretary in 1875, H S Palmer of the United Kingdom's Ordnance Survey was also especially critical of the state of surveys in Auckland Province: 'The history of the Auckland surveys is one of lamentable confusion and neglect, and want of system and accuracy.'[726] His assessment of the surveys conducted for Māori as they sought to secure titles for their lands was as scathing as those offered by Heale and Moorhouse. In his view, the practice of engaging private surveyors had rendered the establishment of a 'general system' impossible, 'and the work fell into the hands of an incompetent set, many of them utterly ignorant of the commonest rudiments of sound scientific surveying. It was accordingly done, though at frightful cost to the Natives, in a vague and slovenly style.' It had been only within the past year, he reported, that Heale had gained control of the method of survey and survey staff.[727]

Palmer offered one other important comment, noting that those surveyors who had been hired by Māori did 'just so much as was absolutely required by the rules of the Court'. Moreover, the requirement under section 67 of the Native Lands Act 1865 that surveyors be licensed by the Government had proved to be a check that was 'a very slight one practically'.[728]

9.7.2.3.3 Introduction of new statutory rules

McLean clearly took account of the many criticisms of Haultain, Heale, and the Native Land Court judges as well as Māori themselves, although the major

723. Moorhouse to Gisborne, appendix to 'Report of the Secretary for Crown Lands', 9 July 1872, AJHR, 1872, C-2, p 8.
724. Moorhouse to Gisborne, 'Report of the Secretary for Crown Lands', 9 July 1872, AJHR, 1872, C-2, p 5.
725. Moorhouse to Gisborne, 'Report of the Secretary for Crown Lands', 9 July 1872, AJHR, 1872, C-2, p 6.
726. Palmer to Pollen, 5 April 1875, AJHR, 1875, H-1, p 9.
727. Palmer to Pollen, 5 April 1875, AJHR, 1875, H-1, p 6.
728. Palmer to Pollen, 5 April 1875, AJHR, 1875, H-1, p 6.

concern was to ensure that the work of the Native Land Court and the colonial project was not impeded, rather than the inequitable burden that was being placed on Māori. Nonetheless, certain protections were to be provided. The law relating to the conduct and requirements of surveys of lands owned by Māori was recast in the Native Land Act 1873. Section 33 deemed preliminary surveys to be 'imperative in every case' and was intended to ensure that those interested in a particular block should know of an impending investigation of title. However, as noted earlier, the judges disliked the provision, and Maning, in particular, argued that surveys prior to title determination were more likely to cause trouble than not. He maintained that, as matter stood, Māori did not resist surveys if their land was encroached upon, confident that the Court would 'do them justice'. He predicted that such faith would be undermined if judges ordered surveys after a cursory and possibly incorrect investigation; applicants would think they had the backing of the Court, while counter-claimants, assuming the same, would resist the survey 'at any risk'.[729] That requirement, in the face of this opposition and having been found unworkable, was abolished in 1880.

Other protections were incidental upon regulations intended to ensure that surveys were properly conducted, but as the Hauraki Tribunal has commented, Māori benefited from an 'improvement in professional standards' as set out in the 1873 Act.[730]

These included:

- section 70 which required that all surveys were to be conducted 'in strict conformity' with the regulations prepared by the Surveyor-General;
- section 71 which required that all survey maps were to be certified by the Surveyor-General;
- section 72 which required Native claimants or owners and the Inspector of Surveys to enter into signed agreements for surveys, set out in both Māori and English, such agreements to specify 'the fixed rate to be paid for the costs of such survey with plans thereof in duplicate, and the mode of payment'; and
- section 74 which forbade surveyors licensed under previous Acts from conducting surveys unless authorised by the Inspector of Surveys and provided that no person could seek to recover survey charges in any court unless the survey in question was authorised by the inspector.

Other sections were, however, more concerned with the recovery of costs. Section 69 empowered the Government, at the request of claimants or owners, to undertake and meet the costs of surveys; but the Act also permitted surveys to be paid for in land at the discretion of the Court (under section 73). The Native Land Act Amendment Act 1878 (No 2) confirmed the power of the Court to award surveyors payment of their costs in land or money.

729. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 685.
730. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 2, p 738.

By 1875, Heale was able to take charge of surveying of Māori land in Auckland and brought some order to the state of post-1867 survey of land in Te Raki.[731] Palmer noted that Heale had for a long time 'struggled in vain' against 'the evils of the Native-surveyor system', but it was 'only within the last few months that the entire control of the method of survey and employment of staff has come into his own hands'. Aside from being able to ensure the work was done to a professional standard, the experienced Heale was assisted by the belated advent of triangulation surveys in Auckland Province.[732] They had been introduced in Canterbury, Otago, and Wellington in 1849, 1856, and 1866 respectively, but were not used in Auckland until 1871.[733]

The reforms contained in the Native Land Act 1873 arose in significant measure out of the confused state of surveys in Te Raki; but while they offered Māori some protection against inaccurate surveys and high costs, such was the pace and scale of Crown purchasing in the region during the mid-1870s that the Survey Department was unable to meet the demand for plans. Heale advised McLean that the surveys conducted in North Auckland were almost all of blocks acquired by the Crown

> which are in almost every case interstitial pieces between former purchases from the Natives, some of them made many years ago; and the survey of them has consequently involved the recovery of old boundaries, originally very imperfectly surveyed, without any reference to triangulated or otherwise fixed points, and of which all marks on the ground had in many cases long since disappeared.

He went on to note that what he termed 'all the larger older surveys in the North have been closed', and that '[i]n doing so many errors of position have been rectified.'[734] This was not always the case, though, as the problems at Huatau would demonstrate. McLean, himself, noted in 1876 that want of 'proper surveys' had delayed the passage of Crown purchase blocks through the Native Land Court and thus the completion of transactions.[735]

Delays in surveys requested by Te Raki Māori of the lands that they proposed to retain were even more pronounced. In 1880, Auckland's Chief Surveyor, S P Smith, recorded that 'Pending more satisfactory arrangements as to recouping the sums advanced on surveys of . . . [Native Land Court blocks], I have not considered it advisable to undertake surveys for the Natives except in particular cases.' Surveys to meet the requirements of the Native Land Court had been conducted by authorised surveyors and the costs borne privately. He concluded:

731. Palmer to Pollen, 5 April 1875, AJHR, 1875, H-1, pp 5–7.

732. Palmer to Pollen 5 April 1875, AJHR, 1875, H-1, p 6; by June 1880, in the Auckland Provincial District, of a total of 22 surveyors employed by the Survey Department, just three were 'contract or other surveyors'; see AJHR, 1880, H-27, p 7.

733. 'Conference of Chief Surveyors', return, AJHR, 1873, H-1, p 14.

734. Heale to McLean, 23 June 1876, AJHR, 1876, H-17, p 1.

735. McLean, 'Statement Relative to Land Purchases, North Island', AJHR, 1876, G-10, p 1.

'It Would Have Been Impossible to Have Compiled a Plan from the Deeds' – the Huatau Survey[1]

In 1895, the Crown ran a survey line through the settlement of Ngāti Toro at Huatau. This case highlighted the long-term impact of the faulty surveys of numerous old land claims and early Crown purchases on Māori in Te Raki as they attempted to have their remaining interests defined by the Native Land Court. It also cast doubt on the claims of survey officials in the 1870s that any irregularities had been resolved.

The initial problem had arisen from James Odeland's old land claim (OLC 356–358) at the mouth of the Waihou River that was not surveyed at the time. The first land commission deemed the transaction (based on three different deeds) to be valid and awarded Odeland a total of 1,100 acres. However, the commission amended the boundaries in its report to exclude the area behind Tipata creek, in accordance with Māori understandings of what had been transacted. As it turned out, Odeland would drown before his grants were issued, and the award was never surveyed.[2]

The second (Bell) commission then pursued the claim in 1858. The sole surviving signatory, Ngairo Whare Toetoe, joined with two other senior rangatira – Hohepa Ōtene and Wi Hopihona Tāhua--in agreeing with the boundaries that Bell read out, but when surveyor White attempted to cut the line at Huatau, Ngaro objected, calling him an 'unjust man' for having 'taken the land of the Mangamuku people'.[3] No further action was taken until the matter was referred to Judge Maning in 1874. Maning dismissed any remaining Māori claim to the land on the grounds that 'some of the natives acknowledge the rights of Odeland to a certain amount of land' and on evidence of 'peaceable possession [by Pākehā] for several years'. Again, nobody pursued the claim on behalf of Odeland's estate, and it lapsed, reverting not to Māori, but to the Crown on the basis that native title had been validly extinguished. It still had not been surveyed at this point (c.1880).

A Crown Lands Ranger raised the matter in 1891, believing the Crown was 'owed' some 600 acres; but when a survey was undertaken in 1895, Māori who had been living for generations on the land immediately protested, both as the survey line was cut, and when Seddon visited the district.[4]

On resurvey by the Crown in 1902, it was found that the area contained only 360 acres (26 acres of which was an urupā) and less than half of which had been

1. *Huatau* (1902) 33 Northern MB, p 351.
2. Bruce Stirling and Richard Towers, '"Not With the Sword But With the Pen": the Taking of the Northland Old Land Claims' (commissioned research report, Wellington: Crown Forestry Rental Trust, 1360).
3. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1357.
4. *Huatau* (1902) 33 Northern MB, p 351.

transacted with Odeland.[5] Special legislation was passed in 1903 to empower the Native Land Court to hear the claim since Huatau was designated Crown land and outside its jurisdiction. At the hearing, William Webster, who said that he had known the area for 'over 50 years', told the court that the survey was incorrect, because:

Instead of going on the lines mentioned in the grant, the surveyor ran his lines so as to include the acreage [granted]. The acreage was not really in the blocks sold and the Crown thus took nearly double the land actually sold by the natives. The survey included a large portion of the native settlement (Huatau) which had been occupied by the natives for very many years.[6]

An official from the Crown Lands Department admitted that the 1895 survey had mistakenly endeavoured to follow the deed descriptions 'strictly' and take in the full 1,100 acres, 'whereas there [was] not the area there.'[7] Huatau (184 acres) was then declared native land, the title of which was investigated. Stirling and Towers point out that: 'The considerable expense of two surveys, an inordinate amount of staff time, and the generation of a considerable degree of ill will resulted in the Crown securing just 150 acres of poor quality land."[8]

5. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 1360.
6. *Huatau* (1902) 33 Northern MB, p 349.
7. *Huatau* (1902) 33 Northern MB, pp 351–353
8. Stirling and Towers. 'Not with the Sword but with the Pen' (doc A9), p 1360.

> The cost per acre of these surveys I have no means of arriving at; but feel sure that it is very great, and a heavy burden to the owners. There are many reasons which make it certain that, if the Government had the power of taking *all* these surveys into their own hands, they could be done at once more accurately, and at half the cost involved in private surveys. [Emphasis in original.][736]

Nor had abuse of the system stopped. In 1875, evidence had emerged of substantial kickbacks being paid by surveyors to land purchase agents, including those contracted by the Government. Before the Auckland Provincial Council's Committee on Native Land Purchases, Crown agent Edward Brissenden, for example, was accused of requiring a 25 per cent commission on work he directed to surveyors. Brissenden denied the allegation, but Heale subsequently acknowledged that it had substance.[737]

Further changes to the law relating to surveys followed. These largely continued the trend of facilitating the payment of survey costs, more especially in land, and

736. Appendix to 'Surveys of New Zealand', 9 August 1880, AJHR, 1880, H-27, p 10.
737. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 783–784.

ensuring that surveys were conducted to a proper standard. Thus section 39 of the Native Land Court Act 1880 stipulated that surveys for its purposes could only be carried out by government surveyors. (That provision was not included in the Native Land Court Act 1886; instead, survey plans had to be certified.) Notably, the capacity of the Court to compel the payment of costs was enhanced by the 1880 legislation. Under section 40, it could order the auction of a defined portion of the land to meet unpaid survey costs. The Court was also empowered to execute all instruments necessary to convey land in satisfaction of survey debts (under section 40). The 1882 Native Land Division Act stated that any person impeding survey was deemed to be guilty of contempt of the Court.

The Native Land Court Act 1886, which repealed the 1873 Act and its amendments, introduced charging orders in favour of surveyors to secure their costs (section 81). Such an order was to have the effect of a mortgage. An amendment of the Act two years later also provided that moneys owed under such a mortgage were repayable 12 months after an order had been made and that interest was payable at the rate of five per cent per annum.[738] The Native Land Court could authorise a survey and where that order had been approved by the Surveyor-General, the surveyor was authorised to enter the land, and any obstruction was deemed an offence.

The criminalisation of obstruction of a survey was confirmed under the Native Land Court Act 1894. Sections 61 and 62 allowed, respectively, the Court and the Surveyor-General to authorise the survey of and entry upon Native land. Section 65 empowered the Court to vest a defined area of land in any individual to whom survey charges were due, or to charge land by way of mortgage 'on such terms as may seem just' and to order the sale of such land upon six months' expiration. Section 66 provided that the Court could levy interest on a mortgage as 'shall seem fair and reasonable, but not to exceed five per cent per annum'. Such interest was to be payable for not more than five years, although whether that implied, should charges remain unpaid, the land could be sold or vested is not clear. In the course of the debate on the Native Land Court Bill 1894, Hōne Heke Ngāpua objected to what he described as 'a cruel interest of 5 per cent on the principal'.[739] Finally, section 10 of the Native Land Laws Amendment Act 1896 empowered the Native Land Court to vest a defined area in trust for sale to meet survey (and other costs), the Chief Surveyor in each case to be one of the trustees.

Such changes strengthened the power of the Crown to order surveys, levy Māori landowners, and recover the costs in cash or in land. None of the later changes appears to have taken into account the representations to the 1891 Native Land Commission made by Māori in Te Raki and elsewhere that they continued to be troubled by defective and costly surveys. Witnesses described 'overlapping' surveys as a major cause of discontent among Ngāpuhi, and claimed a great deal of money had been spent on the preparation of plans only for the Court to reject

738. Section 25 Native Land Court Act 1886 Amendment Act 1888.
739. Native Land Court Bill', 28 September 1894, NZPD, vol 86, p 385.

them when brought forward, necessitating new surveys.[740] They were particularly critical of the Crown's taking of land as payment for survey charges.[741] At Waimate North, Wiremu Kātene asserted that 'if these lands of ours were sold they would scarcely produce sufficient money to pay for the heavy outlay entailed in connection with investigating the title.' Surveys, Kātene added, were 'a great source of difficulty with us', and he argued that Native committees were better able to define tribal and hapū boundaries.[742] It was for this and other problems associated with the Native Land Court that leading Ngāpuhi rangatira stated a growing preference for the resolution of land disputes by Native committees, rendering surveys, and especially subdivisional surveys, unnecessary, and enabling them to manage their own lands (see chapter 11).

9.7.2.3.4 Evidence of survey costs in Te Raki, 1860s–90s

While comprehensive and systematic data relating to the survey costs that Te Raki Māori were required to bear are not available, the evidence indicates that from an early stage they encountered serious difficulties in funding surveys, with some assisted by Government advances (per section 77 of the Native Lands Act 1865) and others by cash advances from purchasers.[743]

The Crown was fully aware of the burden survey requirements were placing on Māori at an early stage. In 1866 and again in 1867, Judge William White (Mangonui) advised Fenton that many Māori were unable to meet survey and Court costs, and he recommended heavy reductions lest they decline to bring their lands before the Court.[744] In 1867, Fenton drew Native Minister Richmond's attention to the burden imposed by survey costs, noting that survey and other expenses in respect of Waitaroto had amounted to 10 pence per acre, while the block had been offered for sale at one shilling per acre.[745] In 1871, Fenton again reported to McLean that survey costs were absorbing almost 'the entire proceeds of the land when sold'.[746] The Haultain commission and survey officers also made trenchant criticisms of the problems faced by Māori in this respect. These difficulties were caused, at least in part, by the costs of bringing that land into English tenure if they had to undertake multiple surveys to meet the requirements of the ten-owner rule, or to partition out interests as a result of sales.

We point to a number of examples. Armstrong provided details concerning the costs imposed on the owners of Otonga (28,036 acres) and Opuawhango

740. 'Minutes of Meetings with Natives and Others and Correspondence', AJHR, 1891, G-1, pp 19, 25.
741. 'Minutes of Meetings with Natives and Others and Correspondence', AJHR, 1891, G-1, p 19.
742. 'Minutes of Meetings with Natives and Others and Correspondence', AJHR, 1891, G-1, pp 19, 21.
743. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 354–356.
744. Cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 356; and White to Fenton, 5 July 1867, AJHR, 1867, A-10, p 10.
745. Fenton to Richmond, 'Report on the Working of the Native Lands Act, 1865', 11 July 1867, AJHR, 1867, A-10, p 4.
746. Fenton to McLean, 'Return Relative to the Working of the Native Land Acts', 28 August 1871, AJHR, 1871, A-2A, p 11.

(33,193 acres). He noted that in 1868, a surveyor named Newbury applied to register a survey lien over several blocks, including Otonga and Opuawhango, the lands having been acquired by the Auckland provincial government. The cost was £520, while additional partition surveys incurred a further £332, for a total of £852.[747] Armstrong also recorded that survey costs on 20 Te Waimate–Taiāmai blocks totalled £1,400; between 1871 and 1879, the Crown acquired 56,698 acres for £4,421, so that these charges absorbed 31.7 per cent of the purchase price. Among the blocks were:

- Waiohanga 2 block (481 acres): survey costs amounted to £62 12s, practically the whole of the purchase price of £65 paid by the Crown.
- Whakarongorua 1 block (810 acres): survey costs amounted to almost £51 while the Crown paid just under £61 for the block.
- Whaitapu block (2,716 acres): sold to the Crown for £212 12s 6d, the block carried survey charges of just over £166 or almost 78 per cent of the purchase price.
- Okaka block (915 acres): survey costs amounted to £63 4s, absorbing some 72 per cent of the purchase price of £87 3s 9d paid by the Crown.
- Te Horo (132 acres): survey costs of £32 exceeded the £20 that the Crown paid.[748]

Other Te Raki examples include the 12,433-acre Pakanae block. In 1875, the Crown purchased Pakanae 1 and 3, a total of 11,430 acres. Survey charges amounted to £260 15s 9d, a sum deducted from the £799 paid for the two blocks; that is, almost 33 per cent of the purchase price.[749] Such charges bear little relation to the Crown's 'norm' of survey costs being a small percentage of the overall returns from sales.

The Inspector of Surveys prepared a return for 1874 and 1875 that included a list of blocks 'North of Auckland', their acreage, and the costs of survey. Most (but not all) were located within the Te Raki inquiry district. The blocks were grouped into four main categories:

- those conducted under 'Contract mileage rates', a total of 292,912 acres with an average survey cost of twopence per acre;
- those conducted under 'Contract average rates', a total of 61,429 acres with an average cost of 3.5 pence per acre;
- those conducted under 'Surveyors on daily salary', a total of 64,916 acres at an average cost of 4.6 pence per acre; and
- '[c]ost of surveys under Native Lands Act 1865', a total of 29,645 acres (in 15 blocks) at an average cost of 8.8 pence per acre.[750]

747. David Armstrong, 'Ngati Hau "Gap Filling" Research,' report commissioned by Crown Forestry Rental Trust, 2015 (doc P1), p 23.

748. Armstrong, 'The Native Land Court and Crown Purchasing' (doc A A52), pp 3–4.

749. Paula Berghan, 'Northland Block Research Narratives,' report commissioned by Crown Forestry Rental Trust, 2006 (doc A39(f)), pp 39–55.

750. Heale to the Native Minister, 'Report by Inspector of Surveys', 28 May 1875, AJHR, 1875, H6, pp 4–6.

If it is assumed that the categories were constructed upon the same basis, then the range of costs, from twopence to 8.8 pence per acre seems extraordinary. One explanation may lie in the size of the blocks, those surveyed under the Native Lands Act 1865 being mostly small, while it is also possible that the cost of surveys under the Act included the expenses incurred by the surveyors attending the Court. As we have explained, such costs, which could be considerable when cases were contested, adjourned, or moved, also had to borne by Māori.

In an effort to clear survey (and other costs), owners offered blocks to the Crown or otherwise set them apart for sale. In 1887, for example, the owners of the Maunu block asked Native Minister Ballance 'how are we to act in selling our land so that we may discharge our debt to the surveyor to whom we are in debt that is to say under the Act of 1886 which came into force in 1887'?[751] The land set aside was 168 acres of Maunu 1E: although the details are obscure, it appears that a private sale took place and that the proceeds were employed to discharge the survey debt.[752]

Historian Paula Berghan detailed several other examples of sales associated with survey debts in our inquiry district. In 1889, for example, the owners of the 1,012-acre Papakauri block offered it to the Crown in order to discharge a survey lien of £45 5s 4d. The Crown acquired 890 acres at two shillings per acre, the lien thus absorbing almost half of the sale price.[753] The 3,226-acre Kaurinui 3 carried a survey lien in favour of the Government of £87 3s 9d. In 1899, the owners offered the block to the Crown, insisting that they had no other way of meeting the survey (and rate) costs. The Crown acquired the block at 2s 6d per acre but remitted the lien, effectively raising the price to just over three shillings per acre of which survey costs absorbed almost 22 per cent. In 1903, Kaurinui 3A of 2,193 acres was partitioned out and awarded to the Crown.[754] By 1895, the owners of the 1,106-acre Mareikura F, in an effort to discharge a survey lien (including interest over two-and-a-half years) of £72 7s 2d, sold the block to the Crown, the lien being deducted from the purchase price.[755] A final example which Berghan gives was Motukaraka West. In 1897, the Native Land Court vested the 775-acre block in two trustees for sale, one being the Chief Surveyor. In 1915, the block was declared to be Crown land.[756] Transactions of that kind support the Crown's own concession that any sale of land to meet excessive survey charges constituted a failure on its part to implement a fair titling regime and to protect the interests of Māori.

9.7.3 Conclusions and Treaty Analysis

Our analysis leads us to a number of conclusions. The first is that prior to 1872, Te Raki Māori largely chose to engage with the Native Land Court to secure titles and advance mutually advantageous relationships and partnerships with the

751. Kamariera Te Wharepapa to Ballance, 8 June 1887 (quoted in Walzl, 'Overview of Land Alienation' (doc U1), p 93.
752. Walzl, 'Overview of Land Alienation' (doc U1), p 93.
753. Berghan, 'Northland Block Research Narratives' (doc 39(f)), pp 108–115.
754. Berghan, 'Northland Block Research Narratives' (doc A39(c), pp 355–362.
755. Berghan, 'Northland Block Research Narratives' (doc A39 (d)), pp 155–163.
756. Berghan, 'Northland Block Research Narratives' (doc A39(d), pp 349–350.

Crown and settlers. They also sought to secure the legal basis on which they could invest in and derive revenue from their lands, preserving their place, authority, and role in what they understood would be a new social, economic, and political order. Our second conclusion is that largely voluntary engagement with the Court increasingly gave way during the 1870s to one that was involuntary and defensive. The evidence is clear that the pace of titling during the 1870s reflected the arrival of the Crown's purchase agents and their liberal use of tāmana to draw owners into the Court process. As the Government's financial difficulties increased towards the end of the 1870s and purchasing contracted, and as the opposition of Te Raki Māori to engagement with the Court intensified, the pace of titling slowed. Thirdly, we conclude that engagement, whether voluntary or involuntary, imposed heavy costs on Te Raki Māori. Despite calls for far-reaching reforms, especially with respect to multiple fees and expenses associated with Native Land Court hearings, the funding of surveys, and the allocation of survey costs, little was done to ease the financial burden on Māori. Instead, the focus was on ensuring the recovery of the costs incurred by Māori generally in the form of land.

In 1891, Native Department Under-Secretary T W Lewis famously advised the Native Land Laws Commission that 'the whole object of appointing a Court for the ascertainment of Native title was to enable alienation for settlement'. He went on to add that

> Unless this object is attained the Court serves no good purpose, and the Natives would be better off without it, as, in my opinion, fairer Native occupation would be had under the Maoris' own customs and usages without any intervention whatever from the outside. Therefore, in speaking of the Native Land Court, this . . . I consider, must be applied – viz, that there should be a final and definite ascertainment of the Native title in such a way as to enable either the Government or private individuals to purchase Native land.[757]

In other words, the main beneficiaries of the conversion of customary tenure and title determination were the colonists. Yet the burden fell largely on Māori who were compelled to contribute to that process in the form of heavy Court costs and survey charges. The result for Māori, as Moorhouse expressed it, was that the 'first transaction connected with English tenure [was] remembered as the certain precursor of the complete and rapid extinction of his property'.[758] Nor did the inequities end there; every partition, succession, and rehearing came with a further burden of costs (direct and indirect).

In his 1871 inquiry into the workings of the Native Lands Acts, Haultain endorsed the views of some of his Māori respondents, among them Te Raki leaders Hōne Mohi Tāwhai, Eru Nehua, and Wiremu Pomare, proposing that the

757. 'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws', AJHR, 1891, G-1, p 145.

758. Moorhouse to Gisborne, 'Report of the Secretary for Crown Lands', 9 July 1872, AJHR, 1872, C-2, pp 4–5.

Government accept full responsibility for the conduct and cost of surveying on the grounds that the colony as a whole benefited.[759] Further, in his 'Memorandum on the operation of the Native Lands Court', Sir William Martin proposed that all surveys should incur 'a fixed rate per acre', and that all surveys should be conducted by officers of the Court.[760] The Native Land Act 1873 did empower the Government to undertake surveys at the request of owners and to pay the costs, at least initially, and this certainly happened on occasion. For example, the Crown met the costs of surveying Puhipuhi 1 block and Eru Nehua's reserve as part of the purchase agreement. However, the focus of that Act and subsequent legislation was on ensuring that the costs of survey were recovered from the owners, through the excision of a portion of land and by compulsory sale if need be.

Te Raki Māori were faced with an extra burden in having their titles defined as a result of the deplorable state of surveys in the district because of multiple, overlapping, and poorly surveyed old land claims and early Crown purchases. The Crown's failure to introduce into Te Raki a survey system to provide 'a robust framework of regulations and a triangulation control network to ensure accuracy'[761] constituted a failure to protect the interests of Māori with respect not only to ownership but also to the development and management of their lands. The consequence of complex, faulty, and expensive corrective surveys had to be borne by Māori as they sought to have title defined to their remaining lands through the Native Land Court system.

The Tribunal has previously found that in Northland the provisions of the Native Land Act 1873, intended to prevent the survey-related defects and abuses apparent in the district, under the pressure of the Crown's purchase agents were frequently infringed upon in an attempt to accelerate surveys, title investigations, and alienation. *The Te Roroa Report 1992* concluded that

> the Crown and its agents clearly failed to control the survey and furnish approved survey plans that defined boundaries for purposes of title and sale in accordance with the vendors' wishes and intentions. Its dealings with Te Roroa in respect of the survey were unfair and dishonourable and breached articles 2 and 3 of the Treaty.[762]

The evidence from Te Raki supports those conclusions, but we add that the Crown's first concern was its own survey needs not those of Te Raki Māori, leaving many to turn to private, incompetent surveyors who indulged in unfair practices for personal profit. The reports prepared by the Surveyor-General indicate that during the 1870s and 1880s at least, the Crown focused its survey efforts on its

759. Haultain to McLean, 'Return Relative to the Working of the Native Land Court Acts', 18 July 1871, AJHR, 1871, A-2A, p 6.

760. Martin, 'Memorandum on the Operation of the Native Lands Court', AJHR, 1871, A-2, pp 6, 15.

761. Craig Innes, 'The History of Mangataraire, Rangaunu, Tapapanui, Toukauri, Wiroa and Whakataha 1–3 Blocks, 1865–2015', report commissioned by the Waitangi Tribunal, 2016 (doc A69), p 81.

762. Waitangi Tribunal, *The Te Roroa Report*, Wai 38 (Wellington: Brooker and Friend, 1992), p 70.

own purchases, clearly prioritising them over those required by Māori attempting to utilise the Native Land Court system for their own benefit. In 1908, the Native Land Commission could still refer to 'huge arrears of survey work to be undertaken' in Northland.[763]

One of the major consequences of survey deficiencies would become apparent when the Government Advances to Settlers Act 1894, a major factor in the post-1890 expansion of the primary sector, excluded Native freehold land from the classes of land that qualified as security for loans. If the purpose of the Native Land Court was, as the Crown claimed in its submissions, to convert customary Māori land in collective ownership into titles derived from the Crown and 'facilitate Māori involvement in the new colonial economy', then it failed, proving unable to deliver titles considered sufficient as security for State development loans.[764]

Accordingly, we find that:

- By rejecting all requests by Te Raki Māori for the right, opportunity, and authority to conduct title investigations through their own institutions, by empowering individual Māori to act independently of co-owners, and by employing questionable purchasing tactics, the Crown rendered engagement with the Native Land Court and its processes practically obligatory, thereby breaching te mātāpono o te tino rangatiratanga.
- The process of tenure conversion meant many Te Raki Māori incurred substantial debt, notably in the form of survey costs. Although the extinguishment of customary ownership principally served the interests of the Crown, Māori were forced to meet the costs, often through the loss of land. By failing to ensure that the costs of extinguishing customary Māori title in the Native Land Court were allocated according to the distribution of benefits arising from the process, the Crown breached te mātāpono o te mana taurite/the principle of equity, in breach of te mātāpono o te houruatanga/the principle of partnership and te mātāpono o te matapopore moroki/the principle of active protection.

9.8 Were Sufficient Forms of Remedy and Redress Available?

9.8.1 Introduction

Beginning with the Native Lands Act 1865, Native Land legislation contained provisions for rehearings. Prior to 1880, applications were dealt with by the Governor-in-Council, and after 1880 by the chief judge of the Native Land Court. Besides rehearings, the only other recourse open to those dissatisfied with decisions of the Native Land Court was petitioning Parliament. Responding to growing criticism of the rehearing process and the Native Affairs Committee's insistence that it did not, and could not, act as a de facto court of appeal, the Government established the Native Appellate Court in 1894. The key issue before us is whether the provisions for rehearing, petitions to Parliament, and appeals to the Native Appellate

763. Stout and Ngata, 'Native Lands and Native-Land Tenure', 10 June 1908, AJHR, 1908, G-1J, p 8.
764. Crown closing submissions (#3.3.406), p 9.

Court were of themselves fair and robust, and whether those avenues collectively provided an adequate means through which Te Raki Māori might seek remedy and redress.

The claimants argued that the Crown failed to provide adequate recourse or remedies for those of Ngā Hapū o Te Raki aggrieved by decisions of the Native Land Court. They submitted that established remedial mechanisms were inadequate and that the Crown was aware of Court decisions that resulted in injustice; however, it failed to respond appropriately. The claimants acknowledged that, prior to 1894, aggrieved parties could apply for a rehearing. They argued, however, that this remedy was essentially illusory, because rehearings lacked consistent or transparent criteria, and the chief judge of the Native Land Court was reluctant to interfere with the decisions of his judges. Additionally, applications could be, and often were, refused without explanation, while successful applications resulted in new hearings and a second round of costs. As a consequence, claimants argued, few rehearings were pursued and fewer granted. An alternative to rehearings were petitions, but claimants suggested that the Native Affairs Committee tended to favour the Crown's view of disputes.[765] Furthermore, the claimants argued that the Native Land Appellate Court, established in 1894, 'was not a *physically* separate Court' (emphasis in original) but comprised judges already sitting in the Native Land Court itself.[766] They submitted that the Native Appellate Court was ineffective for reasons relating to the rules pertaining to the lodging of notices of appeal and the requirement to pay a deposit as security for the costs involved.[767]

The Crown noted that provision for rehearings was included in all Native Land legislation from 1865 onwards. Crown counsel argued that Te Raki Māori were aware of that provision, that there was no reason to suppose that applications for rehearings were not dealt with on their merits, and that the apparently low number of applications lodged by Te Raki Māori reflected the fact that many title investigations were based upon prior or out-of-court agreements. Further, counsel argued that the Native Affairs Committee acted as 'a de facto court of appeal', could take evidence, and 'invariably' sought background information from the Native Department. The Crown submitted that there was no evidence to support any claim of systemic failure with respect to both rehearing provisions and the operation of the Native Affairs Committee as a de facto court of appeal. Finally, the Crown dismissed the position adopted by claimants with respect to the status of the Native Appellate Court.[768]

9.8.2 The Tribunal's analysis

The right of appeal from judicial decisions is a crucial one, but the Crown was slow to institute a formal process. Prior to the establishment of the Native Appellate Court in 1894, Te Raki Māori aggrieved by the Native Land Court's decisions had

765. Claimant closing submissions (#3.3.225), pp 213–216.
766. Claimant closing submissions (#3.3.225), p 216.
767. Claimant closing submissions (#3.3.225), p 217.
768. Crown closing submissions (#3.3.406), pp 59–63.

two lesser avenues through which to seek redress: rehearings and petitions. In the following sections, we examine these in turn and offer some conclusions.

9.8.2.1 *Rehearings*

Provisions relating to rehearings (but not to appeals) were included in the Native Lands Act 1865. Section 81 empowered the Governor-in-Council to order a rehearing, provided the order was made within six months of the Native Land Court's original decision. Rehearings would be held before one or more judges of the Court and two or more assessors. All previous proceedings dealing with the matter in question would be annulled and the case would be heard afresh (although as the Puhipuhi rehearing demonstrates, this rule was not necessarily followed by judges, who sometimes compared the evidence they heard with what had been said on previous occasions). So although section 81 was headed 'Appeals', it in fact provided for a rehearing by the same Court, accruing all the costs that attended the original hearing. The Act did not specify the grounds on which an application for a rehearing could be made, any procedure by which applications should be made, nor the remedies available. The rules issued under the Act were also silent on these matters.[769] These provisions were carried forward into the Native Land Act 1873.

As noted above, there was a six-month period within which to apply for a rehearing under the 1865 Act. Section 20 of the Native Lands Act 1869 reduced this to three months. Section 58 of the Native Land Act 1873 restored the period to six months, and then section 10 of the Native Land Act Amendment Act (No 2) 1878 again reduced it to a three-month period.

Under the Native Lands Act 1865, a decision to order a rehearing rested with the Governor-in-Council. In practice, the Government referred applications to the chief judge of the Native Land Court for his recommendation. Not until 1880 did section 47 of the Native Land Court Act 1880 transfer full responsibility to the chief judge. The legislation did not specify the matters the chief judge was required to consider when reaching a decision, nor the process that should be followed.[770] While anyone could seek a rehearing under the Native Lands Act 1865, section 47 of the 1880 Act limited that right to 'any Native who feels aggrieved by the decision of the Court' and to the Governor. The Act provided that rehearings would be held before two judges (one of whom could be the chief judge) and one or two assessors 'as the Chief Judge shall think fit'. The Court could 'affirm the original decision, or reverse, vary, or alter the same, or give such other judgment and make such orders as it may think the justice of the case requires'. Rehearings continued to mean that previous decisions were cancelled and that the entire case, with all the attendant costs, would be reheard. Māori were not involved in the decision-making process

769. 'Rules under "The Native Lands Act, 1865"', 5 April 1867, *New Zealand Gazette*, vol 20, pp 135–140.

770. Grant Phillipson, '"An Appeal from Fenton to Fenton": The Right of Appeal and the Origins of the Native Appellate Court', in NZJH, vol 45, no 2 (2011), p 175.

on applications for rehearing (until 1888), while their participation even as assessors in rehearing proceedings was entirely at the discretion of the chief judge.

The difficulty of securing a rehearing and the associated costs encouraged a growing number of Te Raki Māori to petition Parliament for redress, among them Hōne Te Awa and 15 others of the Bay of Islands (1876), Wiremu Puata and five others of the Bay of Islands (1876), Hirini Taiwhanga and 70 others (1876), and Reihana Paraone and 10 others (1880).[771] Of these, none were successful.[772] In 1876, the growing number of petitions induced the Native Affairs Committee to recommend the establishment of a Court of Appeal to deal with complaints from those aggrieved by decisions of the Native Land Court. In 1884, the same committee drew the Government's attention to the fact that it was devoting a large proportion of its time to 'receiving statements in regard to claims for rehearings which have been refused by the Chief Judge of the Native Land Court'. Changing membership, interrupted sittings, and the expense involved in summonsing and maintaining witnesses meant that the committee was unable to arrive at properly considered and just decisions. It went on to note that 'the Natives complain that it frequently happens that the Chief Judge is himself the person from whose decision they appeal' and it remarked on the irregularity of this situation: that the Native Land Court was 'in the exceptional position that there is no appeal from its decision, and no remedy for its wrongful awards, except through special legislation'.[773]

The Government was slow to respond. The rehearing provisions of the Native Land Court Act 1880 remained in force until the passage of the Native Land Court Act 1886 Amendment Act 1888, although section 2 of the Native Land Acts Amendment Act 1881 had allowed the chief judge to order rehearings for part of a case or block. Under section 76 of the Native Land Court Act 1886, the chief judge continued to hear applications for rehearings unless he was a party to the decision appealed against, in which case the matter would be referred to two judges named by him. Section 77 provided for rehearings to be conducted before two judges – of whom the chief judge could be one, unless he were a party to the original decision – and one or two assessors as he saw fit. Two years later, the law was changed again: section 24 of the Native Land Court Act 1886 Amendment Act 1888 repealed section 76 (and section 77) and provided that the chief judge, 'assisted by an Assessor', was required to decide upon applications for rehearings in open court and that rehearings would be determined by a court of no fewer than two judges, one of whom could be the chief judge and the other an assessor, 'none of whom shall have adjudicated on the case at any former time'.[774]

It is not entirely clear what matters the chief judge took into account when preparing recommendations for the Government to consider, or in reaching his own decisions. According to historian Dr Grant Phillipson, the provisions relating to rehearings were intended to act as 'a safety valve for when court decisions posed

771. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 864–866.
772. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 865–866.
773. Native Affairs Committee, 17 October, 1884, AJHR, 1884, I-2, p 1.
774. Native Land Court Act 1886 Amendment Act 1888, section 24.

a risk of armed conflict'. Other factors included 'the threat of trouble over a block, evidence that a decision was "manifestly wrong", technical or procedural mistakes, and glaring inconsistencies in the Court's decisions'.[775]

Whether the Crown's desire to acquire land that was the subject of an application for rehearing influenced such decisions is not entirely clear, although the Government's land purchase agents did offer advice over whether rehearings should be granted.[776] So long as the Government itself rather than the chief judge made decisions over whether an application would be allowed to proceed, the provision of this advice raised a serious question over potential conflicts of interest. Crown purchase agents had direct access to the Native Minister and clearly sought to exercise such influence as they could on rehearing decisions, as demonstrated in the case of Tangihua (noted in the following section); Paul Thomas noted in that context, 'it was up to the Native Minister to recommend to the Governor-in-Council whether the rehearings [sought] should be granted.'[777]

Few details relating to the number of rehearings are available. A search of Bergan's block narratives for Te Raki yields just a handful of examples, but that may reflect the fact that few Native Land Court records identified 'rehearings' by this title.[778] Overall, at least 29 rehearings were ordered in Te Raki during this period, most of them after 1880.[779] From the following examples, nevertheless, it is possible to draw some conclusions about the difficulties Te Raki Māori confronted when endeavouring to secure rehearings and about the manner in which the Crown chose to deal with applications.

9.8.2.1.1 Tangihua

Tangihua is located on the border of the Whangārei sub-district and Kaipara.[780] In 1873, the Crown initiated negotiations for the purchase of the block and in February 1875, the objections of counter-claimants notwithstanding, the 15,531-acre block was awarded to Te Tirarau Kūkupa and Maraea Te Waiata. Within a few days, Arama Karaka Haututu and seven others wrote to the chief Native Land Court judge seeking a rehearing. Civil Commissioner Kemp, who had negotiated the purchase and was anxious to complete the transaction, defended the Native Land Court's decision and advised Native Minister McLean against a rehearing on the grounds that, if it was questioned, the confidence of Māori in the Court's proceedings would be greatly weakened. McLean accepted that advice and advised the Governor accordingly. The Crown completed the purchase on 23 June 1875. In this instance, it seems likely that the decision to decline the application for a rehearing was influenced by the Crown's determination to protect its interest in the block.

775. Phillipson, '"An Appeal from Fenton to Fenton"', pp 172–173.
776. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 752–753.
777. Thomas, 'The Native Land Court' (doc A68), p 104.
778. Thomas, 'The Native Land Court' (doc A68), p 256.
779. Thomas, 'The Native Land Court' (doc A68), pp 334–373.
780. The following account is taken from Berghan, 'Northland Block Research Narratives' (doc A39(g)), pp 188–205.

9.8.2.1.2 Te Tapuwae

Te Tapuwae, a Hokianga block in which both Ngāti Here and Ngāti Tupoto claimed rights, was brought to our attention as an example that illustrated 'many of the negative elements usually present in northern land purchases', including the 'lack of any 'preliminary inquiry', the intervention of interested third parties which exacerbated conflict, the Crown's manipulation of survey liens and hapū divisions to achieve its own objects, expensive lawyers, accusations of judicial partiality, incompetence, deception, and ultimately, land loss.'[781]

In 1874, John Lundon and Frederick Whitaker had arranged with Nui Hare and Ngāti Here for the supply of timber for railway sleepers from the block, prompting objections from Hōne Mohi Tāwhai that the block belonged to Ngāti Tupoto. Lundon and Whitaker advised Nui Hare to put the land through the Native Land Court so as to settle the question of ownership. In accordance with this advice, Nui Hare accompanied Lundon to Auckland, where he arranged with the surveyor, Tole, to have the land surveyed at the rate of fourpence per acre, to be paid within six months of its passing through the Court.[782] This agreement was put in writing. However, after survey, Tole sold the plans to the Government for £142 9s 4d without Nui Hare's knowledge. According to Lundon, a 'great injustice [had] been done to these people', who remained unaware that the surveyor 'had given the plans over to the Government', which now held a lien on the block. Lundon noted that '[t]hey were very much annoyed about it on account of their written agreement with Mr Tole.'[783]

The Crown now became more directly involved. Preece was anxious to secure road access to adjoining Government-owned land. He had tried to buy the block previously but without success and, with Lundon's assistance, now won Ngāti Here's consent to put a road through it. Ngāti Tupoto objected, saying that to consent to the road would be tantamount to admitting Ngāti Here's claim. However, Mohi Tāwhai was willing to sell the land, an offer which Preece at first refused and then accepted, fearing that road access would otherwise continue to be denied. He paid an advance of £100 on the block, upon which Ngāti Tupoto made an application to the Court for a title determination. From their point of view, this had been arranged openly and fairly; from Ngāti Here's perspective, the payment was surreptitious and wrong.[784] They were particularly aggrieved when the survey plan they had commissioned was submitted to the Court with Ngāti Tupoto's application.[785] Ngāti Here representatives then appeared in Court to object both to the application and the use of their plan. Monro, the presiding judge, replied that the

781. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 749. The following account draws on Berghan, 'Northland Block Research Narratives' (doc A39(g)), pp 217–236; and Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 749–757.
782. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 749–750.
783. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 750.
784. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 750.
785. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 750–751.

land had been properly gazetted and that he would hear the case whether they were present or not.[786]

A protracted hearing followed in 1879. Nui Hare and his party were unprepared and convinced that Monro was biased against them 'on account of [the Government] giving them [Ngāti Tupoto] money'.[787] Charles Nelson, who had taken over from Preece, kept an eye on the Crown's interests during proceedings. Amid a 'great deal of excitement', Monro divided the block equally between Ngāti Here and Ngāti Tupoto, each party being awarded a block of 3,147 acres, while a reserve of 2,000 acres was set aside for their joint ownership. Ngāti Here immediately sought a rehearing, asking Nelson not to make any further payment on the land until the matter was settled, a request that he ignored. Another £500 went to Tāwhai's party, while Ngāti Here refused to accept the offer made to them. Both sides were armed and conflict looked likely. Native Minister Sheehan apparently asked Lundon to use his influence to calm matters down – and to ensure that road access was not threatened. According to Nui Hare's subsequent petition, Sheehan had instructed Lundon to tell him that there would be a rehearing. On this basis, and with the assistance of Webster, von Sturmer, and other local colonists, the peace was kept. Lundon also advised Hare to engage a lawyer (which he did at what was said to be great cost) and make a direct approach to Chief Judge Fenton in order to confirm that a rehearing would take place.[788]

According to Hare and his lawyer (surveyor Tole's brother), Fenton had agreed to a rehearing. But it was standard practice for Fenton to refer such matters to the judge concerned, and Monro insisted that 'equal justice had been done to all parties and that a rehearing was unnecessary'. Armstrong and Subasic noted that Fenton, who 'was always most reluctant to go against the advice of his judges', recommended to Sheehan that none be granted, a recommendation that Sheehan accepted.[789] Fenton denied a claim made by Ngāti Here that he had promised to approve the case being heard again, stating that he had no recollection of the matter.

Sheehan also requested a report from Nelson, who blamed 'keen and zealous advisers' for the trouble, but acknowledged that the block had been in dispute for a number of years. He remained optimistic that the remaining land could be purchased and suggested it be included in a list of lands 'under negotiation', but cautioned that he might 'not for some time, be able to show that moneys have been paid on account of such negotiations'.[790]

When the case was called again, Ngāti Here found to their dismay that it was not for a rehearing but to supply a list of names for insertion in the Crown grant for their portion of the land. They refused, stating that they would wait upon the

786. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p751.

787. Petition of Nui Hare and others, 8 July 1880 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p751).

788. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp751–752.

789. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p752.

790. Nelson to Secretary Native Land Purchase Department, 6 August 1879 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p753).

rehearing they had been promised. Monro threatened that he would go ahead and issue a Crown grant for that portion on which the Government had advanced money.[791] At this point, there was a £64 debt owed by Ngāti Here as their part of the survey costs. According to Lundon, upon hearing this 'the Natives hung down their heads and looked very black, and went across the river very dark, what the natives themselves call "pouri"'.[792]

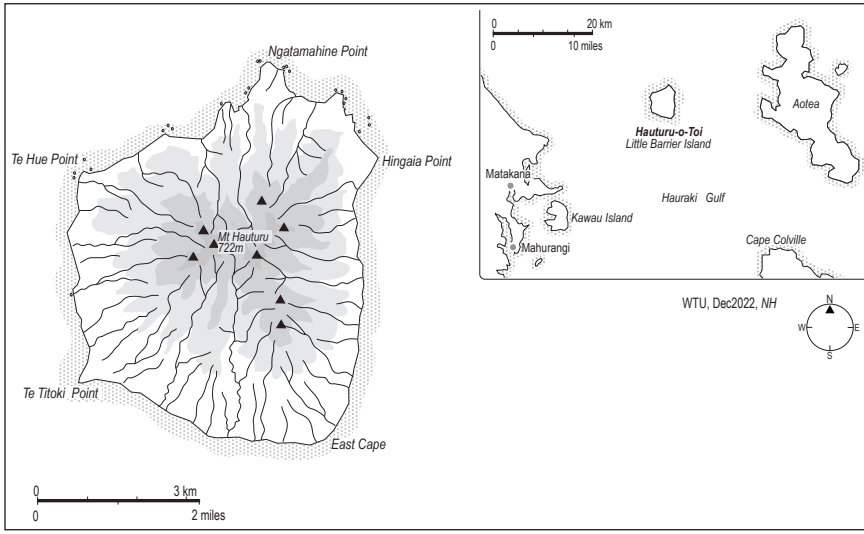
On Lundon's advice, Ngāti Here – joined by a party of Ngāti Tupoto who had not accepted payments – petitioned Parliament. There can be no doubt that the Native Affairs Committee took the allegations seriously. It called a number of witnesses, including Lundon, Tole (Nui Hare's lawyer), Gill of the Native Land Purchase Department, and Chief Judge Fenton himself. The chief judge acknowledged that if the facts as set out in the petition were accurate, a 'miscarriage of justice' had occurred. As to his own actions, he did not remember having promised a rehearing, being (he said) over-worked and tired at the time;[793] yet according to Tole, the promise had been given 'in a most unmistakable way'.[794] R J Gill outlined the course of the Crown's purchase.

The Native Affairs Committee reported that 'the land . . . seems to have been fairly dealt with by the Court' but recommended that the Government inquire into the alleged grievances, including Fenton's original promise to grant a rehearing and Monro's subsequent actions. Native Minister Bryce rejected that recommendation. In his view, the case was an appeal against a decision of the Native Land Court, and if the Government were to review such a decision by 'extra judicial inquiry', this would be tantamount to creating a new tribunal.[795]

A rehearing did, however, eventually take place in 1882, for reasons that are not explained. Since the statutory period had lapsed, special legislation was required in the form of the Special Powers and Contracts Act 1881. The Native Land Court reaffirmed its original decision. In August 1882, Tapuwae was partitioned into Tapuwae 1 (3,147 acres, awarded to Ngāti Here), Tapuwae 2 (3,147 acres, awarded to the Crown), Tapuwae 3 (1,040 acres, awarded to Ngāti Tupoto and Ngāti Here), and Tapuwae 4 (1,040 acres, awarded to Ngāti Tupoto and Ngāti Here).

While the circumstances under which a decision was made to allow, or disallow, a rehearing remain unclear, the available evidence again indicates that decisions over rehearings were often entangled with Crown purchase plans that had exacerbated tribal rivalries. Further, the expense of prosecuting their claims had left Ngāti Here in debt. There was the survey lien to pay off, plus the expenses of legal service and Court fees. Hare wrote to the Government offering 520 acres (the Ngāti Here share of Tapuwai 4) for 10 shillings per acre. The Crown did not

791. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 753.
792. Petition of Nui Hare and others, 8 July 1880 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 753.
793. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 754.
794. Petition of Nui Hare and others. 8 July, 1880 (Armstrong and Subasic, 'Northern land and politics' (doc A12), p 755).
795. Bryce memorandum, 27 September 1880 (Berghan, 'Northland Block Research Narratives' (doc A39(g)), p 224.



Map 9.1: Hauturu-o-Toi (Little Barrier Island).

immediately accept the offer, but undertook further purchasing in Tapuwae in the following decade.[796]

9.8.2.1.3 Hauturu

Historian Ralph Johnson has investigated title determination in the case of Hauturu (Little Barrier Island), one of the few areas Mahurangi Māori still retained by the 1870s. The first of many hearings commenced in 1878 but was adjourned on the grounds that a suitable survey plan had not been submitted. A second hearing was held in July 1880 when the Court, in the absence of Ngātiwai claimants, awarded ownership to several hapū of Ngāti Whātua. The Ngātiwai claimants were granted a rehearing on the basis that they had not participated in the proceedings because they were unaware a survey plan had been completed. This was held in May 1881, but Chief Judge Fenton and Native Assessor Te Wiremu Te Awaitaia could not agree on a decision. As a result of this deadlock, the case had to be heard again. In June 1881, Judges Monro and O'Brien awarded the land to five members of Ngātiwai. The Crown then decided that it required the island for defence purposes. In response to a request from the Crown, the Court (under section 36 of the Native Land Court Act 1880) declared the land to be inalienable except to the Crown.[797]

When Te Hemara Tauhia and 32 others petitioned Parliament, the Native Affairs Committee merely noted that '[t]he Government is now trying to settle the matter,

796. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 756–757.
797. Ralph Johnson, 'Report on the Crown Acquisition of Hauturu (Little Barrier Island)' (commissioned research report, Wellington: Waitangi Tribunal, 1999) (doc E8), pp 4–9.

and the Committee recommend that no effort should be spared to bring to a satisfactory conclusion a very serious dispute.'[798] In June 1881, two applications for a rehearing were lodged; in response, in July 1881, the Government gazetted a notification declaring its prior rights as provided under section 3 of the Government Native Land Purchases Act 1877.

In 1882, the Native Affairs Committee considered another petition against the decision, this time lodged by Henare Te Moananui and Paratene Te Manu of Ngātiwai, and concluded that 'It is evident that a mere legal decision is not likely to settle this case satisfactorily, and the committee would therefore recommend Government to continue its efforts to arrive at a peaceful solution either through purchase or some other way.'[799]

Under section 2 of the Special Powers and Contracts Act 1883, the Native Land Court was required to investigate afresh the ownership of Hauturu. A hearing was held before Chief Judge Edward Williams in February 1884. The Crown was not represented, but Williams chose to contact Native Minister Bryce as to whether the Crown still wished to acquire the island and pressed him to reimpose restrictions on alienation (we discuss the Crown's purchase of Hauturu in chapter 10). Such action, Johnson observed, 'makes it difficult to credit the court hearing with any sense of judicial impartiality'. Johnson described Williams' interactions with Bryce as constituting 'extraordinary conduct on the part of the Chief Judge [that] appears to have compromised the integrity of [the] Native Land Court system'.[800] The Court awarded the land to those associated with Te Kawerau (Ngāti Whātua) but did not impose any restrictions on alienation, at their request.

The Court's decision elicited an application, lodged in September 1884, from Ngātiwai for a further rehearing. On the recommendation of the Native Select Committee, a clause was inserted into the Special Powers and Contracts Act 1884, and Hauturu was again declared to be customary land. Both groups of claimants lodged applications, and a final hearing was conducted by Judge Edward Puckey in October 1886, in which the Court found for Ngātiwai. In December 1886, Ngāti Whātua applied for a rehearing, but their request was denied, thus bringing to an end a struggle that had significant impacts on the hapū involved. Johnson concluded that the Government intervened directly in the Native Land Court's handling of Hauturu at least partly to try to ensure that the island did not pass into private ownership.[801] While we reserve comment on the ultimate outcome of the case, we can only agree with Johnson's assessment that the Court's rehearing process was in this instance plagued by a weak-to-non-existent understanding of judicial independence and appeared subordinate – at least for a period – to the aims of the Crown.

798. Native Affairs Committee, 19 July 1881, AJHR, 1881, I-2, p 5.
799. Native Affairs Committee, 28 June 1882, AJHR, 1882, I-2, pp 6–7.
800. Johnson, 'Report on the Crown acquisition of Hauturu' (doc E8), pp 14–15.
801. Johnson, 'Report on the Crown acquisition of Hauturu' (doc E8), pp 12, 16, 18–19, 22.

9.8.2.1.4 Te Pupuke

Historian Alexandra Horsley has examined the title history of the Te Pupuke block in Whangaroa.[802] The first hearing for this block was held in 1880 on the application of Hāre Hongi Hika and Paora Ururoa but it was adjourned because the surveyor had not been paid for work on the Waihapa block and refused to hand over the plans. When the case came on again in 1882, Hika and Ururoa advised the Court that they intended placing the block before the Komiti o te Tiriti o Waitangi (discussed in chapter 11). According to the later evidence of counter-claimant, Taniora Arapata of Ngāti Pou, it was he who had called the komiti together.[803] Whatever the truth of the matter, the increasing dissatisfaction with the Native Land Court and desire for a Māori-controlled alternative would complicate the determination of title in Te Pupuke in the years that followed.

The Komiti o te Tiriti o Waitangi, comprised of ten rangatira chaired by Wiremu Katene, heard the case in 1884 over the course of two days. It divided the land between Taniora Arapata and Hika and Ururoa. According to Arapata, Hāre Hongi Hika's party rejected the decision and boundaries set down by the komiti.[804] The matter seems to have been referred back to the Native Land Court by Arapata, the following year, in order to gain legal title for his portion. Hāre Hongi Hika's people did not attend. According to Arapata, their party of thirty had left the hearing and they gave no evidence. Natanahira Te Poua appeared as a counter-claimant but not as a representative for Hāre Hongi Hika and his evidence was not recorded[805] Taniora Arapata claimed the western portion of Te Pupuke through ancestry (namely through Te Pikinga) but admitted the right of Hongi Hika's party to the eastern side, informing the Court of the Komiti's decision. The Court accordingly awarded 'Te Pupuke West' to Arapata and his party of 65 claimants.[806]

Around the time of Hāre Hongi Hika's death in 1885, Mita Hape and Paora Ururoa petitioned Parliament for a rehearing stating that the block had been awarded to the wrong people. The Native Affairs Committee merely noted 'that this is a re-hearing case, and entirely in the hands of the Native Land Court'.[807] The chief judge agreed to a rehearing after Mita Hape had paid a deposit of £24 to cover the costs, possibly in anticipation of political objections. As Judge George Barton who presided over the rehearing in 1891 noted, the statutory grounds for that demand were questionable. While section 74 of the Native Land Court Act 1886 empowered the Court to demand a deposit to cover the costs of a hearing, that provision was not repeated in the sections of the Act dealing with rehearings.[808]

802. The following account is taken from Alexandra Horsley, 'A History of the Otongoroa, Te Pupuke, and Waihapa Blocks (Whangaroa) 1874–1990' (commissioned research report, Wellington: Waitangi Tribunal, 2016) (doc A57), pp 70–80.
803. Horsley, 'A History of the Otongoroa, Te Pupuke, and Waihapa Blocks' (doc A57), p 73.
804. Horsley, 'A History of the Otongoroa, Te Pupuke, and Waihapa blocks' (doc A57), p 73.
805. Horsley, 'A History of the Otongoroa, Te Pupuke, and Waihapa blocks' (doc A57), p 74.
806. Horsley, 'A History of the Otongoroa, Te Pupuke, and Waihapa blocks' (doc A57), pp 74–75.
807. Native Affairs Committee, 12 August 1886, AJHR, 1886, I-2, p 42.
808. Horsley, 'A History of the Otongoroa, Te Pupuke, and Waihapa Blocks' (doc A57), p 85.

In 1891, Mita Hape and Te Ururoa wrote to the Native Land Court stating that they intended to withdraw their case. Horsley noted that Mita Hape had signed the 1888 petition addressed to the Queen which protested about the impact of the Native Land laws on Māori: that 'there were a great many troubles and pains oppressing' Maori caused by the 'bad laws' which were being enacted by Parliament.[809] The attempt to withdraw the case in 1891 was prompted in part by the recent discussions held with the Native Land Laws Commission. Hape and Ururoa told Judge Barton:

> This is to inform you that the Land Court at Whangaroa has been made of none effect concerning Te Pupuke and other lands of ours at Whangaroa on account of the burdensomeness of the (Native) land laws. The words of the Commissioner have reached us (requesting) that any observed evil (working) of the NL Court should be made public. Enough, the right methods have been shown by the Native people to the Commissioners. The Commissioners have said that a Native Committee will be set up to adjudicate on Native lands in the immediate future, therefore we have agreed to this at the present. time. Therefore for the present our lands are being withheld. Enough, do you all remain away and not waste time.[810]

Resistance on the part of Hape and Ururoa to the further involvement of the Court notwithstanding, a rehearing was held in June 1891 before Judges Barton and Spencer von Sturmer and Native Assessor Tuta Tamati. A further effort by Mita Hape to stop the case was also unsuccessful. He asked the Court whether it had received his letters and stated that 'the natives had decided after several meetings not to bring this case before the Court.'[811] However Taniora Arapata wanted the case to proceed. After a lengthy discussion the Court adjourned to allow Mita Hape to consult with his people and he returned the following day and told the Court that they had agreed to go ahead with the rehearing.[812]

The case was reheard over five days. Ururoa and Hape argued that Arapata and his people of Ngāti Pou had 'no mana' over the land, living there only by permission of Hongi Hika. Arapata changed his evidence from that given earlier with reference to Te Pupuke and (with his uncle Heremaia Te Ara) at Kaingapipiwai. He acknowledged to the Court, 'I wanted to deceive the other party. It was wrong on my part to set up Te Pikinga as my ancestor, but I was afraid the other side deceived so I did not set up the present ancestors. I certainly did wrong in not doing so.'[813] He now claimed through Te Puta and testified to his cultivations and

809. Horsley, 'A History of the Otongoroa, Te Pupuke, and Waihapa blocks' (doc A57), p 77.
810. Hape and Ururoa, 12 June 1891 (cited in Horsley, 'A History of the Otongoroa, Te Pupuke, and Waihapa Blocks' (doc A57), pp 78–79).
811. Mita Hape, 17 June 1891 (cited in Horsley, 'A History of the Otongoroa, Te Pupuke, and Waihapa Blocks' (doc A57), p 79).
812. Mita Hape, 18 June 1891 (cited in Horsley, 'A history of the Otongoroa, Te Pupuke, and Waihapa blocks' (doc A57), p 79).
813. Taniora Arapata, 19 June 1891 (cited in Horsley, 'A history of the Otongoroa, Te Pupuke, and Waihapa blocks' (doc A57), p 81).

burial grounds. Ururoa and Mita Hape argued that Hongi Hika had conquered the block and occupied it thereafter. The dispute, Ururoa said, had begun when Arapata had returned from Hokianga. The Court also heard evidence that Hongi Hika had gifted a portion of Te Pupuke to Whiro, the father of Ngawhare.[814]

The Court awarded the bulk of the block to the party of Hāre and Ururoa and the rest to Ngawhare. Much of the decision was devoted to the contradictions in Arapapta's evidence which the Court believed to be 'untrue'. It emphasised the return of Hongi Hika to Pupuke in 1820 when Ngāti Hau had 'conquered' and driven Ngati Pou from the area. They had fled to Hokianga living under the protection of Tamati Waka Nene until long after the death of Hongi Hika. It was the view of the Court that when Arapata's people had returned they had done so under the protection of Whiro. As a result, Te Pupuke 1 of 522 acres was awarded to Whiro's daughter, Ngawhare, and Te Pupuke of 1,841 acres to Mita Hape, Paora Ururoa, 39 other owners and 33 minors. Taniora Arapata was awarded no share.[815] On this outcome being protested the Court stated that if Arapata had 'a good claim [but] he kept it back and did not show it, he deserves to lose it'.[816] The assessor denied Arapata's accusation of bias, stating that his people were the enemies of Hongi Hika, not his friends.[817] The Court kept Hape's deposit of £24 on the grounds that the 'trouble' over the title of Te Pupuke had 'been caused by the misconduct of Mita Hape and his advisors' and regretted that it was 'unable to punish him more severely'.[818]

9.8.2.1.5 Tribunal summary

These Te Raki examples, and the Crown's reluctance to grant rehearings in blocks where it had a purchase interest, illustrate the inadequacy of the procedure that was in place from 1865 to 1894. On occasion rehearings were granted – as Tapuwae demonstrates – even when applicants changed their mind as dissatisfaction with and opposition to the Native Land Court intensified. However, the relevant statutory provisions did not form a properly constituted process by which those aggrieved by the decisions of the Native Land Court could appeal to a higher, separate, and independent tribunal. The Native Land Court was not, as earlier Tribunal inquiries have clearly established, the appropriate body to 'correct' injustices arising out of its own prior decisions.[819] The procedure by which applications were assessed was neither open nor contestable. In spite of conflicts of interest, the

814. Horsley, 'A History of the Otongoroa, Te Pupuke, and Waihapa Blocks' (doc A57), pp 81–82.
815. Horsley, 'A History of the Otongoroa, Te Pupuke, and Waihapa Blocks' (doc A57), pp 83–84.
816. Court, 29 June 1891 (cited in Horsley, 'A History of the Otongoroa, Te Pupuke, and Waihapa Blocks' (doc A57), p 84).
817. Horsley, 'A History of the Otongoroa, Te Pupuke, and Waihapa Blocks' (doc A57), p 84.
818. *Te Pupuke* (1891) 10 Northern MB, p 341 (cited in Horsley, 'A history of the Otongoroa, Te Pupuke, and Waihapa blocks' (doc A57), p 85).
819. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, pp 449–452, 468; Waitangi Tribunal, *Te Urewera*, Wai 894, vol 3, p 1100; Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 473; Waitangi Tribunal, *Te Mana Whatu Ahuru*, parts 1–2, p 1298.

Crown could and did intercede, and the Native Land Court was not averse to engaging in delaying – and sometimes punitive – tactics.

The demand for rehearings pointed to the underlying difficulty that the Native Land Court frequently encountered when attempting to determine ownership according to tikanga, especially when judges lacked the necessary expertise. To simplify its task, the Court employed a narrow set of fixed criteria by which to assess claims to ownership; its adversarial and winner-take-all character encouraged the presentation of partial, skewed, and weighted evidence; it often failed to identify all rightful owners and to adjust lists of owners; and it was ill-equipped to deal with the complexities of customary tenure, in particular with overlapping rights. But the Crown proved reluctant to analyse the root causes of grievances; namely, the lack of meaningful Māori input into decisions and the assimilation of their laws into a transplanted system that was supposed to assess rights according to their tikanga, but did not.

Continuing dissatisfaction led finally to the establishment in 1894 of a 'Native Appellate Court'. Section 82 of the Native Land Court Act 1894 provided for a broad right of appeal, leave to file was not required, and the grounds of any appeal were not defined. Section 90 provided that the Court could 'affirm the decision appealed from' or direct the Native Land Court 'to give such other decision as to the Appellate Court as may seem just'. On the other hand, the Court was to comprise no fewer than two judges of the Native Land Court, while no provision was made for assessors. Moreover, section 93 provided that the decisions of the Court 'shall, as to every question of law and fact, be final and conclusive'. In other words, there was no appeal from a decision of the Native Appellate Court to the Supreme Court or the Court of Appeal, although the Native Appellate Court could state a case for the opinion of the Supreme Court on any question of law arising out of the proceedings.[820] Despite these defects, this was a much needed reform but one that came too late for many; by 1894, most land had already gone through the Native Land Court without a formal right to appeal its decisions.

9.8.2.2 *Petitions and the Native Affairs Committee*

In its submissions, the Crown argued that if an application for a rehearing was not lodged within the period allowed, petitions could be considered by the Native Affairs Committee 'acting as a *de facto* appeal court' with the capacity to gather evidence. This course of action was readily available to Māori and involved no cost unless they were called to appear in person. In the Crown's view, there was no systemic failure in in how these procedures operated.[821]

The committee was not generally disposed to review decisions of either the Court or its chief judge, despite its concerns about the number of applications for rehearing that were being made and the lack of a formal avenue of appeal. In 1876, for example, Wiremu Puatata and five others from the Bay of Islands complained that they had been 'done out of their land' through the actions of the Court and

820. Native Land Court Act 1894, section 92.
821. Crown closing submissions (#3.3.406), pp 61–62.

sought compensation or the restoration of 1,000 acres. In 1877, the Native Affairs Committee reported:

> it appears from the evidence taken that applications for the re-hearing of this block were refused by the Governor in Council in consequence of a recommendation to that effect made by the Chief Judge of the Native Land Court. The law gives the Governor in Council a discretionary power, and there is no evidence before the Committee to show that that discretion was not properly exercised.[822]

Whether or not the committee had sought evidence is unknown. Exactly the same decision was reached, again in 1877, with respect to the petition lodged by Hone Te Awa and 15 others of the Bay of Islands.[823]

In 1876, the Native Affairs Committee considered a petition lodged by Hirini Taiwhanga and 70 others seeking compensation or a rehearing; it decided 'that the time at their disposal has not been sufficient to enable them to make such inquiries as to justify them in reporting an opinion.'[824] The petition was reconsidered in 1877, and on that occasion the Native Affairs Committee decided that the matter involved a dispute among family members, but then noted, 'In the absence of any evidence, the Committee has no specific report to make.'[825] Again, it is not clear that the committee sought evidence. Finally, the committee often referred petitioners back to the original source of the grievance. The Native Land Court unsurprisingly proved reluctant to overturn its own decisions.[826]

The Native Affairs Committee's own reports demonstrate that it did not see itself as a court of appeal. In 1876, it recorded that it was 'not desirable that they should act in the capacity of a Court of Appeal from the Native Land Court, inasmuch as it is manifestly impossible that they can take sufficient evidence or devote sufficient time to a single case to enable them to come to a satisfactory conclusion.'[827] In 1883, the committee again noted:

> Disappointed claimants seem to think they can bring parliamentary influence to bear upon the Chief Judge by petitioning the House, and getting their case stated to this Committee; and the sooner this erroneous impression is removed the better for all parties concerned.[828]

In 1885, a large meeting in the Bay of Islands involving a number of upper North Island iwi complained of 'the somewhat cavalier manner in which their petitions have been treated by Parliament'. Petition after petition had been submitted

822. John Bryce, 19 September 1877, AJHR, 1877, I-3, p 22.
823. John Bryce, 19 September 1877, AJHR, 1877, I-3, p 21.
824. John Bryce, 25 October 1876, AJHR, 1876, I-4, p 26.
825. John Bryce, 25 September 1877, AJHR, 1877, I-3, p 24.
826. Ward, *A Show of Justice*, p 271; Williams, '*Te Kooti Tango Whenua*', pp 4–5.
827. John Bryce, 23 August 1876, AJHR, 1876, I-4, p 9.
828. Robert Trimble, 3 August 1883, AJHR, 1883, I-2, p 12.

without an outcome.[829] Speaking generally of the failure to have concerns about the Native Land Court addressed, Hōne Heke Ngāpua could only lament the dismissal of the many petitions submitted by his constituents, who had a 'very strong objection to the Court' for its 'distortion of Native Customs' and for its 'enormous expense.'[830]

As noted earlier, the Native Affairs Committee did express concern about the number of petitions it was expected to consider, proposing that the Government 'create a properly-constituted tribunal to act as an Appeal Court from the decision of the Native Land Court'. The Committee also recommended that the Government introduce 'some general legislation . . . dealing with appeals from decisions in respect of re-hearings'.[831] In other words, by its own statement, the committee recognised that it was not equipped to review Native Land Court decisions. The committee often decided that it was unable to deal with a particular matter on the grounds that it raised issues of policy. It could not overturn decisions of the Native Land Court; it did not have the time or capacity to investigate such matters. Nor could it compel the Government to act but could only recommend that it do so.[832] In sum, the most that it could do was to refer petitions on to other agencies for further investigation and possible resolution, criticise the Government when the latter failed to act on such recommendations as it did make, and occasionally recommend the passage of special legislation to give effect to its recommendations. It did not and could not fulfil the Crown's treaty obligations under article 3.

9.8.3 Conclusions and treaty findings

While limited, the evidence available to us on redress and remedies nonetheless indicates that the Crown did not provide a readily accessible, robust, transparent, and fair means by which those dissatisfied with decisions of the Native Land Court could seek relief. Neither the grounds on which applications for rehearings could be lodged, nor the basis on which they might be accepted or rejected, were specified. The lack of clarity may well have served to deter those dissatisfied from lodging applications, while the fact that full rehearings were mandatory until 1889 meant that costs were high.[833]

We conclude further that the Native Affairs Committee could not, as it observed itself on a number of occasions, act as a de facto court of appeal. The committee often declined to investigate petitions regarding Native Land laws on the grounds that the matters raised involved issues of policy (as we discuss further in chapter 11) Where it sought evidence, the committee usually consulted the Native Department, and it frequently referred the matters raised back to the very court whose decision gave rise to the original complaint. Tapuwae serves as a case in

829. 'Native Meeting at the Bay of Islands', *New Zealand Herald*, 21 April 1885, p 6.
830. 'Maori Lands Administration Bill', 19 October 1899, NZPD, vol 110, p 745.
831. Native Affairs Committee, 21 June 1888 and 26 June 1888, AJHR, 1888, I-3, pp 12, 14.
832. Guy Finny, *New Zealand's Forgotten Appellate Court? The Native Affairs Committee, Petitions, and Maori Land: 1871 to 1900* (honours thesis, Victoria University of Wellington 2013), pp 5, 15.
833. Native Land Court Acts Amendment Act 1889, s 13; Native Land Court Act 1894, s 39.

point. The Native Affairs Committee considered the matter at some length but was inclined to the views of the Native Land Court itself (as were the Native Ministers with whom the ultimate decision rested). The Native Land Court decision may well have been fair within the constraints of attempting to recognise a complex customary matrix of rights. We are not in a position to say – but the process certainly was not. Ngāti Here and some of Ngāti Tupoto were forced into a Court investigation that they did not want at that point and a protracted and expensive process thereafter.

Moreover, the committee possessed only the power of recommendation. It was entirely at the Government's discretion whether any action followed. We conclude that Native Land Court decisions could not easily be challenged through an independent and robust legal appeal procedure at least until 1894. In our view, this failure contributed to the steady loss of confidence on the part of Te Raki Māori in the Native Land Court apparent from the mid-1870s.

We find in respect of the Crown's provision of remedy and redress:

- The legislative provisions relating to Native Land Court re-hearings did not, at least until 1894, furnish a sufficiently robust appeal mechanism or process, while the Native Affairs Committee possessed only a power of recommendation, and was not intended to act (and did not act) as a de facto court of appeal. The failure of the Crown to provide a robust appeal mechanism was in breach of article 3 of the treaty and te mātāpono o te mana taurite/the principle of equity.
- The Crown, in being responsible for and failing to remedy these systemic deficiencies over a period of nearly 30 years, breached te mātāpono o te matapopore moroki/the principle of active protection and te mātāpono o te whakatika/the principle of redress.

9.9 Whakarāpopototanga o ngā Whakataunga / Summary of Findings

In light of the full discussion of treaty findings and analysis undertaken earlier, we briefly recap established treaty breaches of the treaty and its principles.

In respect of the establishment of the Native Land Court, we find that:

- By developing and implementing a system for title determination based on its own agenda to acquire more land, rather than the protection of Māori rights as guaranteed under article 2, the Crown breached te mātāpono o te tino rangatiratanga and te mātāpono o te matapopore moroki/the principle of active protection.
- The Crown's failure to seek Māori engagement on the provisions of the Native Lands Act 1862 was inconsistent with its duty to consult and gain the consent of Te Raki Māori on matters central to their guaranteed treaty rights, in breach of te mātāpono o te houruatanga/the principle of partnership and te mātāpono o te tino rangatiratanga.

In respect of the restructure of the Native Land Court and the Native Lands Act 1865, we find that:

- By failing to make a good-faith effort to engage with and secure Māori consent in advance of the changes to the Native Land Court system, as set down in the Native Lands Act 1865, the Crown breached te mātāpono o te houruatanga/the principle of partnership, te mātāpono o te matapopore moroki/the principle of active protection, and te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect.
- By legislating unilaterally in 1865 to codify changes to the composition and decision-making powers of the Native Land Court, the Crown effectively removed Māori control of the title investigation and determination process, breaching te mātāpono o te tino rangatiratanga and te mātāpono o te houruatanga/the principle of partnership.
- By abolishing, without consultation, the flexible and tikanga-informed process the Court had originally employed to determine ownership in favour of a British system prioritising individual over collective rights, the Crown breached te mātāpono o te houruatanga/the principle of partnership and mātāpono o te tino rangatiratanga.

In respect of the appropriateness of titles awarded by the Native Land Court, we find that:

- The Crown introduced laws offering a title that failed to give legal expression to collective tenure and to accord with Te Raki Māori preferences. Such failures breached te mātāpono o te houruatanga/the principle of partnership and te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect and the guarantee of te tino rangatiratanga.
- The titles awarded to Te Raki Māori under nineteenth-century Native Land legislation and through the Native Land Court failed to provide the same certainty, stability, and protection as titles awarded in respect of general land and duly registered under the Land Transfer Act. The failure of the Crown to provide an equivalently robust titling regime for Māori as that applying to the settler population (and which failed to equip whānau and hapū to participate in the colonial economy to the same degree) breached te mātāpono o te mana taurite/the principle of equity.

In respect of the operation of the Native Land Court in Te Raki, we find that:

- The failure of the Crown to create a body in which Māori (in Te Raki and elsewhere) had the determining role when deciding questions pertaining to their own lands was a breach of te mātāpono o te houruatanga/the principle of partnership; and in respect of the Court it created, its failure to ensure that assessors had equal status and authority to judges throughout the period under consideration was a breach of te mātāpono o te mana taurite/the principle of equity.
- The failure to ensure adequate notification of hearings and that the costs involved in the conversion of customary title were shared appropriately and fairly among the parties who benefited, Crown as well as Māori, breached te mātāpono o te houruatanga/the principle of partnership and te mātāpono o te mana taurite/the principle of equity.

- The Crown failed to monitor court processes to assure itself that the institution it had created was functioning in an appropriate manner and to ensure that statutes were appropriately rigorous, fully implemented, and effective. Those failures breached te mātāpono o te matapopore moroki/the principle of active protection.

In respect of Te Raki Māori engagement with the Native Land Court, we find that:

- By rejecting all requests by Te Raki Māori for the right, opportunity, and authority to conduct title investigations through their own institutions, by empowering individual Māori to act independently of co-owners, and by employing questionable purchasing tactics, the Crown rendered engagement with the Native Land Court and its processes practically obligatory, thereby breaching te mātāpono o te tino rangatiratanga.
- The process of tenure conversion meant many Te Raki Māori incurred substantial debt, notably in the form of survey costs. Although the extinguishment of customary ownership principally served the interests of the Crown, Māori were forced to meet the costs, often through the loss of land. By failing to ensure that the costs of extinguishing customary Māori title in the Native Land Court were allocated according to the distribution of benefits arising from the process, the Crown breached te mātāpono o te mana taurite/the principle of equity, in breach of te mātāpono o te houruatanga/the principle of partnership and te mātāpono o te matapopore moroki/the principle of active protection.

In respect of the forms of remedy and redress availabel to Te Raki Māori, we find that:

- The legislative provisions relating to Native Land Court re-hearings did not, at least until 1894, furnish a sufficiently robust appeal mechanism or process, while the Native Affairs Committee possessed only a power of recommendation, and was not intended to act (and did not act) as a de facto court of appeal. The failure of the Crown to provide a robust appeal mechanism was in breach of article 3 of the treaty and te mātāpono o te mana taurite/the principle of equity.
- The Crown, in being responsible for and failing to remedy these systemic deficiencies over a period of nearly 30 years, breached te mātāpono o te matapopore moroki/the principle of active protection and te mātāpono o te whakatika/the principle of redress.

9.10 Ngā Whakahāweatanga / Prejudice

As we have foreshadowed throughout this chapter, the Crown's failure to include Te Raki Māori in decision-making about its native land policies resulted in a court process that individualised Māori land rights in a manner that caused enormous prejudice to them both at the time and for generations to come.

9.10.1 Māori subordination by a key colonial institution

While the Native Lands Act 1862 provided for substantial Māori control over the Crown-initiated process for the conversion of customary tenure, it was short lived. Less than a year after the Kaipara court's first sitting, it was restructured. Under the changes introduced by Chief Judge Fenton and the Weld ministry in 1864 and 1865, the power of Te Raki Māori communities to decide the ownership of their own lands was wrested out of their hands. A rūnanga-based model characterised by facilitation and consensus was replaced (without consultation) by an alien court structure and an adversarial process in which tikanga had limited space. In our view, this was prejudicial to Te Raki Māori in and of itself, resulting in the subordination of Māori in and by a Crown-created institution dealing with matters of especial concern to them, their own knowledge of which far exceeded that of the men put in charge. The place of assessors, and the role of applicants and their ability to reach out-of-court compromises which were then approved by the Native Land Court, falls well short of the partnership role that had been guaranteed to Māori by the treaty. Instead of protecting tikanga and Māori autonomy, the Native Land laws and Court operations resulted in the assimilation of Māori customary law into the imported system based in English law.

From this point on, the Crown's Native Land legislation and its interpretation and application by the Native Land Court generated further devastating consequences, including social, cultural, and economic prejudice for Te Raki Māori whānau, hapū, and iwi.

Tikanga was misrepresented. Pākehā judges brought their own perceptions, preoccupations, and prejudices to their interpretation of Māori tenure, resulting in its distortion and over-simplification in order to assist land transfer. The Court developed its own precedents and rules for excluding one group of claimants in favour of others although many decisions were inconsistent and confusing; they were, and remain, a source of distress for many claimants.

Much of the thinking behind the Court's determination of relative rights of claimants in land was based in European patriarchal assumptions and understandings of 'natural law' and 'primitive' societies in which 'might was right'. The Native Land Court's codification of custom gave greatest weight to occupation but determined this by 'physical evidence' rather than whakapapa, which was seen as secondary 'in all cases to the more visible and important facts of occupation and possession', or as 'necessarily unsatisfactory' and unreliable.[834]

Victory in warfare was given more weight than peacemaking. Conquest was elevated over intermarriage (which in such circumstances tied the later arrivals to the more ancient line). Similarly, the conditional nature of take tuku was misunderstood. The laying down of fixed boundaries cut across the fundamental value of whanaungatanga which emphasised inclusiveness, extending to resources and their use. The need to tailor evidence to persuade the Court of the validity

834. *Important Judgements Delivered in the Compensation Court and the Native Land Court, 1866–1879*, 1879, p 60; Judge Seth Smith, cited Norman Smith, *Native Customs and Law Affecting Maori Land*, Wellington, 1942, p 52.

of claims distorted the written record of rights and entrenched many of those misconceptions.

Most importantly, the refusal to give legal recognition to the collective nature of rights in land and resources meant that Native Land Court decisions could not give effect to tikanga and customary rights, the impact of which is discussed separately in the next section.

9.10.2 Uncontrolled pace of conversion of customary tenure

In Maning's view the difference between collective and individualised ownership was the difference between 'barbarism' and 'civilization'.[835] The effects of this deeply ingrained cultural assumption widely shared among his Pākehā contemporaries on Māori society and their capacity to engage with the court and its new laws was immense. The accountability that had always regulated the actions of rangatira and hapū was greatly weakened, and customary title was extinguished at a rapid rate, as traditional controls were undermined by the ability of individuals to bring applications for title determination without the knowledge or consent of hapū. As collective controls unravelled and pressures deepened, partly as a result of the costs of that process and the tactics of purchasers (discussed in chapter 10),) so did the pressure to bring more land through the Court with a view to gaining title so that it could be sold in order to pay debts including those required to put lands into a tenure acceptable to Crown and colonists.

The Court awarded individualised titles to 325,200.2 acres in 469 individual blocks between 1865 and 1874.[836] Paul Thomas found that in this period 'the Court had a clear and considerable impact on those parts of Te Raki where the threat of landlessness and pressure from Crown purchasers was most acute'. Mahurangi, close to Auckland, was the taiwhenua most affected, having already been the site of significant Crown purchasing prior to 1865; there, 141,228 acres of the remaining customary Māori land had Crown-derived title by 1874. Similarly, in Whāngārei, where significant Crown purchasing activity had occurred during the 1850s, customary title was extinguished over 141,228 acres of the remaining Māori land.[837] In Hokianga, the Bay of Islands, and Whangaroa, the Court had less of an initial impact, and the majority of the lands Māori had retained still remained under collective ownership in 1874.

After 1875, however, the Court's operation became closely intertwined with the Crown's renewed land purchasing policy.[838] Over the next five years, large swathes of land held collectively by hapū in Hokianga, Bay of Islands, and Whangaroa were brought through the Court. Thomas gave evidence that by 1880, 114,235 acres of Hokianga land had its title determined in the Native Land Court; in Whangaroa,

835. Maning to Fenton, 24 June 1867, AJHR, 1867, A10, pp 7–8.
836. Thomas, 'The Native Land Court' (doc A68), p 17.
837. Thomas's evidence suggests that these figures reflect 79 per cent of the total land that would be titled in the Native Land Court in Mahurangi, and 40 per cet in Whāngārei: Thomas, 'The Native Land Court' (doc A68), p 20.
838. Thomas, 'The Native Land Court' (doc A68), p 69.

the figure was 40,445 acres; and in the Bay of Islands, 94,456 acres.[839] In Mahurangi, customary title had been effectively extinguished except for Hauturu which, Thomas observes, had already come before the Court for titling but would take several years for ownership issues to be resolved.[840] According to Thomas, 'the Native Land Court was inextricably connected, in the view of Te Raki Māori, with massive land loss.'[841] We agree with that assessment, as we detail in chapter 10.

The Court's activity slowed throughout the region during the 1880s, as Māori resistance to its operation grew. The end of the frenetic Crown purchasing of the late 1870s also contributed to this slowdown, as did the diminishing land base left to be put through the Court system in some parts of the district.[842] But even with widespread resistance, the Court's operation continued. When the protracted title determination for Hauturu concluded in 1886, the last substantial area still held under customary title in the Mahurangi and Gulf Islands subregion had been brought within the new system. By 1889, the Court had determined title in 643,193 acres of Māori land across the district, and by the end of 1899 Thomas's evidence was that 80 per cent of the lands that would come before the Court for title determination had done so.[843] Yet, Thomas observed that 'Te Raki Maori resistance to the Court had, against considerable odds, achieved some significant victories'. He observed that by 1900, Te Raki was 'one of the few parts of New Zealand that retained significant amounts of customary, or papatupu, land' (we will discuss the administration of the remaining customary lands after 1900 in a subsequent volume of this report).[844]

The extensive nature of the tenure conversion indicates the extent of the impact and prejudice suffered as a result of the operation of Native Land laws; the 'award of paper interests in blocks of land to individuals, enabling them to deal with land without reference to iwi or hapū', made those lands more susceptible to partition, fragmentation, and alienation, as the Crown has acknowledged. It also meant that Te Raki Māori were not in a position to take full advantage of collective title options when they were finally offered.

The extent to which the individualised titles severed Te Raki Māori from their collective rights in land is illustrated by the dominance of Court awards of ownership to very small groups of individuals between 1865 and 1874 – an average of just over four owners per block.[845] Even though the ten-owner rule was abol-

839. These figures reflect 63 per cent of the total land that would be titled in the Native Land Court in Hokianga; 59 per cent in Whangaroa; and 57 per cent in the Bay of Islands: Thomas, 'The Native Land Court' (doc A68), p 71.

840. Thomas, 'The Native Land Court' (doc A68), p 226.

841. Thomas, 'The Native Land Court' (doc A68), p 3.

842. Thomas, 'The Native Land Court' (doc A68), pp 120–121.

843. Thomas's evidence was that 668,468 acres of land in Te Raki had been titled in the Native Land Court by the end of 1889, and there remained 147,864 acres that would be titled after 1900: Thomas, 'The Native Land Court' (doc A68), p 129.

844. Thomas, 'The Native Land Court in Te Paparahi o Te Raki' (doc A68), p 234; Paul Hamer and Paul Meredith, 'The Power to Settle the Title?: The operation of papatupu block committees in Te Paparahi District 1900–1909 (Doc A62), p 51.

845. Thomas, 'The Native Land Court' (doc A68), p 226.

ished under the Native Land Act 1873, the practice continued, often where prior arrangements had been made with Crown purchasers to facilitate the process but where there still was no legal responsibility to ensure proceeds were fairly distributed. In approximately 78 per cent of the blocks to which the Court determined title during this period, Thomas noted that fewer than 10 owners were registered. Many blocks were awarded to a single individual and were immediately purchased by the Crown.[846]

Conversely, it is telling that in the few cases in which a larger number of owners were awarded title, as in the Omapere block, located in Bay of Islands, where 200 owners were recorded, the Crown's ability to complete purchases was often delayed despite the fact that amendments to the legislation enhanced its capacity to partition out its share.[847] But without a collective ownership structure available to owners, their shares were generally of negligible economic value.

9.10.3 Extensive land transfer

The focus of legislators throughout the nineteenth century was on facilitating land transfer from Māori to colonists, not land retention and its utilisation for the benefit of the hapū long associated with it. The titles created under the Crown's Native Land legislation were incompatible with Te Raki Māori preferences and the collective custodianship of the land. The purported intention of early legislators to enable Māori to create family farms was quickly demonstrated to be illusory in the absence of the necessary protections to ensure that titles were distributed accordingly, and that the wider group of owners was not left out over and over again.

The memorial of ownership system introduced in 1873 further undermined any possibility of whānau possession of a delineated lot on which they might establish a farm or other business. Instead, individuals received an undivided interest in land with which they could do virtually nothing, other than sell or lease. Although all owners were meant to agree to an alienation, it was easy enough for purchasers to break through the circle of community ownership which had no legal status or support, get behind the title, and force a partition and sale at their own price.

9.10.4 Traditional tribal structures undermined

We received extensive claimant evidence concerning the Court's impact on the community structures and welfare of Te Raki hapū and iwi. The accountability between rangatira and hapū that bound them together and to the land was weakened by the process of individualisation and the failure to give legal expression to underlying trusts. Consensus reached in the open on the whenua was no longer required before individuals could take actions that affected everybody without their prior knowledge or agreement.

Principal figures in nineteenth-century Native Land legislation and administration were keenly aware of the devastation the laws and policies they had conceived and implemented had visited upon hapū and iwi. The destructive impact was

846. Thomas, 'The Native Land Court' (doc A68), p 88.
847. Thomas, 'The Native Land Court' (doc A68), p 88.

acknowledged and condemned by the Native Land Laws Commission in 1891, for example.[848] The commissioners found that 'the tendency of the Act to individualise Native tenure was too strong to admit of any prudential check.'[849] Māori were 'helpless' under this law, as the commission explained:

> [T]hey became suddenly possessed of a title to land which was a marketable commodity. The right to occupy and cultivate possessed by their fathers became in their hands an estate which could be sold. The strength which lies in union was taken from them. The authority of their natural rulers was destroyed. They were surrounded by temptations. Eager for money wherewith to buy clothes, food, and rum, they welcomed the paid agents, who plied them always with cash and often with spirits. Such alienations were generally against the public interest, so far as regards settlement of the people upon the lands.[850]

Elsewhere, the commission acknowledged the role heavy costs associated with putting lands through the Court played in this process.[851]

The legacy is still keenly felt. Claimant Rueben Porter (Te Whānaupani, Ngā Tahawai, and Kaitangata) stated that Native Land legislation specifically targeted 'the communal unity of our people, which was bound by whakapapa.'[852] He explained that individualisation of title wrested control of decision-making over land from rangatira, undermining their mana.[853] Tahua Murray (Ngāti Ruamahue) pointed out that the operation of the Court system relied upon the dismantling of collective decision-making and organisation that had been the bedrock of Te Raki hapū and their relationships with land for generations.[854]

The disruption to the unity of hapū and their ability to exercise rangatiratanga and adhere to tikanga was almost immediate. The adversarial Court processes, combined with the additional pressure applied by Crown purchase agents, created distrust and contention among Māori communities. Mr Porter described the way his tūpuna were forced, through Court processes, into situations where they had to compete for land within whānau. Land interests were contested in almost every single title investigation in which Mr Porter's tūpuna were involved, including the investigations into Matangirau in Whangaroa, where Hemi Tupe competed with his own nephew, Paapu Tupe.[855] Wiremu Reihana (Ngāti Tautahi) also noted that processes 'pitted relations against one another as they competed for the land.'[856] Pairama Tahere (Te Uri o Te Aho) argued that the ability of any individual to bring

848. 'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws', AJHR, 1891, G-1; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1189.
849. W L Rees, James Carroll, AJHR, 1891, G-1, pp ix–x.
850. W L Rees, James Carroll, AJHR, 1891, G-1, p x.
851. W L Rees, James Carroll, AJHR, 1891, G-1, pp xi, xxv.
852. Rueben Porter (doc S6), p 55.
853. Rueben Porter (doc S6), p 59.
854. Tahua Murray, transcript 4.1.20, Te Tapui Marae, pp 219–220.
855. Rueben Porter (doc S6), p 52.
856. Wiremu Reihana (doc T10), p 52.

a case before the Court had 'destabilised the fabric of Māori social structure' in other ways as:

> Junior Rangatira . . . entered the process as a means of increasing their status, hapū who had been displaced from ancestral lands or hapū that had only minor interests in land entered the process . . . to confirm their ancestral land interests and those with minor interests in land or aroha interests sought to have those interests formalised.[857]

Denise Egen (Te Māhurehure) told us that the Native Land Court system deprived her people of the guidance traditionally exercised by their rangatira, which 'left them drifting at sea'. Once findings were made, they were difficult to undo given the obstacles to and expense of obtaining a reconsideration by the court. She discussed how the Court had caused ongoing damage to the relationships between hapū members which persists to the present day. This breakdown in hapū relations resulted in 'the loss of a shared history, the loss of tikanga, a loss of rituals and the loss of whanaungatanga', in addition to the loss of land.[858]

9.10.5 Loss of identity

An important consequence of the Court's operation under the Crown's Native Land legislation was that it separated hapū not just from their land but from their own identity, grounded in their relationship with the natural world. Whenua was surveyed into a series of discrete and unrelated economic commodities, fragmenting the spiritual aspect of customary relationships with the whenua and hapū identity, so closely bound to that of their tupuna, all the names they had given to its many landmarks and waterways and all the places remembered for their history there over generations. Laws designed to simplify the complex and overlapping networks of different interests into a defined and fixed ownership inevitably resulted in the exclusion of the 'losers' who had been unable to satisfy the Court's criteria. Claimants told us how their tūpuna became invisible as a result of Native Land Court processes. Vivian Dick (Ngāti Korokoro and Te Poukā) described the struggle of their hapū to re-establish mana whenua in Kokohuia after an adverse Court decision:

> Ten owners were listed on the certificate of title, with the full 15 listed on the pages appended to the certificate. Our tupuna for some unknown reason were left off this certificate of title . . . Because our tupuna were left off this first certificate of title our whanau were practically made invisible by the Court and our tupuna's interests have not been properly recorded, acknowledged or accounted for. This has had ongoing affects for our whanau who have been trying to re-establish our mana whenua in Kokohuia.[859]

857. Pairama Tahere (doc N20), pp 40–41, 46.
858. Denise Egen (doc Q9), p 25.
859. Vivian Dick (doc X12(b)), p 5.

The prejudice associated with this practice endures today. Other claimants spoke in a similar vein. Willow-Jean Prime's explanation encapsulates the devastating effects that individualised title had, and continues to have, on Te Raki hapū:

> the Native Land Court totally changed the system of land holding and administration of both land and authority for our hapu . . . Changes from collective hapu ownership, to the individualisation of title, to failing to recognise those with interests thereby creating landlessness for whanau, to individuals now being able to make decisions that should have been collective decisions. Today we are so conditioned by colonisation that we think we have an individual right to land; however, the only reason we have that individual right is because of the Native Land Court process which created individual titles for our hapu land. The Native Land Court itself is a breach of Te Tiriti, and if the collective ownership of land was not eroded by the Native Land Court, individuals would not have the rights that they hold on to today.[860]

9.10.6 Socio-economic impact

Te Raki Māori suffered material hardship resulting from engagement with the Court. Direct fees, survey costs, payments to lawyers, and the incidental but unavoidable costs such as food and accommodation and other expenses associated with travelling to and residing near hearing centres for extended periods of time all placed financial strain on hapū. Rangatira were often accompanied by whanau and the wider community even if not everybody attended the hearing itself. At the same time, hapū already living near hearing locations bore the burden of hosting often-large groups of visitors for the duration of the session. Even when a session was not widely attended the survey and court costs had to be borne by the hapū through their leaders.

The costs of survey fell heavily and inequitably on Māori. Research into the Waimate–Taiāmai blocks indicated that survey costs often absorbed over 30 per cent of the proceeds from sale. Similar examples such as Pakanae were identified elsewhere in the inquiry district. In some instances, such as Whaitapu and Okaka, the proportion exceeded 70 per cent, and at Te Horo the survey costs swallowed more than the whole of the proceeds, leaving the owners in debt. The Crown was aware from an early stage that the costs of surveys could consume the main proceeds of sales for whānau, but it failed to introduce legislative changes to improve the growing inequities between Māori and settler communities.

Kuia Titewhai Harawira described the way costs associated with the Native Land Court forced her tūpuna into a cycle of debt:

> This resulted in significant and high costs to Ngati Hau. Not only were Court costs imposed on us but surveys were also conducted at our cost. On top of this we also had to bear the costs involved in travelling to the hearings, including witnesses and overheads. This was incredibly difficult for us, as our people often did not have the financial means to meet these costs. It was worse when my Tupuna left lands to individual

860. Willow-Jean Prime (doc AA86), p17.

whanau. This of course, created a cycle of debt. Surveying our land came at a particularly high cost. It had to be done and we were often instructed to survey the land multiple times.[861]

Since the Court would only consider evidence viva voce, hapū and iwi were forced to attend entire sessions as they waited for their cases to be heard. Mr Tahere explained how Te Uri o Te Aho had been affected:

> In order to prevent the risk of land being alienated because the Hapuu were not there when the claim was heard, rangatira along with his support were forced out of necessity to attend hearings. The need for the Hapuu to attend Court hearings placed significant financial pressure on the Hapuu. Costs were incurred in attending hearings. The schedule for hearing the different claims lacked certainty. The Hapuu had to wait at Court for their case to be heard. The time spent waiting for their hearing placed significant financial burden and debt on the Hapuu. The Hapuu had to pay for accommodation and food while they waited. The tasks of rangatira and their supporters having to repeatedly attend hearings resulted in many Hapuu including Te Uri o Te Aho becoming impoverished and destitute.[862]

With no alternative, tūpuna used 'whatever resources [they] could in order to attend even if this meant getting into debt'. According to Mr Porter, Māori had 'to rely on their gum reserves to cover costs while they were attending the Court sittings.'[863]

Additionally, there were 'secondary effects' of the hapū being away from the kāinga:

> As a result of less numbers of the Hapuu being at home on the kainga crops did not get planted or tended, harvested was sometimes done later, harvesting and storage of food for winter was neglected or there was insufficient planting and as a result less produce harvested and the Hapuu never had enough food to sustain their dietary needs.[864]

Not only were the normal cycles of planting and harvesting disrupted while attending the Court but also the health of attendees was endangered by the frequently crowded and unsanitary 'tent villages' that sprung up around the sittings. Herbert Rihari (Ngāti Torehina ki Mataka) discussed the negative health impacts on his tūpuna from attending Native Land Court hearings. Uncertainty about Court hearing dates meant that whānau often had to stay away from home for weeks at a time. This 'made them susceptible to illnesses either by being in close contact with others or through the conditions they were having to cope with,

861. Titewhai Harawira (doc I30(a)), p 8.
862. Pairama Tahere (doc G17), p 65.
863. Rueben Porter (doc S6), p 41.
864. Pairama Tahere (doc G17), p 65.

fending for themselves away from their kainga'. His tūpuna had no choice but to risk their health as otherwise their land interests may have been lost.[865] Likewise, Pairama Tahere told us that those who attended hearings 'suffered from stress and their health and mental wellbeing was compromised. The effect of ill health of individual members had a negative effect on the Hapuu as a whole.'[866]

These conclusions about the adverse socio-economic consequences of the Court system were supported by Armstrong and Subasic's commissioned research. For example, they pointed to the increasing reliance of Whangaroa Māori on income from the gumfields and timber lands during this period, the money earned in this way supplemented by occasional wage labour building roads.[867] They further noted that the occurrence of famine in the Hokianga in 1883 at Waimā forced Māori 'to the Taheke gum-field *en masse* to earn the funds necessary to purchase food.'[868] These trends of increased reliance on declining extractive industries and wage labour also appeared in Whāngārei and Mahurangi, where the Resident Magistrate observed in 1885 that Māori communities struggled to cultivate sufficient foods for their needs.[869] Across the district, Armstrong and Subasic found that Māori were more in debt, more affected by disease, and increasingly absent from the social and cultural life of northern settlements. These trends worsened during the 1890s as kauri gum remained the only source of income for many Te Raki Māori, and the industry continued to decline.[870]

Armstrong and Subasic placed the marginalisation of Te Raki Māori during the late nineteenth century within the context of the wider economic downturns of this period and the gradual exhaustion of extractive resources, such as timber and gum, as well as the cumulative effects of the transfer of their lands into the hands of the Crown and colonists.[871] The Native Land Court was an additional burden on an already distressed people that their Pākehā neighbours did not face.[872] Armstrong and Subasic concluded:

> the Native Land Court and the deeply flawed tenurial system it introduced, isolation and lack of communications, ongoing land sales, conflict and debt, and a lack of planned or systematic Pakeha settlement on anything like Maori terms, consigned many to the economic margins.[873]

865. Herbert Rihari (doc R14), pp 66–67.
866. Pairama Tahere (doc G17), p 65.
867. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1123–1124.
868. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1127.
869. J S Clendon to Native Secretary, 28 May 1883 (Armstrong and Subasic, supporting papers (doc A12(a), vol 11, p 3:388; cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1129.
870. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1245.
871. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1125, 1134.
872. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1125.
873. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1134.

This cumulative disadvantage was a sad contrast to the reasonable expectations of Te Raki Māori that the treaty relationship they had entered into in 1840 would put them in a position to benefit from settlement in their rohe and the development of the colonial economy.

9.10.7 Overall conclusion

In our view, the prejudice resulting from the land laws compounded the damage already inflicted upon the tino rangatiratanga and well-being of Te Raki hapu by the Crown's imposition of its legal system, institutions, and its conduct of land purchase in the first 25 years of the colony. The Crown's Native Land legislation, which provided for the Court's operation, was designed to facilitate the purchase of land and succeeded in that objective. As Hōne Heke Ngāpua, a leading critic of the land laws and the Court, noted, as a result the remaining lands held by Te Raki were not sufficient for their support. He told Parliament in 1899:

> I can speak so far as the Native lands in the north of Auckland are concerned. The number of natives there has been increasing for a number of years. All the native lands north of Auckland are not really sufficient if divided equally amongst members of the different hapus for their maintenance and support . . . further acquisition of Native lands should be stopped altogether.[874]

The following chapter will consider in greater depth the complex socio-economic circumstances Māori faced during this period and into the twentieth century. It is sufficient for our current purposes to note that by the close of the century, landlessness had become a reality for many Te Raki Māori and with it came a greatly reduced capacity to engage in economic development. Māori were left instead with subsistence agriculture and marginalised wage labour as their chief future prospects. Claimant Rueben Porter put it plainly:

> Our people were only ever going to be able to prosper in this new economy if we retained our lands. The retention of our lands would have allowed us to use the land for farming, to obtain funds from banks for economic development and for leasing. All of this would have allowed us to be a part of the new economy that was created by the Government.[875]

In sum, far from the opportunities and benefits they had been promised, Te Raki Māori suffered greatly as a consequence of their engagement with the Native Land Court. By imposing a new form of land ownership and failing to consult, involve, and respond constructively to Māori concerns, the Crown eroded the trust and confidence Te Raki Māori had originally placed in the treaty's promises

874. Hone Heke Ngāpua, 1 September 1899, NZPD, vol 108, p 658 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1156).
875. Rueben Porter (doc S6), p 42.

of partnership, mutual benefit, equitable well-being, and development, as well as in the Court itself. The failure of the Crown to recognise or respect the exercise of their tino rangatiratanga over their lands and resources had long-lasting effects that extended throughout the twentieth century and continue today.

CHAPTER 10

NGĀ HOKONGA O NGĀ WHENUA MĀORI, 1865–1900 / CROWN AND PRIVATE PURCHASING OF MĀORI LAND, 1865–1900

kua rongo nga iwi Maori katoa o enei motu e rua i te mamae me te taumaha i raro i te mana o nga hanganga ture a te Paremata o te Kawanatanga o Niu Tireni i nga tau maha kua mahue ake nei, na reira i kimi ai nga iwi Maori o enei motu i nga huarahi e mau ai kia ratou nga toenga whenua kia ratou inaianei.

all the Maori people of these two islands have heard about the pain and the weightiness [caused by] the New Zealand Parliament legislation of many years that have passed. Therefore, the Maori people of these islands should search for pathways that would enable them to hold on their remaining land now.

—Heta te Haara (Ngāpuhi), speech at the 1892 Kotahitanga Parliament[1]

10.1 Hei Tīmatanga Kōrero / Introduction

In the previous chapter, we saw how the operation of the Native Land Court after 1865 transformed Māori land tenure. Customary ownership by hapū was replaced, first, by Court-derived certificates of title and later, by memorials of ownership listing owners certified by the Court. These changes enabled the Crown to deal with owners, whose interests in land it sought to acquire, on an individual basis rather than from groups or the community. In this chapter, we resume the analysis of Crown purchasing of Māori land we began in chapter 8, starting here at 1865 and continuing through until 1900. This latter date marks the introduction of legislation to establish Māori Land Councils and the beginning of a new approach to the determination of title process (we discuss the origins of the Maori Lands Administration Act 1900 in chapter 11, see section 11.5.3, and will consider its operation in a subsequent volume of this report). It also coincides with a hiatus in new purchasing which the Crown imposed on itself in 1899.

1. 'Nga Korero o te Hui o te Whakakotahitanga i tu ki te Tiriti o Waitangi, Apereira 14, 1892' (cited in Merata Kawharu, 'Te Tiriti and its Northern Context' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2008) (doc A20), p 311).

From 1865 to 1900, the Crown purchased some 231 Māori land blocks within the inquiry district.[2] Their combined area comes to an estimated 588,707.5 acres.[3] Private purchasing occurred on a much smaller scale during this time, with available evidence suggesting that at least 174,000 acres were alienated in this way (from 1865 to 1905).[4] Over this period, the amount of land the Crown purchased was slightly greater than the combined acreage of the Crown's pre-1865 purchases (some 482,000 acres, see chapter 8). However, the combined effect of the Crown's investigation of pre-treaty land transactions, pre-emption waiver grants, the Crown's scrip and surplus land policies, and pre-1865 Crown purchasing meant that over one-third of their land had already transferred out of Te Raki Māori ownership by 1865.[5] Thus, the overall effect of the Crown's nineteenth-century land and alienation policies was that only one-third of the district, or less than 604,000 acres, remained in Māori ownership by 1900.[6]

2. The maps used to illustrate land purchasing in this chapter are based on a different time period (1865 to 1909) as they are drawn from information recorded by the 1909 Stout-Ngata commission. We are satisfied that this causes little distortion in the portrayal of Crown purchasing in this period.

3. Barry Rigby, 'Validation Review of the Crown's Tabulated Data on Land Titling and Alienation for the Te Paparahi o Te Raki Inquiry Region: Crown Purchases 1866–1900' (commissioned research report, Wellington: Waitangi Tribunal, 2016) (doc A56), p 3; Crown closing submissions (#3.3.407), p 13; claimant closing submissions (#3.3.213), p 35.

4. This figure was reached as the sum of the private purchase data provided by the Crown for the period from 1865 and 1905 onward. The figure includes purchases where the date of purchase is unknown, but excludes all blocks that had their title determined by the Native Land Court after 1905. The figure also accounts for an error in the Tokawhero block, where the Crown data recorded the purchase of the whole block (2,777 acres), whereas the purchase only amounted to 694 acres: Crown data (#1.3.2(c)). In his evidence in this inquiry, Paul Thomas observed that the Crown's data on private purchasing may not be complete as it has relied on the block narratives produced by researcher Paula Berghan, and 'it is unclear how extensive and systematic Berghan's search for private purchase was'. As a result, our figure is most likely lower than the acreage actually purchased privately during this period: Paul Thomas, 'The Native Land Court in Te Paparahi o Te Raki: 1865–1900' (commissioned research report, Wellington: Waitangi Tribunal, 2016) (doc A68), p 257; Paula Berghan, 'Northland Block Research Narratives', 13 vols (commissioned research report, Wellington: Crown Forestry Rental Trust, 2006) (doc A39).

5. In chapter 6, we found that some 274,592 acres were considered purchased as a result of old land claims and pre-emption waivers. Because of the overlapping nature of some of the pre-1840 transactions and pre-1865 Crown purchase blocks is difficult to accurately assess the amount of Te Raki land that remained in Māori ownership in 1865. However, the Crown estimated that approximately 34.7 per cent of the district had been alienated by 1865. This figure appears to account for a combined total loss of 736,282 acres of land by 1865 – or the sum of the Crown's figures for land loss as a result of old land claims, pre-emption waivers and pre-1865 Crown purchases. If our figures from chapter 6 are adopted, and using the same method, then the result is slightly higher: approximately 758,708 acres alienated by 1865, or 35.6 per cent of the district: Crown closing submissions (#3.3.407), p 3; Crown closing submissions (#3.3.412), p 6; Crown closing submissions (#3.3.404), p 5.

6. At the end of the nineteenth century, we estimate that Te Raki Māori retained approximately 603,700 acres of land. This figure is reached by subtracting the lands alienated by Crown processes for investigating pre-treaty transactions (274,592 acres), Crown purchasing (482,115 acres, pre-1865; 588,707, post-1875), and private purchasing (174,000) from the total area of the district (estimated at 2,123,148 acres by the Crown). However, because of the limited evidence available on private purchasing during this period, the actual figure is most likely lower. We note that in 1908 the Stout Ngata

The pace of Crown purchasing throughout the latter decades of the nineteenth century was very uneven, for reasons we describe more fully later. Initial inactivity was followed by a purchasing spree in the mid-1870s; the Crown completed acquisition of approximately 294,735 acres in 1875 and 1876; over half the total acreage it purchased between 1865 and 1900.[7] Dr Barry Rigby observed that many of Crown purchases during these two years were undertaken in Hokianga and Mangakahia, which 'contrasts with the pre-1865 pattern where Crown purchases were concentrated in Whangaroa, Bay of Islands Whangarei and Mahurangi'.[8] While we received no systematic evidence on the leasing of land as an alternative to permanent alienation, it, too, appears to have been more common during the 1870s. Then came a lull before a second upsurge in the mid-to-late 1890s, which ended when the Crown temporarily halted new purchases across the entire country in 1899. Many of the blocks that had been leased for 21-year terms for the harvesting of timber in the 1870s were purchased by the Crown during this period. Between the suspension of Crown pre-emption in 1865 and its reimposition – first from 1886 to 1888, and then from 1894 – private purchasers were entitled to compete for Māori land with the Crown. At all times however, the Crown could employ advance payments or issue proclamations declaring blocks under 'negotiation', wherever and whenever it wanted to exclude rival bids.

We received a large number of claims concerning land purchasing in Te Raki throughout this period.[9] These claims focused largely on the Crown's alleged

Commission found that the total amount of land in Māori ownership in Te Raki was only 543,754 acres: Crown closing submissions (#3.3.407), p 3.

7. Rigby, 'Validation Review of the Crown's Tabulated Data' (doc A56), p 4; Crown closing submissions (#3.3.407), p 3.

8. Rigby, 'Validation Review of the Crown's Tabulated Data' (doc A56), p 6.

9. These included closing submissions for Wai 49 and Wai 682 (#3.3.382(b)); closing submissions for Wai 53 (#3.3.370(b)); closing submissions for Wai 68 (# 3.3.347); closing submissions for Wai 120 (#3.3.320); closing submissions for Wai 121, Wai 230, Wai 568, Wai 654, Wai 884, Wai 1129, Wai 1313, Wai 1460, Wai 1896, Wai 1941, Wai 1970, and Wai 2191 (#3.3.262); closing submissions for Wai 156 (#3.3.401(c)); closing submissions for Wai 179, Wai 620, Wai 1524, Wai 1537, Wai 1541, Wai 1673, Wai 1681, Wai 1917, and Wai 1918 (#3.3.393(b)); closing submissions for Wai 246 (#3.3.249); closing submissions for Wai 250 and Wai 2003 (#3.3.272); closing submissions for Wai 295 (#3.3.394); closing submissions for Wai 320 and Wai 736 (#3.3.350); closing submissions for Wai 354, Wai 1514, Wai 1535, and Wai 1664 (#3.3.399); closing submissions for Wai 354 and Wai 1535 (#3.3.392); closing submissions for Wai 421, Wai 593, Wai 869, Wai 1247, Wai 1383, and Wai 1890 (#3.3.329); closing submissions for Wai 492 (#3.3.311); closing submissions for Wai 549, Wai 1526, Wai 1728, and Wai 1513 (#3.3.297); closing submissions for Wai 779 (#3.3.268); closing submissions for Wai 919 (#3.3.390); closing submissions for Wai 974 (#3.3.245); closing submissions for Wai 990, Wai 1467, and Wai 1930 (#3.3.274); closing submissions for Wai 1140 and Wai 1307 (#3.3.354); closing submissions for Wai 1147 (#3.3.263); closing submissions for Wai 1312 (#3.3.319); closing submissions for Wai 1314 (#3.3.396); closing submissions for Wai 1341 (#3.3.377); closing submissions for Wai 1354 (#3.3.292(a)); closing submissions for Wai 1384 (#3.3.286); closing submissions for Wai 1464 and Wai 1546 (#3.3.395); closing submissions for Wai 1497 (#3.3.271); closing submissions for Wai 1508 and Wai 1757 (#3.3.330); closing submissions for Wai 1509, Wai 1512, and Wai 1539 (#3.3.301); closing submissions for Wai 1514 (#3.3.357); closing submissions for Wai 1515 (#3.3.314); closing submissions for Wai 1516 and Wai 1517 (#3.3.246); closing submissions for Wai 1522 and Wai 1716 (#3.3.341(a)); closing submissions for Wai 1525 (#3.3.306); closing submissions for Wai 1531 (#3.3.260); closing submissions for Wai 1534

exploitation of tenure change and manipulation of the legislative framework to favour itself in land dealings; the practices of the Crown's purchasing agents on the ground; and the immediate and enduring consequences of land loss for Te Raki hapū and iwi. Other particular grievances included the failure of the promised benefits of land alienation to materialise, inadequate valuations and prices, and a lack of protection for Māori interests – demonstrated particularly in the Crown's failure to provide adequate reserves. As a result, claimants argued, Māori were left with an utterly inadequate land base and prevented from participating in the development of the colony on equal and equitable terms.[10]

10.1.1 Purpose of this chapter

Previous chapters have considered the treaty compliance of the Crown's policies for purchasing Māori land in the inquiry district from 1840 until 1865 (chapter 8), as well as the political origins, legislative purpose and structure, and workings of the Native Land Court (which began operating in Te Raki in 1864; see chapter 9). Here, we turn our attention to claim issues relating to the purchasing of Māori land from the time it came under the new Native Land Court system until the turn of the century.

Claimants allege that the Crown's land purchasing regime during these 35 years breached the treaty. Broadly, they argue that the Crown diminished the ability of Te Raki hapū and iwi to exercise tino rangatiratanga by facilitating land alienation in the district to such an extent that it caused them irreversible prejudice.[11] The chapter considers whether these allegations can be upheld. In doing so, we assess the treaty compliance of the Crown's efforts to acquire Te Raki Māori land itself,

(#3.3.292); closing submissions for Wai 1536 (#3.3.368); closing submissions for Wai 1538 (#3.3.303); closing submissions for Wai 1544 and Wai 1677 (#3.3.261); closing submissions for Wai 1613, Wai 1838, Wai 1846, and Wai 2389 (#3.3.328); closing submissions for Wai 1661 (#3.3.369); closing submissions for Wai 1665 (#3.3.380(b)); closing submissions for Wai 1684 (#3.3.358); closing submissions for Wai 1712 (#3.3.283); closing submissions for Wai 1724 (#3.3.332); closing submissions for Wai 1725 (#3.3.238); closing submissions for Wai 1832 (#3.3.352); closing submissions for Wai 1843 (#3.3.386); closing submissions for Wai 1852 (#3.3.372); closing submissions for Wai 1857 (#3.3.291); closing submissions for Wai 1886 and Wai 2000 (#3.3.273); closing submissions for Wai 1940 (#3.3.259); closing submissions for Wai 1957 (#3.3.335); closing submissions for Wai 1959 (#3.3.304); closing submissions for Wai 1961 and Wai 1973 (#3.3.325); closing submissions for Wai 1968 (#3.3.337); closing submissions for Wai 2010 (#3.3.349); closing submissions for Wai 2058 (#3.3.267); closing submissions for Wai 2059 (#3.3.296); closing submissions for Wai 2060 (#3.3.247); closing submissions for Wai 2063 (#3.3.255); closing submissions for Wai 2071 (#3.3.375); closing submissions for Wai 2181 (#3.3.242); closing submissions for Wai 2206 (#3.3.400); closing submissions for Wai 2244 (#3.3.326); closing submissions for Wai 2355 (#3.3.275); closing submissions for Wai 2368 (#3.3.243); closing submissions for Wai 2371 (#3.3.327); closing submissions for Wai 2376 (#3.3.316(a)); closing submissions for Wai 2377 (#3.3.333(a)); closing submissions for Wai 2382 (#3.3.339(a)); closing submissions for Wai 2394 (#3.3.336); closing submissions for Wai 2425 (#3.3.367).

10. Claimant closing submissions (#3.3.213), pp 66–67.

11. Claimant closing submissions (#3.3.213), p 16; submissions in reply for Wai 1940 (#3.3.436), p 9; claimant submissions in reply (#3.3.429), p 10; claimant submissions in reply for Wai 1259, Wai 1538, Wai 1543 (#3.3.462), p 8.

and also to facilitate purchasing and leasing by private interests (bearing in mind that the evidence shows this happened on a considerably smaller scale).

10.1.2 How this chapter is structured

We begin by summarising the findings of previous Tribunal reports about the Crown's treaty obligations when it purchased, or facilitated the purchase of, Māori land. We also set out the concessions the Crown has made about its land purchasing policies in this period, and the positions of the parties on the topic.

On the basis of this contextual material, we identify the three salient issue questions to be determined in the chapter. In short, they concern the political and economic objectives driving the Crown's purchasing in Te Raki between 1865 and 1900, the fairness of its purchasing practices, and the extent to which the Crown acted to protect the interests of Te Raki hapū while pursuing its purchasing programme. On each issue, we begin by briefly setting out the key arguments advanced by the parties. We then analyse those arguments in light of the evidence to reach a series of conclusions and findings. All our findings are brought together in summary in section 10.6, followed by our overall assessment of any prejudice that Te Raki hapū sustained through treaty breaches arising from the Crown's purchasing policies and practices over this period.

10.2 Ngā Kaupapa / Issues

10.2.1 What previous Tribunal reports have said about the Crown's treaty obligations

Chapter 8 of this report, which discussed Crown purchasing from 1840 to 1865, detailed the Crown's general treaty obligations in respect of the alienation of Māori land, as expressed in previous Tribunal reports (see section 8.2.1). Broadly, te Tiriti explicitly guaranteed Māori tino rangatiratanga over their lands and resources, and obliged the Crown to uphold this guarantee. Previous Tribunal reports have found that these obligations continued to apply in the later period too, when the Native Land Court regime was in force. Drawing on those reports, the Crown's treaty obligations when purchasing (and facilitating the purchase of) Māori land between 1865 and1900 can be summarised as:

- all groups of customary owners and their respective interests must be identified;
- all disputes over ownership must be resolved before the start of Crown negotiations for purchase;
- the hapū must be involved in negotiations, not just individuals;
- the area of land being negotiated must be clearly defined;
- the nature of the transaction, whether permanent or not, must be well understood by all the customary owners;
- the price must be fair;
- all customary owners must give their free and informed consent to the purchase, or have the ability to remove their interests;

- the purchase must leave sufficient community land for the current and future use of the hapū and for their well-being and their economic development; and
- the nature and substance of the purchase must have been put to those consenting to it honestly, and without fraud or unfair inducement.[12]

In chapter 9, we also outlined what previous Tribunal inquiries have said about the relationship between imposed title changes and the alienation of Māori land in the Native Land Court era. Briefly, the individualisation of title – first provided for through the Native Lands Act 1862 – had serious consequences for Māori groups wishing to retain their land. For the Crown, though, individualised title was essential to achieving its land acquisition objectives, and it provided the basis for the land purchasing system that operated from 1862 onwards. But, as the Tribunal found in *He Maunga Rongo: Report on Central North Island Claims* (2008), that system was not consistent with the treaty. It followed, the Tribunal said, 'that every purchase conducted under [that system] was necessarily in breach of the Treaty'.[13]

In *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims* (2004), the Tribunal also found that the creation of a 'virtual' individual title, which enabled purchases from individuals who were equipped with a new right to sell their paper interests, was inconsistent with the duty of active protection of Māori tino rangatiratanga over their land. The Native Land Court regime, the Tribunal concluded, destroyed 'community decision making in respect of alienation and land development'.[14] In *He Whiritaunoka: The Whanganui Land Report* (2015), the Tribunal similarly concluded that Crown purchasing methods undermined communal or collective decision-making and advantaged those who wished to sell. It said the Crown's desire to avoid negotiating with hapū or whānau remained constant, even as the methods employed and the legislation that underpinned them changed over the period from 1870 to 1900.[15] In *He Maunga Rongo*, the Tribunal found that the Crown 'turned their tino rangatiratanga into a virtual,

12. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, Wai 9 (Wellington: Brooker and Friend, 1987), pp 205–206; Waitangi Tribunal, *The Ngai Tahu Report 1991*, Wai 27, 3 vols (Wellington: GP Publications, 1991), vol 3, pp 825–826; Waitangi Tribunal, *Muriwhenua Land Report*, Wai 45 (Wellington: GP Publications, 1997), p 5; Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, Wai 201, 2 vols (Wellington: Legislation Direct, 2004), vol 1, p 120; Waitangi Tribunal, *Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims*, Wai 785, 3 vols (Wellington, Legislation Direct, 2008), vol 1, p 286; Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, 3 vols (Wellington: Legislation Direct, 2010), vol 1, p 104; Waitangi Tribunal, *He Whiritaunoka: The Whanganui Lands Report*, Wai 903, 3 vols (Wellington: Legislation Direct, 2015), vol 1, p 368; Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims – Pre-publication Version*, Wai 898 (Wellington: Legislation Direct, 2018), pts 1–2, pp 1303–1304.

13. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims*, Wai 1200, 4 vols (Wellington: Legislation Direct, 2008), vol 2, p 625.

14. Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, Wai 814, 2 vols (Wellington: Legislation Direct, 2004), vol 2, pp 513–514.

15. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, 3 vols (Wellington: Legislation Direct, 2015), vol 1, p 496.

saleable, individual interest. This was a very serious breach of the terms of the Treaty and of the principles of partnership, autonomy, and active protection.'[16]

Previous Tribunal inquiries have also discussed specific aspects of Crown purchasing practices in this era, especially its agents' use of tāmana – advance payments made to individuals within ownership groups before the Court had determined title. In the Wairarapa ki Tararua inquiry (2010), the Tribunal found that the use of tāmana raised issues as to 'the fairness and propriety of binding owners to a future sale by offering them money when they were so impecunious'; it also called into question whether owners could, in the absence of details about the final purchase, give 'their full and free consent to a subsequent sale'.[17] In *He Maunga Rongo*, the Tribunal found that,

> [by] making a tiny payment, the Crown could tie up all the land and resources over a large area, without time limitations . . . [which] placed the Crown in a position of considerable advantage in using its monopoly powers to not only drive prices down, but to coerce Maori to sell the freehold, faced as they were with few other alternatives to earning an income from their properties.[18]

10.2.2 Crown concessions

During our inquiry, the Crown conceded that aspects of its purchasing policies were inconsistent with the treaty. It also acknowledged the relevance here of its concessions about the operation and impact of the Native Land laws – especially 'the award of land to individuals and enabling individuals to deal with land without reference to iwi or hapū' – and about the lack of collective title (we address this concession in detail in chapter 9.2.2).[19] In addition, as it had in other inquiries, the Crown accepted that 'excessive and unnecessary use of its power to legislate a [land purchasing] monopoly for the Crown' could, in specific cases, represent a treaty breach; however, it considered no such cases had been identified in Te Raki (see section 10.2.4).[20]

The Crown submitted that the combined effect of these concessions sufficiently addressed claimant arguments about its purchasing activities.[21] Specifically, the Crown conceded that in this period, 'it did not have a system in place to ensure that it did not purchase land that was needed to ensure the iwi and hapū of Northland could continue to maintain themselves. That was a failure to actively protect Māori and a breach of the Treaty.'[22]

Crown counsel stated that the date when Te Raki hapū were left with insufficient land would have 'varied between regions and within hapū'. It acknowledged records indicating that 80 to 90 per cent of land within the Whāngārei

16. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 625.
17. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 2, p 465.
18. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 587.
19. Crown closing submissions (#3.3.406), pp 5–6.
20. Crown closing submissions (#3.3.407), p 34.
21. Crown closing submissions (#3.3.407), p 6.
22. Crown closing submissions (#3.3.407), pp 3–4.

and Whangaroa districts was no longer in Māori ownership by 1908. For the people of Mahurangi and the Gulf Islands, insufficient land was a reality even earlier – although, in closing submissions the Crown resiled from its earlier statement that iwi in these areas were 'virtually landless' by 1865, noting that the figures supporting that statement had been revised over the course of the hearings.[23] Acknowledging that these groups are *now* virtually landless, however, Crown counsel conceded that the Crown's 'failure to ensure they retained sufficient land for their present and future needs was a breach of the treaty and its principles'.[24]

The Crown also made specific concessions about deficiencies in its acquisition of Hauturu (Little Barrier Island) over the course of the 1880s and 1890s – including pursuing negotiations with individual shareholders rather than all landowners, using monopoly powers and special legislation to achieve its purchasing aims, and forcibly evicting Ngāti Manuhiri living on the island. We return to these concessions later in this chapter when we examine the fairness of the Crown's purchasing practices.

10.2.3 The claimants' submissions

In their generic submission, claimant counsel argued that Te Raki hapū understandings and expectations of land purchasing were not materially different in 1865 from what they had been in 1840. As in the earlier period, land was not considered to be a tradeable commodity. Selling it did not extinguish the mana, tino rangatiratanga, or ancestral connections of hapū and iwi to the lands in question. Rather, counsel contended, Te Raki Māori saw land transactions as a means to attract European settlement and enjoy the economic benefits that would follow.[25]

Their vision was consistent with the treaty, claimant counsel asserted. Under article 2, hapū and iwi should have been allowed to alienate land through existing tribal structures and thereby exert and maintain control over the scale, pace, and nature of settlement.[26] However, claimants submitted that the Crown denied hapū and iwi this right, giving control of the sales process to the Native Land Court, whose abhorrence of 'tribalism' served to expedite Crown purchasing operations.[27]

Central to the claimants' arguments was their assertion – supported by Tribunal findings in other inquiries – that the Crown's purchasing activities in this period were conducted under a system (the Crown's Native Land legislation and regime for land administration) that was inconsistent with the treaty. As such, they said the key issue for the Tribunal to determine was whether the resulting transactions entered into by the Crown between 1865 and 1900 were treaty-compliant. Claimants spoke of the Crown's failure to actively protect Te Raki hapū and their

23. Crown statement of position and concessions (#1.3.2), p 131; Crown closing submissions (#3.3.407), p 4; Crown closing submissions on issue 4 (# 3.3.404), pp 10–11.
24. Crown closing submissions (#3.3.407), p 4.
25. Claimant closing submissions (#3.3.213), pp 62–64; claimant submissions in reply (#3.3.429), p 9.
26. Claimant submissions in reply (#3.3.499), pp 105–106.
27. Claimant closing submissions (#3.3.213), pp 21, 40.

lands, resources, and tino rangatiratanga over those lands.[28] They gave further detail of the Crown's alleged breaches in their generic submission:

- The Crown has failed to prevent, rectify, or remedy the rapid alienation of Te Raki Māori lands so that the remaining land in Te Raki Māori ownership is insufficient for their present and future needs;
- The Crown failed to ensure that sufficient lands and resources were set aside as inalienable reserves for the present and future needs of Te Raki Māori;
- The Crown undertook a determined and comprehensive land purchase programme designed to obtain for the Crown as much Māori land as possible from within Te Paparahi o Te Raki Inquiry District; [. . .]
- The Crown employed sharp and unfair purchase policies and practices in dealings with Te Raki Māori which assisted the Crown to acquire land at bargain-basement prices;
- The Crown failed to ensure that Te Raki Māori were protected against individual members further fragmenting the land by sale and partition; [. . .]
- [T]he Claimants suffered significant prejudice as a result of Crown actions and omissions which constituted breaches of Te Tiriti during the period 1865–1900.[29]

Claimant counsel submitted that both the legislation the Crown enacted in this period and its purchasing policies were driven by political and economic imperatives. The Crown sought to acquire Te Raki Māori land at a discount, promising collateral benefits in the form of towns, public works, settlers, and services. But the Crown did not deliver on these promises;[30] it continued to pressure Māori into selling their land, and adopted or facilitated the use of aggressive tactics. These included the payment of tāmana, low pricing, a failure to identify all owners of Māori land earmarked for purchases, and an unwillingness to consult with those who did not wish to sell.[31]

Once the Crown's exclusive right of pre-emption was reintroduced under the Native Land Court Act 1894, Māori land could no longer be purchased privately. Claimants alleged that the Crown then took advantage of its purchasing monopoly – which it had secured for itself through 'a variety of legal devices' – by failing to pay a fair price for the lands.[32] Subsequent on-sales of land created a windfall for the Crown and therefore constituted losses for Te Raki hapū. Claimant counsel emphasised the prejudicial effect on Te Raki Māori of their inability to profit commensurately with the market potential of their land in this period.[33]

Throughout these years, the claimants allege, the Crown was aware that its land legislation and purchasing programme would result in the widespread alienation

28. Summary of claimant closing submissions (#3.3.213(a)), p 4.
29. Claimant closing submissions (#3.3.213), pp 10–11.
30. Claimant closing submissions (#3.3.213), p 39; claimant submissions in reply (#3.3.499), p 113.
31. Summary of claimant closing submissions (#3.3.213(a)), p 17.
32. Ngāti Hine evidence (doc M25), p 106; summary of claimant closing submissions (#3.3.213(a)), p 25.
33. Claimant closing submissions (#3.3.213), p 58.

of Te Raki Māori land and resources.[34] Nonetheless, it pressed on with purchasing and facilitated the purchase of large tracts of land, even when the impact of doing so on hapū and iwi became known. Claimants identify several points at which the Crown was alerted to the growing landlessness of Te Raki Māori and its effects, including by way of warnings from its own officials (such as the report to Parliament by the Minister of Native Affairs, Donald McLean, in 1876) and complaints from Māori; the Crown knew, claimants say, of the severe prejudice hapū would suffer if it did not stop purchasing land in the north.[35] Yet the Crown's purchasing policy remained largely unchanged: still it failed to set aside the reserves for Māori as required by law; still it failed to monitor the sufficiency of land and resources retained both by specific groups and across the district as a whole.[36]

It was not only the Crown's own purchasing practices that were the subject of claimant allegations. Claimants noted that the Native Lands Act 1865, which allowed for the purchase of Māori land by private purchasers, also encouraged unscrupulous storekeepers and traders to supply goods to Māori at high prices – inducing them to sell land as they sought to repay the moneys owed. It was argued that, although 'these transactions may not have been directly at the hand of the Crown', the Native Land legislation certainly helped to facilitate them.[37] And, as it was the Crown that had enacted this legislation (and more) to facilitate European settlement, claimants said the Crown was responsible for any adverse consequences.[38]

Ultimately, claimants argued, the Crown's purchasing programme throughout this era failed to meet the expectations of Te Raki hapū. The promised benefits of closer Pākehā settlement did not eventuate, and hapū instead lost large tracts of land to Crown and private purchasing.[39] Their sense of loss would have been compounded by the Crown's subsequent failure to utilise all the land that had been alienated. Claimants pointed out that when, in the 1890s, Premier Richard Seddon told Te Raki Māori the Crown wanted even more of their purportedly 'barren' land for European settlement, a local leader reminded him of the large amount of Crown land in the district that was still unoccupied – surely this could be brought into service if the Crown really wanted to utilise idle land?[40] Overall, the claimants concluded, the Crown failed to actively protect Māori property interests to the fullest extent reasonably practicable, failed to protect the land base of Te Raki hapū, and in fact actively reduced their papatupu (customary) landholdings – all with little regard for the sufficiency of land for present and future Māori needs.[41]

34. Claimant closing submissions (#3.3.213), p 37; claimant submissions in reply for Wai 2063 (#3.3.544), pp 78–79.
35. Claimant closing submissions (#3.3.213), p 52; see Paul Thomas, 'The Native Land Court: 1865–1900' (commissioned research report, Wellington: Waitangi Tribunal, 2016) (doc A68), p 121.
36. Claimant closing submissions (#3.3.213), p 43; claimant submissions in reply (#3.3.429), p 3.
37. Claimant closing submissions (#3.3.213), p 25.
38. Claimant submissions in reply (#3.3.429), p 10.
39. Summary of claimant closing submissions 3.3.213(a), p 27.
40. Claimant closing submissions (#3.3.213), p 54.
41. Summary of claimant closing submissions (#3.3.213(a)), p 29.

10.2.4 The Crown's submissions

We have already noted the Crown's concession that aspects of its purchasing policies in this period were inconsistent with the treaty. The Crown also acknowledged that, as a privileged land purchaser throughout these years, it was obliged 'to apply high standards of good faith and fair dealing'; 'to take such steps as were reasonable in the circumstances to protect the land and resources of Northland Māori for as long as they wished to retain them'; and to ensure that Māori 'retained sufficient land to meet their existing and future needs.'[42]

The Crown accepted that 'excessive and unnecessary use of its power to legislate a monopoly for the Crown in terms of land purchasing' might, in specific instances, amount to a treaty breach. Indeed, in previous inquiries it had acknowledged that 'roll[ing] over proclamations giving it monopoly purchasing powers' was one unnecessary use of its legislative powers.[43] However, Crown counsel argued that pre-emptive purchasing did not, in itself, amount to a treaty breach: to determine if a breach occurred, it was 'necessary to identify actual prejudice as a result of particular proclamations'.[44] The Crown noted that its purchasing in Northland during the 1890s, the period in which Crown pre-emption was reintroduced under section 117 of the Native Land Court Act 1894, 'did not compare to purchases that took place in the 1870s.' However, Crown purchasing also increased between 1895 and 1898.[45]

Moreover, in the case of Te Raki, the Crown argued that Māori still retained the right to alienate land, describing this as a 'fundamental right of ownership' guaranteed under article 3 of the treaty.[46] In the 1860s and early 1870s, counsel submitted, Northland Māori had control of land purchasing processes in the district.[47] This changed in the 1870s. From this point on and until the end of the century, the Crown's land purchase policy was driven by the national exigencies of the time, counsel argued. It was seeking to stimulate an ailing economy, capitalise on an expanding dairy market, and integrate Pākehā and Māori societies.[48] The Crown's purchase policy reflected these imperatives and was not expressly designed to facilitate the alienation of Māori land, Crown counsel contended.[49]

Responding to claimant allegations that the Crown failed to ensure Te Raki Māori had sufficient lands for their needs or to create reserves as the Native Land Act 1873 required during this period, Crown counsel pointed to its 'overarching concession that it did not have a system in place to ensure that it did not purchase land that was needed by Northland Māori'.[50] Put simply, the Crown acknowledged

42. Crown closing submissions (#3.3.407), p 2.
43. Crown closing submissions (#3.3.407), p 4.
44. Crown closing submissions (#3.3.407), p 34.
45. Crown closing submissions (#3.3.407), pp 34–35.
46. Crown closing submissions (#3.3.407), pp 2, 9.
47. Crown closing submissions (#3.3.407), p 8.
48. Crown closing submissions (#3.3.407), pp 9, 12.
49. Crown closing submissions (#3.3.407), pp 7–11.
50. Crown closing submissions (#3.3.407), p 6.

it had no system to monitor the sufficiency of Te Raki Māori landholdings and cease purchasing if particular groups or individuals were at risk of landlessness.[51]

As to tāmana, the Crown asserted that the practice of paying tāmana did not, in and of itself, breach the treaty. Counsel argued that the Native Minister instructed land purchase officers that the strategy was 'to be used with caution and with respect for the wishes of Māori communities'. Moreover, the Crown completely banned the practice of tāmana for papatupu land in the 1880s.[52]

With regard to land pricing, the Crown contended that in determining a 'fair' price, it is not always helpful to compare regions, similar blocks, or Crown and private purchases. Such comparisons, the Crown argued, do not take into account issues such as the size, quality, and location of the land in question, nor the infrastructure required to either extract resources from it or establish settlement.[53]

In respect of private purchasing, Counsel commented that an absence of reliable data meant that its extent cannot be gauged, and little is known about individual transactions beyond the bare details. In general, though, counsel said private purchasers 'were concerned mainly with the personal economic return the land would produce', and so were interested only in land of high quality or which carried marketable resources, including kauri and minerals.[54] Moreover, as historians David Armstrong and Evald Subasic had concluded, Te Raki hapū retained control over land alienation to private buyers throughout the 1860s and early 1870s.[55] After 1870, the Crown submitted, private land transactions were subject to scrutiny by the Trust Commission (see section 10.5), which would have rejected any unfair transactions. The Crown also noted that the Native Land Court was empowered to examine the fairness of certain sales.[56]

Lastly, the Crown asserted that its land purchasing policies and actions in the inquiry district should be judged in relation to the standards of the time and in terms of what was reasonably possible for the Crown to achieve.[57]

10.2.5 Issues for determination

Having reviewed the findings of previous Tribunal reports (including our own stage 1 report), the Crown's concessions, differences between the parties' arguments, the stage 2 statement of issues, and the evidence presented to us, the issues for determination in this chapter are as follows:

- What were the political and economic objectives of the Crown's purchasing policy, and how were they implemented in Te Raki between 1865 and 1900?
- Were on-the-ground purchasing practices consistent with the Crown's treaty obligations?
- Did the Crown take adequate steps to protect the interests of Te Raki hapū?

51. Crown closing submissions (#3.3.407), p 7.
52. Crown closing submissions (#3.3.407), p 7.
53. Crown closing submissions (#3.3.407), p 28.
54. Crown closing submissions (#3.3.407), p 17.
55. Crown closing submissions (#3.3.407), p 8.
56. Crown closing submissions (#3.3.407), p 17.
57. Crown closing submissions (#3.3.407), p 8.

10.3 What Were the Political and Economic Objectives of the Crown's Purchasing Policy and How Were they Implemented in Te Raki between 1865 and 1900?

10.3.1 Introduction

The passing of the Native Lands Acts 1862 and 1865 and the establishment of the Native Land Court as a national institution were transformative events for Te Raki Māori (we discuss the operation of the Native Land Court under these Acts in chapter 9). The creation of the new regime was propelled by the Crown's desire to acquire the substantial quantity of land it said it needed for expanding European settlement.[58] This objective remained constant throughout the period and prompted the Crown to introduce other legislation, such as the Public Works and Immigration Acts of the 1870s, intended to encourage settlers and free up land for them. It underpinned the resumption of Crown purchasing after 1870, which was essential to the Government's plan to revive an ailing colonial economy and improve internal security.[59] But Government officials were eager for Māori to recognise its purchasing programme had other objectives too: it would enhance their lives and prospects, delivering benefits that would be 'felt and enjoyed by both races alike'.[60]

However, according to the claimants, the benefits promised by the Crown – jobs, economic prosperity, better infrastructure, and more – failed to materialise. Instead, they were left increasingly landless by a 'determined and comprehensive' Crown campaign to purchase as much Te Raki Māori land as possible at nominal prices, which used monopoly powers, self-serving Native Land legislation, and aggressive tactics to achieve that goal.[61]

Crown counsel denied that its policies regarding Māori land were intended to bring about 'wholesale alienation', arguing instead that the Crown's purchasing was shaped by contemporary national needs.[62] Crown counsel contended that Northland was not an immediate focus for land purchasing or land development in this period, as its '[p]oor unfavourable climatic conditions, and rugged terrain' rendered it less attractive to settlers than other parts of the colony.[63] No money was set aside for land development in the region until 1873, so it was not until the mid-1870s that Crown purchasing recommenced in Northland in earnest.[64] That programme was also short-lived; by the end of the 1870s, the bulk of Crown purchasing in the district had been completed.

As noted earlier, while the Crown has previously accepted it 'did not comply with its duty to purchase reasonably when it continually rolled over proclamations

58. Claimant submissions in reply (#3.3.429), p 14.
59. Crown closing submissions (#3.3.407), pp 8–9.
60. H T Kemp to Native Secretary, 5 January 1874 (cited in David Armstrong and Evald Subasic, 'Northern Land and Politics: 1860–1910' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2007) (doc A12), pp 760–761).
61. Claimant closing submissions (#3.3.213), pp 10, 18, 58.
62. Crown closing submissions (#3.3.407), p 8.
63. Crown closing submissions (#3.3.407), p 11.
64. Crown closing submissions (#3.3.407), p 12.

giving it monopoly purchasing powers', it considered that this did not necessarily apply in Te Raki, and questioned in general the extent that such powers were utilised in the district.[65] The Crown considered that no particular Te Raki purchases met its threshold for a treaty breach in this regard; namely, a situation in which actual prejudice arose because of a specific proclamation.[66] Moreover, in respect of the Immigration and Public Works Amendment Act 1871, counsel noted that the power to proclaim pre-emption over specific blocks was not used in the district.[67] When it came to the Government Native Land Purchases Act 1877, counsel asserted that the most relevant evidential reports had only documented its use in relation to Hauturu and Puhipuhi.[68]

10.3.2 Tribunal analysis

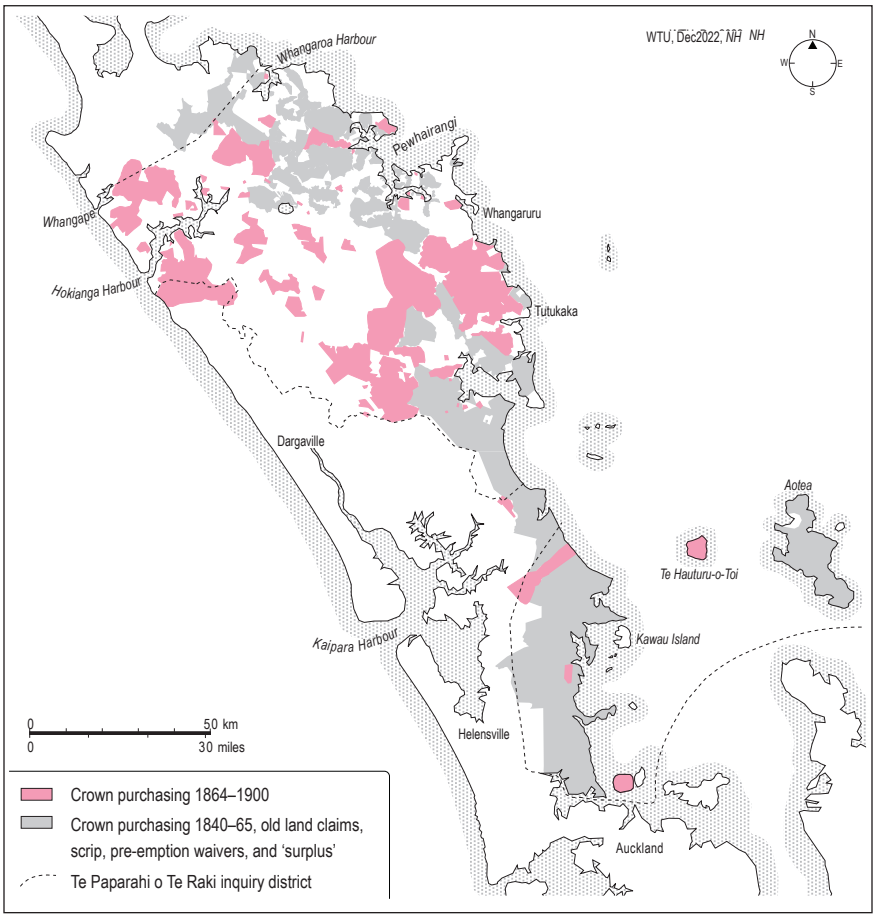
We begin by considering the objectives underlying the Crown's land purchasing policy and programme in Te Raki (section 10.3.2.1). This discussion encompasses the entire period, from 1865 to 1900. We then examine the implementation of the programme – in other words, what those objectives translated to in practice – over three distinct phases. In turn, we focus on the 1870s, when large-scale Crown purchasing began in earnest in the district; the 1880s, when the Crown pulled back from the extensive purchasing of the previous decade; and the 1890s, when large-scale purchasing flourished again under the Liberal Government.

10.3.2.1 *The Crown's evolving objectives 1865–1900*

From the very start, the Crown's objectives in purchasing Māori land were both assimilationist and economic. While Crown pre-emption was in place, its purchasing was the primary means by which land was made available for settling new immigrants. It was anticipated that the profits arising out of the on-sale of purchased land to settlers would generate revenue to fund the development and governance of the colony (we discuss the land fund model in chapter 8, section 8.3.2). Large land blocks were preferred by the Crown, as this minimised transactional and development costs (especially surveying costs, see section 8.4.2). Where purchasing took place in advance of the settlement frontier, it could reduce the potential for Māori–settler conflict – although conversely, officials such as McLean (Chief Native Land Purchase Commissioner before his parliamentary career) recognised that pushing purchases too far could also create tensions and damage the possibility of Māori engaging with the new settler economy.[69]

As we have discussed in previous chapters, the settler Parliament had become highly critical of McLean and the Native Land Purchase Department, and the slow pace of land purchasing under Crown pre-emption. The respective merits of Crown pre-emption and direct private purchase of Māori land were the subject of

65. Crown closing submissions (#3.3.407), p 34.
66. Crown closing submissions (#3.3.407), p 34.
67. Crown closing submissions (#3.3.407), p 33.
68. Crown closing submissions (#3.3.407), p 34.
69. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1029.



Map 10.1: Overall Crown purchasing in Te Raki, 1864–1909

intense debate during the early 1860s, as the Governor and the colonial Legislature stuggled for control and responsibility for the Māori affairs (see chapter 7, section 7.5.2.5).[70] In May 1865, however, the Native Land Purchase Department was abolished in one of a series of policy shifts that included Fenton's restructure of the Native Land Court as a national and Pākehā led institution for the determination of Māori titles (see chapter 9, section 9.4).[71] At that time, the Crown did not need to pursue fresh land purchases; the recent confiscation of millions of acres

70. Donald Loveridge, 'The Development and Introduction of Institutions for the Governance of Maori, 1852–1865' (commissioned research report, Wellington: Crown Law Office, 2007) (doc E38), pp 228, 266–270.

71. Proclamation, 17 May 1865, *New Zealand Gazette*, 1865, no 19, p 168; Loveridge, 'The Development and Introduction of Institutions for the Governance of Maori' (doc E38), pp 222–228.

of Māori land following its campaigns in the Waikato, Bay of Plenty, and Taranaki had provided it with more than could be settled in the short term.[72] In fact, as late as 1870 the Crown was still spending more than £2,000 per year on surveying the confiscated lands.[73] And now, settlers could buy land directly from Māori once it had been put through the Native Land Court, rather than waiting for the Crown to purchase it, extinguishing native title, and on-sell it.[74] However, as we will discuss further, the Auckland Provincial Government pursued a limited purchasing programme in Te Raki in the absence of a central Native Land Purchase Department.[75]

It was not until the start of the 1870s that the Crown had reason to resume purchasing Māori land in earnest. The catalyst was the Vogel scheme – the Fox ministry's response to the economic woes then facing the country, not least the financial burden created by the costs of the military campaigns in the second half of the 1860s.[76] The scheme, driven by Julius Vogel, Colonial Treasurer to Premier William Fox and Premier himself between 1873 and 1875, involved large-scale foreign borrowing to finance immigration and extensive public works, and the provision of direct assistance to selected industries (notably goldmining). Altogether, £4,000,000 was to be raised under the Immigration and Public Works Loan Act 1870: of this, £2,000,000 was allocated for railways, £1,000,000 for immigration, £400,000 for roads, £300,000 for water supply works on the goldfields, £200,000 for the purchase of land from North Island Māori, and £60,000 for telegraphs.[77] Three years later, the Immigration and Public Works Loan Act 1873 empowered the Government to raise another £2,000,000 for the construction of roads and land purchasing, with £500,000 allocated to the latter; accompanying legislation set aside half of the £500,000 for Auckland Province.[78] Altogether, some

72. Stafford to Whitaker, 18 January 1866, AJHR, 1866, A-2, pp 4–5; 'Return of Lands Confiscated by the General Government, Etc', AJHR, 1871, C-4.

73. 'Return of the Cost of the Administration of the Confiscated and Ceded Lands', undated, AJHR, 1870, C-7, pp 3–4.

74. Under section 18 of the Native Lands Act 1862, the Governor could issue a Crown grant to a private purchaser who had purchased the interests of an owner named on a certificate of title issued under that Act. This provision was carried over in section 47 of the Native Lands Act 1865: Loveridge, 'The Development and Introduction of Institutions for the Governance of Maori' (doc E38), pp 137–138, 228–229.

75. Rose Daamen, Barry Rigby, and Paul Hamer, *Auckland*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1996) (doc H2), p 225; section 73 of the New Zealand Constitution Act 1852, which provided for the Crown's sole right of purchase, also made limited provision for the Crown to delegate its land purchasing powers to provincial governments.

76. J Vogel, 'Financial Statement', 29 July 1869, AJHR, 1869, B-2, pp 9, 13–15; J Vogel, 'Financial Statement', 28 June 1870, AJHR, 1870, B-2, pp 11–17; see also section 7.3.2(g)–(h) for a discussion of how responsibility for Māori affairs was transferred from the imperial government to its colonial counterpart between 1865 and 1870. In return, the colonial Government agreed to bear all costs of future internal defence, which the imperial government had previously met.

77. Immigration and Public Works Loan Act 1870, s 35; Waitangi Tribunal, *The Te Roroa Report 1992*, Wai 38 (Wellington: Brooker and Friend, 1992), p 55.

78. Immigration and Public Works Loan Act 1873, s 3, sch; Immigration and Public Works Loan Act 1873, ss 3–4; Waitangi Tribunal, *The Te Roroa Report*, Wai 38, p 55.

£11,000,000 was borrowed in support of the Vogel scheme between 1870 and 1878.[79] Initially, the provincial governments were to carry out land purchasing, and the cost was to be charged against the provinces until the land passed to the colonial Government, or was on-sold to raise funds for immigration and public works purposes.[80] In 1873, responsibility for Crown land purchasing transferred to Native Affairs and a new Native Land Purchase Department whose spending and personnel were considerably extended under McLean's direction as Native Minister.[81]

The success of the Vogel scheme relied on the Crown's ability to acquire, once again, Māori land cheaply and on a large scale. As McLean put it, only the Crown could provide the 'regular and progressive settlement' that was required for colonial development.[82] The revenue obtained from on-selling the land to the new immigrants was needed to help defray the scheme's costs.[83] To maximise its return, the Crown would have to purchase the land serviced by the infrastructure proposed under the scheme ahead of its construction; otherwise, it would not benefit from the rise in land values that would occur once the infrastructure was completed.[84] Vogel also pointed to the enhanced security arising from extending communications and settlement into Māori-dominated districts, and providing Māori with employment on public works contracts.[85] For Māori communities, the potential for deriving income from the construction of public works would only have added to the promise of economic integration which they hoped would come from having settlers in their midst.[86]

The Crown's plan to re-enter the land market was not without its critics when it was presented to Parliament in 1870. Member of the House of Representatives (MHR) Edward William Stafford (who had already twice served as Premier, and would do so briefly again between September and October 1872), objected to 'the Government taking the position', as he perceived it, of 'land jobbers and land buyers among the Natives, instead of exhibiting itself to them as the impartial judge and beneficent ruler'.[87] Other political opponents questioned the need for Crown purchasing at all, while some predicted private competitors would compel the Crown to pay prices that would imperil its hopes of making a profit from on-sale.[88]

79. Waitangi Tribunal, *The Hauraki Report*, Wai 686, 3 vols (Wellington: Legislation Direct, 2006), vol 2, p 797.

80. Vogel, 'Financial Statement', 28 June 1870, AJHR, 1870, B-2, p 13; Immigration and Public Works Loan Act 1870, ss 35, 38.

81. Kathryn Rose, 'The Bait and Hook: Crown Purchasing in Taupo and the Central Bay of Plenty in the 1870s' (commissioned research report, Wellington: Crown Forestry Rental Trust, 1997) (Wai 1200 ROI, doc A54), p 5.

82. 'Immigration and Public Works Bill', 16 August 1870, *New Zealand Parliamentary Debates*, vol 9, pp 21–23.

83. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 2, p 797.

84. Vogel, 'Financial Statement', 28 June 1870, AJHR, 1870, B-2, p 13.

85. Vogel, 'Financial Statement', 28 June 1870, AJHR, 1870, B-2, p 20.

86. See, for example, W B White's report on Mangonui: White to Native Minister, 21 June 1872, AJHR, 1872, F-3, pp 3–4.

87. 'Financial Statement', 12 July 1870, NZPD, vol 7, p 348.

88. See, for example, W Rolleston, 8 July 1870, NZPD, vol 7, pp 314–315; W Stafford, 12 July 1870, NZPD, vol 7, p 348.

Walter Mantell, who had conducted purchasing for the Crown in the South Island between 1848 and 1853 and was now a member of the Legislative Council, attacked both the new policy and McLean's past record when in charge of the Native Land Purchase Department.[89] However, McLean insisted that Crown purchasing was needed to prevent land being taken over by private speculators, and he reassured Parliament in 1870 that the Crown did not intend to hide its operations and would not complete purchases until 'after inquiry as to title in the Native Land Court'.[90] Similarly, Minister of Justice Henry Sewell argued that 'The evils of the old land purchase system have been met by the . . . [establishment of] the Native Lands Court.'[91]

By October 1875, McLean's purchasing programme had achieved its objective of enabling a sizeable public estate to be accumulated. As of June 1876, completed and incomplete purchases since 1870 in the North Island as a whole amounted to 1.77 million acres and 2.70 million acres respectively. The remaining 1.81 million acres of the public estate (then 6.28 million acres in size) consisted of leases, both completed and incomplete. McLean reported that a large proportion of all purchases completed nationwide since 1872 were north of Auckland, with 443,856 acres purchased after 1872 and another 165,661 acres purchased after 1875. With so much land already acquired, or soon to be, McLean was able to announce that the Crown intended completing all purchases already in train before embarking on fresh ones; no large new land acquisitions would be required for at least a year.[92] The following year, McLean added a further justification for pausing Northland purchasing in particular. In one of his final statements as Native Minister, he observed that it was questionable whether the 'wants' of its Māori population could be met if their landholdings continued to diminish.[93]

McLean's decision in 1875 to wind down purchasing marked the start of a much more restrained Crown approach to acquiring Māori land, which would remain in place until the start of the 1890s. Indeed, in September 1876, the new ministry, with Harry Atkinson as Premier, proposed abolishing the Land Purchase Department, which it considered as 'being no longer a necessary part of the Government service'.[94] When the Atkinson ministry fell in October 1877, it was replaced by a new administration led by the two-term former Governor, Sir George Grey.[95] The incoming Government soon signalled its own plans for the Crown to largely withdraw from purchasing Māori land.[96] To support the process of wrapping up

89. 'Protests upon the Immigration and Public Works Bill', 6 September 1870, *Journals of the Legislative Council of New Zealand*, pp 146–147.

90. 'Immigration and Public Works Bill', 16 August 1870, NZPD, vol 9, pp 21–23.

91. 'Immigration and Public Works Bill', 26 August 1870, NZPD, vol 9, p 309.

92. 'Supply', 8 October 1875, NZPD, vol 19, p 342; see also 'Statement Relative to Land Purchases, North Island', 30 June 1875, AJHR, 1875, G-6, p 7.

93. McLean, 'Statement Relative to Land Purchases, North Island', undated, AJHR, 1876, G-10, p 1.

94. 'Ministerial Changes', 4 September 1876, NZPD, vol 22, p 2. As noted earlier, the Land Purchase Department was abolished in 1865, but it had since been re-established.

95. Grey had entered politics in 1875 after his second vice-regal appointment was terminated in 1868.

96. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 402.

existing purchases and to protect the Crown's unrealised investment, the Grey Ministry passed two significant statutes in 1877: the Native Land Act Amendment Act 1877 empowered the Crown to bring blocks before the Native Land Court for determination of ownership and the excision of such interests as it had purchased; and the Government Native Land Purchase Act 1877 gave the Crown the power to exclude private competition in respect of blocks which had been proclaimed as 'under negotiation'.[97]

The budget for Crown purchasing was then slashed when John Bryce became Native Minister in John Hall's ministry in 1879. In part, this was in keeping with the paring back of Crown expenditure in response to the economic downturn which started that year and continued through the 1880s. But the budget cut also reflected Bryce's disdain for what Crown purchasing had achieved relative to its settlement objectives.[98] In his statement to Parliament in 1879, Bryce made a pointed comparison between the acreage the Crown had acquired in various provincial districts since 1870 and the acreage disposed of by waste land boards to settlers: for Auckland province, the figure was 1,153,648 acres acquired, versus only 691 acres sold.[99] Accordingly, during the early 1880s, there was little money available for new purchasing, and funds that were expended had to be targeted rather than used indiscriminately.[100]

There was a brief return to the Vogelism of the early 1870s when the Stout-Vogel ministry (led by Robert Stout, with Vogel as Colonial Treasurer) took over the reins of Government in 1884, and Native Minister John Ballance pursued the purchase of Māori land blocks along the proposed route of the North Island main trunk railway.[101] Ballance's Native Land Administration Act 1886 also restored Crown pre-emption, but only for two years; private purchasing was soon made legal again with the passing of the Native Land Act 1888.[102] By then, the Stout-Vogel ministry had been replaced by the Government of Harry Atkinson who, having been returned to office as Premier for a fourth time, reverted to the policies of fiscal restraint practised at the start of the decade.[103]

Crown policy on Māori land purchasing was turned on its head, however, when the Liberals came to power at the start of the 1890s. The Liberal Governments, led first by John Ballance and later by Richard Seddon, believed that promoting the cause of small farmers was key to achieving economic prosperity. On that basis, they reasoned, they should acquire the lands tied up in unsubdivided blocks of Māori land as well as in large pastoral settler estates, both of which were

97. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 403.
98. 'Lands Purchased and Leased from Natives in North Island', 30 June 1886, AJHR, 1886, C-5, p 9; Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 404.
99. Bryce, 'Native Statement', 17 October 1879, AJHR, 1879, G-1, p 9.
100. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 2, p 806; Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 557; Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 412.
101. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, pp 416–417; Minister for Public Works, 'Public Works Statement', 25 June 1886, AJHR, 1886, D-1, pp 14–15, 23.
102. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, pp 417–418.
103. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 483.

considered as either underutilised or unproductive. Thus, the Government set out its plan to resume large-scale purchasing of Māori land in June 1891.[104]

To fund it, the Ballance Government passed the Native Land Purchases Act 1892. This Act authorised the borrowing of £50,000 per annum for up to five years, and also extended the Crown's ability to utilise proclamations declaring blocks to be under negotiation, which excluded private competition.[105] Section 14 of the Act addressed the Crown's concern that restrictions against alienation applied by the Native Land Court might interfere with its land settlement plans;[106] it enabled the Governor to remove or declare void restrictions on the alienation of 'any Native land . . . provided that any such removal or avoidance shall only operate in favour of the Crown.'[107] Almost alone, the Māori members of Parliament raised objections to this legislation. Notably, Eparaima Kapa (Te Whananaki hapū of Te Aupōuri and MHR Northern Maori) advocated for a return to 'the plan followed in former days', when purchase negotiations were conducted in open meetings where all the terms of sale were defined and agreed. He stated: 'Let us have things done in an open manner, and in the light of the shining sun', a plea that was commonly expressed by Māori at that time.[108]

The following year, the Liberals' thinking on Māori land was further elucidated in the preamble to the Native Land Purchase and Acquisition Act 1893:

> Whereas at least seven million acres of land, principally situated in the North Island of the colony, owned by Natives, are lying waste and unproductive, and, in the interest of the Natives and of Her Majesty's other subjects in the colony, and more especially for the extension of settlement, it is necessary that such land should be made available for disposal under the land laws of the colony: And whereas the existing law for extinguishing by purchase the Native title . . . fails to afford adequate means for supplying the rapidly increasing demand for land for settlement purposes, and great injury is thereby occasioned, and the progress of colonisation is retarded, and is therefore necessary to provide further and other means by which lands owned by Natives may be acquired for the purpose of disposal.

This Act allowed for areas of 'Native territory' to be proclaimed and made subject to a Native Land Purchase Board; landowners could then be required to vote on whether to lease or sell their land to the Crown, or vest it in the board.[109] The

104. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1144; 'Financial Statement', 16 June 1891, NZPD, vol 71, p 65.
105. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 422; Native Land Purchases Act 1892, ss 4, 16, 22.
106. T W Lewis, evidence to Commission on Native Land Laws, 12 May 1891, AJHR, 1891, G-1, p 146.
107. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 422; Native Land Purchases Act 1892, s 14.
108. 'Native Land Purchases Bill', 19 August 1892, NZPD, vol 77, p 229.
109. 'General Report on Native Lands and Native Land Tenure', 11 July 1907, AJHR, 1907, G-1C, p 4; Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 585.

legislation also allowed the Governor-in-Council to direct the Native Land Court to hold a title hearing for the land subject to the proclamation.[110] The Act thus provided no security for iwi and hapū who had kept their lands from going before the Native Land Court – which was happening at an increasing pace in Te Raki.[111]

As it turned out, the Crown never found it necessary to invoke the Native Land Purchase and Acquisition Act 1893. Instead, from 1894 until 1899 the Seddon Government was able to rely upon the Lands Improvement and Native Lands Acquisition Act 1894 and the Native Land Court Act 1894 to meet its purchasing objectives. Like the Native Land Purchases Act 1892 which it replaced, the Lands Improvement and Native Lands Acquisition Act was essentially about financing the Crown's land settlement programme.[112] Aiming to encourage 'the settlement of the [Pākehā] people upon the lands of the colony', the Act consisted of two parts: part I related to Crown lands and dealt with the construction of roads and bridges, and the preparation of land for settlement, with section 8 empowering the Government to borrow £250,000 for a 'Lands Improvement Account'; part II – which applied to Native lands – authorised the Government to borrow £250,000 for the 'Native Lands Purchase Account', which was purely for purchasing Māori land.

Under this Act, many State-assisted farm settlements were established or improved, while the Liberal Government expanded its purchasing of Māori-owned land. As the Tribunal observed in *He Maunga Rongo*, 'the Liberal Government of the 1890s recognised the potential for new farming developments to support its economic, social and political objectives of closer rural settlement and individual family farms'.[113] Its efforts were boosted by legislation such as the Advances to Settlers Act 1894, under which enticing low-interest loans were made available to prospective Pākehā settlers – but not to Māori, due to the multiple ownership of Māori land. Clearly, the prosperous economic future envisaged by the Liberal Government was first and foremost a Pākehā one. Settling Māori either upon their own lands or upon Crown lands did not number among the Crown's objectives.[114]

At the same time, the Crown's right of pre-emption had been restored by section 117 of the Native Land Court Act 1894,[115] a step fully consistent with the Liberal Government's willingness to employ the power of the State to achieve its goals. Professor Tom Brooking has argued that 'Seddon hoped that pre-emption would appeal to Liberal MHRs from rural North Island seats, whose tenure would only become secure if the Government ended the stalemate in Māori land sales'.[116] Seddon also viewed restoring the Crown's right of pre-emption as just towards Māori. He stated in Parliament that the Act would simplify the proceedings of the

110. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 585.
111. Thomas, 'The Native Land Court' (doc A68), p 189.
112. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, vol 1, p 1353.
113. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 3, p 945.
114. See Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 3, pp 963–992.
115. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 588.
116. Tom Brooking, *Richard Seddon: King of God's Own, the Life and Times of New Zealand's Longest-serving Prime Minister* (Auckland: Penguin, 2004), p 204.

Native Land Court and lower expenses for Māori, protecting them from 'the land-grabber' and 'land-shark'.[117] However, the Act also loosened alienation restrictions. Under section 52, it empowered the Court to remove restrictions provided one-third of the owners assented and all owners had 'sufficient' land for their support (we discuss the Crown's standard of 'sufficiency' further in section 10.5.2).[118]

The feeling among Māori was that Crown pre-emption would prevent them from securing the full value of lands they might sell in the future.[119] Indeed, the Crown acknowledged in this inquiry that 'there was a good deal of Māori opposition' to the return of pre-emption, which also curtailed the ability of Māori to lease their land; thus, those who could not afford to develop their land could only get a return on it by selling it to the Crown.[120] Following the introduction of the legislation, nearly 6,000 Māori (including those in Te Raki) signed petitions opposing it.[121] Speaking of the reimposition of pre-emption in Parliament, Hōne Heke Ngāpua (MHR Northern Maori) described it as a 'cruel and cowardly proposition . . . cruel because it is unjust; cowardly, because it is the strong treading on the weak'.[122] Nevertheless, two years later Premier Seddon asserted that Māori had accepted its reintroduction.[123] Acknowledging that a great deal of land had, accordingly, been purchased from Māori, he claimed that the Government had

> acted for their benefit . . . we have greatly helped to save the land to the Natives. We have saved them from being tempted by what was their ruin in the past – the pakeha-Maori and the rum bottle. We have saved them from a class of persons who in the past obtained their land by means often absolutely discreditable.

The Crown, he insisted, was obliged to 'do what is just to our Native brethren' and buy such land as they determined to sell.[124]

Between May 1893 and December 1897, the implementation of the Liberals' land policies enabled the Crown to acquire 1,614,017 acres of Māori land across the whole of New Zealand.[125] In contrast, by March 1898 the Government had acquired only 154,623 acres of settler-owned land by breaking up the great estates under the Lands for Settlements Act 1894.[126] Acquisition continued to run a long way ahead of settlement, just as it had in the 1870s. By mid-1898, only 209,512 acres of the Māori land the Crown had acquired from 1893 to 1897 had been occupied

117. Seddon, 28 September 1894, NZPD, vol 86, p 374 (cited in Brooking, *Richard Seddon*, p 204).
118. Native Land Court Act 1894, s 52; Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 635.
119. Parata, 19 August 1892, NZPD, vol 77, p 227.
120. Crown closing submissions (#3.3.407), p 34.
121. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1146.
122. 'Lands Improvement and Native Lands Bill', 21 September 1894, NZPD, 1894, vol 86, p 232.
123. Seddon, 14 July 1896, NZPD, 1896, vol 93, pp 168–169.
124. Seddon, 22 July 1896, NZPD, vol 93, p 385.
125. 'Native Lands Purchased by Government between 1 May 1893 and 31 December 1897', 28 October 1898, AJHR, 1898, G-3A.
126. 'Report on Land for Settlements Act, 1894', 8 June 1898, AJHR, 1898, C-5, p 1.

by Pākehā settlers.[127] Moreover, the Crown was now ready to wind down purchasing operations, as Seddon's financial statement signalled to Parliament in 1899. Later that year, section 3 of the Native Land Laws Amendment Act 1899 set out that 'On and after the commencement of this Act Native land or land owned or held by Natives shall not be alienated to the Crown by way of sale.'[128] Although constraining the Crown, the Act nevertheless provided for the Crown to complete purchases already agreed on, as well as to undertake future purchasing. It was not meant to bind any future policy; indeed, it expired at the end of the 1900 parliamentary year.[129]

The preceding discussion has surveyed the evolving objectives that drove the Crown's purchasing policies throughout the entire period between 1865 and 1900. We now step back to examine the implementation of those policies in Te Raki over three distinct phases: the 1870s, the 1880s, and the 1890s.

10.3.2.2 *The path towards large-scale Crown purchasing in Te Raki: the 1870s*

As described earlier, the Crown set aside its purchasing ambitions from 1865 through until 1870. In the Te Raki district, its re-entry into purchasing Māori land was even later, not taking place until 1872. Te Raki may have been accorded a low priority because the Auckland Provincial Council wanted the Crown to give preference to buying auriferous (gold-bearing) lands.[130] Moreover, with its broken terrain, extensive tracts of poor gumland soils, and unfavourable climate, agricultural opportunities in Northland had been considered limited; extractive industries were the mainstay of the regional economy. And, as the Crown noted, by the early 1870s private purchasers had already accounted for some of the higher-quality land with their tendency 'to "pick the eyes" out of the larger blocks.'[131]

Prior to the dismantling of the Native Land Purchase Department in 1865, the Auckland provincial government had arranged very few purchases in Te Raki, relying instead on the landholdings already in the possession of the Crown.[132] However, as the Crown stepped back from its purchase operations in the mid-1860s, both the provincial governments and private purchasers became involved in buying Māori land. The central Government allocated funding specifically for provincial government purchasing. In 1869, for example, the Auckland provincial government was granted £5,818 for land purchasing under the Auckland Appropriation Act 1869.[133] But judging by a return later presented to Parliament, it appears that the six Opuawhanga and neighbouring Otonga blocks – lying north

127. 'Native Lands Purchased by Government between 1 May 1893 and 31 December 1897', 28 October 1898, AJHR, 1898, G-3A.

128. Native Land Laws Amendment Act 1899, s 3.

129. Native Land Laws Amendment Act 1899, s 5.

130. Gisborne to Gillies, 3 December 1870, AJHR, 1871, D-3, p 5.

131. Crown closing submissions (#3.3.407), p 11.

132. Bruce Stirling, 'Eating Away at the Land, Eating Away at the People: Local Government, Rates, and Maori in Northland' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2008) (doc A15), p 67.

133. Province of Auckland Appropriation Act 1869, sch A.

of Whāngārei and all purchased between 1866 and 1872 – were the provincial government's only acquisitions within the inquiry district.[134] Together, the blocks had a combined area of 61,229 acres.[135] However, the destruction of the various deeds of purchase in a fire meant that it was not until after substitute deeds were prepared in 1878 that the Crown (as successor to the provincial government after its abolition in 1876) confirmed its ownership of these six blocks.[136]

The objects of the Crown's purchasing in the north, as McLean described them, were that

> all the kauri forests of any value that could be secured should be secured, and also that agricultural land of good quality should be acquired even in preference to forest land. With regard to forests, I was anxious that the Government should get them, rather than that they should pass into the hands of speculators.[137]

The Crown's newfound determination to resume acquisition of Māori land in Northland from 1872 first manifested itself in the appointment of Thomas McDonnell as a land purchase agent in the region. A former Hokianga-based old land claimant (see chapter 6), McDonnell was given the initial task of following up on an offer to sell the Waoku block to the Crown.[138] But by mid-1873, McDonnell was actively trying to generate sales of land that had not been already offered. He told one group of Māori he encountered that, as they would never make use of all their good land, their best plan was to sell it.[139]

From March 1874, land purchase agent Edward Brissenden and his assistant Charles Nelson took over much of the purchasing work.[140] Brissenden was instructed to direct his attention to large blocks of forest land,[141] and naturally targeted the forested blocks of the Hokianga where the Māori community was already receptive to the idea of purchase and the 'collateral benefits' that might accrue to them.[142] Making prolific use of tāmana, Brissenden and Nelson generated a rush of sales. By August 1874, Brissenden was asserting that he would be able to secure between 500,000 and 700,000 acres in Northland for the Crown – provided it supplied him with enough money to make full payments for blocks as soon as sale

134. Kaipatiki and Onekura were also recorded as provincial government purchases, but both are in the Kaipara: 'Lands Purchased and Leased from Natives in North Island', AJHR, 1885, C-7, p 4.

135. The six blocks in question were Opuawhanga 1, 2, 3, and 4, and Otonga 1 and 2: 'Lands Purchased and Leased from Natives in North Island', AJHR, 1885, C-7, p 4.

136. D A Armstrong, 'Ngati Hau "Gap Filling" Research' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2015) (doc P1), pp 17–19, 21–22.

137. McLean, evidence to Tairua Investigation Committee, 30 September 1875, AJHR, 1875, I-1, p 40.

138. Waitangi Tribunal, *The Te Roroa Report*, Wai 38, pp 55–56; McDonnell to general government agent, 10 July 1872, AJHR, 1873, G-8, pp 17–18.

139. McDonnell to Under-Secretary, Native Department, 7 August 1873, AJHR, 1875, G-7, pp 2–3.

140. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 654–655; Thomas, 'The Native Land Court' (doc A68), p 77.

141. Under-Secretary, Native Department, to Brissenden, 12 March 1874, AJHR, 1875, G-7, pp 7–8.

142. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 637–638.

Category	Area (acres)	Cash paid (£)
Blocks for which negotiations completed	159,635	12,977
Blocks passed Native Land Court, awaiting funds to settle	106,990	1,973
Blocks surveyed, awaiting sitting of Native Land Court	150,267	2,851
Blocks under survey	33,600	533
Blocks awaiting survey, carefully estimated at	100,000	80
Blocks that he 'shall be unable to complete'	3,974	110
Total	554,826	18,524

Table 10.1: Lands negotiated for by Brissenden, year ended 30 June 1875.
Source: Enclosures in Brissenden to McLean, 24 June 1875, AJHR, 1875, G-7, pp 32–34.

terms had been agreed.[143] In just the brief interval between the start of 1875 and Brissenden's dismissal in October of that year (for his role in issuing fraudulent miners' rights in the Hauraki district),[144] the purchase of some 25 Hokianga blocks was completed. Their combined area was almost 97,000 acres.[145] Brissenden had also signed the deed for the purchase of the Pakiri block in 1874, but as some of the trustees he had paid could not legally sell their interests, this purchase was put on hold. It was retrospectively legalised in 1877, and the sole non-seller's interest partitioned out in 1880.[146]

Brissenden prepared a summary of his purchase activities in Northland for the year ended 30 June 1875, which is set out in table 10.1. By any measure, he had embarked upon a very large and well-funded land-purchasing campaign, and achieved impressive results within a remarkably short period.

Using similar tactics to those of Brissenden, land purchase agent Henry Tacy Kemp was able to acquire 58,810 acres in three large blocks (Wairua, Purua, and Tangihua) in the hinterland of Whāngārei during 1875.[147] Meanwhile, J W Preece, who was given the job of completing Brissenden's purchases, secured some 84,000 acres of Mangakāhia land in 1876. Half fell within the huge Opouteke block, where purchasing was made easier by the Native Land Court having awarded most of the

143. Brissenden to McLean, 3 August 1874, AJHR, 1875, G-7, p 17.
144. Waitangi Tribunal, *The Te Roroa Report*, Wai 38, p 59.
145. Figure based on purchase deed dates in Crown purchases index in Barry Rigby, 'Wai 1040 Local Issues Research Programme': Validation Review of the Crown's Tabulated Data' (doc A56), app A.
146. Thomas, 'The Native Land Court' (doc A68), p 62; Maori Real Estate Management Act Amendment Act 1877, ss 2, 8, 9.
147. Thomas, 'The Native Land Court' (doc A68), pp 103–105.

The Northland Timber Trade in the Late Nineteenth Century

A flourishing, settler-controlled kauri export trade developed in the district in the mid-1870s, driven by increasing demand for timber in Auckland (as forests nearer the city became depleted), improved milling technology, and the emergence of companies able to raise the requisite capital.[1] The industry was far from new. Māori in Northland had traded timber with Europeans since the mid-1820s and had initially retained control over the developing trade; according to historian David Alexander, they used their tribal authority to 'dominate' the timber industry while Europeans were their 'supplicants', seeking the chiefs' permission to acquire essentials.[2] By the 1870s, many Māori still ran small felling operations, supplying timber for European holders of railway contracts or squaring timber – work that enabled them to make 'large sums of money', the resident magistrate at Hokianga noted at the time.[3]

However, the timber industry had changed profoundly over five decades. Kauri timber production had become 'the most significant economic activity' in Northland and a major export earner.[4] But, notwithstanding the bush gangs still felling timber for railway sleepers, Māori were now largely sidelined from the industry.[5] It is apparent that the Government was becoming increasingly averse to Māori entrepreneurialism.[6] Two large, modern sawmills were established in Northland – one on Whangaroa Harbour in 1874, and another at Kohukohu, on the Hokianga Harbour, in 1879 – but the land on which these and other mills stood was European-owned, and the timber processed in them came mainly from Crown-owned land. Moreover, the vast majority of logging and milling employees were European – a direct effect of Julius Vogel's immigration scheme, which brought an influx of people who gravitated to jobs in the country's largest industry. Few Māori were employed.[7] With limited scope to engage in the industry they had once dominated, Māori were limited to participating in the few ways still left to them: by leasing their land for timber extraction, selling the standing timber on their land, and selling their timber land outright.[8]

1. David Alexander, 'Land-Based Resources, Waterways and Environmental Impacts' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2006) (doc A7), pp 142–143.
2. Alexander, 'Land-Based Resources, Waterways and Environmental Impacts' (doc A7), p 144.
3. Alexander, 'Land-Based Resources, Waterways and Environmental Impacts' (doc A7), p 145 n
4. Alexander, 'Land-Based Resources, Waterways and Environmental Impacts' (doc A7), p 144.
5. Alexander, 'Land-Based Resources, Waterways and Environmental Impacts' (doc A7), pp 143–145.
6. Alexander, 'Land-Based Resources, Waterways and Environmental Impacts' (doc A7), p 145.
7. Alexander, 'Land-Based Resources, Waterways and Environmental Impacts' (doc A7), pp 143–144.
8. Alexander, 'Land-Based Resources, Waterways and Environmental Impacts' (doc A7), p 146.

But even the ability of Māori to benefit from the lease and sale of their forest land during the kauri boom was hampered. First, the Government stipulated that cutting rights could be leased only on Māori land held under Crown grant, a law to which many Māori objected.[9] Secondly, the market price of timber was driven down by the Crown's willingness to sell its forests cheaply, a consequence of its priority to clear the land to encourage settlement.[10] The Crown's low sale prices thus dictated the price Māori could obtain for their forestry assets.

The sale price of kauri dropped with the global economic downturn of the mid-1880s, leading to loss of work in the industry.[11] In 1889, the Melbourne-based Kauri Timber Company bought up the country's major sawmills, including Kohukohu, along with 1.5 million feet of standing timber on over 300,000 acres of freehold and leasehold timber land. The Kohukohu mill operated for a further 20 years.[12]

9. Alexander, 'Land-Based Resources, Waterways and Environmental Impacts' (doc A7), pp 146–147.
10. Nicholas Bayley, 'Aspects of Maori Economic Development and Capability in the Te Paparahi o Te Raki Inquiry Region (Wai 1040) from 1840 to c 2000' (commissioned research report, Wellington: Waitangi Tribunal, 2013) (doc E41), p 76.
11. Alexander, 'Land-Based Resources, Waterways and Environmental Impacts' (doc A7), p 189; Bayley, 'Aspects of Maori Economic Development and Capability' (doc E41), p 77.
12. Bayley, 'Aspects of Maori Economic Development and Capability' (doc E41), p 74.

land involved to a single owner, Kamariera Te Wharepapa.[148] These Mangakāhia acquisitions were in addition to 25,667 acres of adjacent land already gained when Brissenden completed the Waoku 1 and 2 purchases in 1875.[149] In comparison, between 1874 and 1876 Whangaroa and the Bay of Islands attracted the Crown's attention to a lesser degree. The aggregate areas purchased there were nonetheless still significant, amounting to around 5,700 acres in Whangaroa and 24,200 acres in the Bay of Islands.[150] The latter acreage added to the 19,500-acre Hukerenui (or Touwai) block which had been sold to the Crown in 1873.[151]

Meanwhile, completing Brissenden's purchases remained a sizeable and protracted task. As of June 1876, 16 of the 52 purchases, encompassing an estimated 115,900 acres, had not even been surveyed. In nine of these cases, the survey had been delayed by disputes among competing owners, suggesting that Brissenden's

148. Thomas, 'The Native Land Court' (doc A68), pp 100–102, 111. Figure based on purchase deed dates in Crown purchases index in Rigby, 'Validation Review of the Crown's Tabulated Data' (doc A56), app A.
149. Return of negotiations completed to 30 June 1876, AJHR, 1876, G-10, p 7.
150. Rigby, 'Validation Review of the Crown's Tabulated Data' (doc A56), app A.
151. Thomas, 'The Native Land Court' (doc A68), pp 63, 67.

claim to have carefully established who the owners were in each case was likely untrue.[152]

A full year later, Preece summarised the position of 55 blocks 'North of Auckland':

- Twenty-nine transactions had been completed; the 50,919 acres had been acquired for £5,302 10s (excluding survey and incidental costs) or just over two shillings per acre. Preece recorded that very large payments had been made by way of deposits but that many owners had not participated in them. The average area of the blocks was 1,756 acres.
- A further three transactions were nearing completion.
- Twenty-three transactions were 'incomplete.' Only five involved blocks whose ownership had been investigated by the Native Land Court.
- Of Brissenden's purchases, 30 had been completed and eight – on which no advance payments had been made – had been abandoned.[153]

The 6,050-acre Puketutu and 5,646-acre Manganuiowae blocks, for which purchase deeds were signed in 1877, were the last 5,000-acre-plus blocks the Crown acquired from Brissenden's operations, but the process of completing his transactions continued until at least 1882 when the 2,071-acre Oikura 1 block was finally secured.[154] Brissenden has been described as 'perhaps the most successful and unprincipled' of the Crown land purchase agents working in the north throughout the 1870s, and at least some of the delays in completing his acquisitions likely arose because his 'haste also caused him to cut legal corners'.[155] We comment further on the actions of Brissenden and other Crown purchase agents in section 10.4.2.1.

Crown purchasing during the late 1870s did not end with the finalisation of Brissenden's transactions, however. In late 1876, Māori living in Whāngārei made new offers to sell around 40,000 acres (Taheke, Waitomotomo, Te Ripo, Papakauri, and Omaikao) in the Mangakāhia-Hokianga backblocks.[156] Only a few months earlier, McLean had issued a parting warning that Māori landownership north of Auckland was reaching the threshold beyond which they might not have enough land to meet their future needs. Despite this, Charles Nelson was authorised to engage in a fresh series of purchases throughout 1878 to 1880.[157] At the same time, Nelson also made advance payments to rangatira claiming interests in the 25,000-acre Puhipuhi block, which contained some of the best remaining kauri forest in

152. Preece to Native Minister, 1 June 1876, AJHR, 1876, G-5, pp 1–2.
153. Preece to Under-Secretary, Native Department, 26 June 1877, AJHR, 1877, G-7, pp 1–2.
154. Smith to Brissenden, 12 June 1875, AJHR, 1875, G-7, p 35; 'Lands Purchased and Leased from Natives in North Island', AJHR, 1878, G-4, pp 2–3; 'Lands Purchased and Leased from Natives in North Island', 20 August 1883, AJHR, 1883, C-3, p 3.
155. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 653–655.
156. Berghan, 'Northland Block Research Narratives' (doc A39(h)), vol 9, pp 211–212.
157. Compare 'Lands Purchased and Leased from Natives in North Island', AJHR, 1879, C-4, pp 4, 10–11; 'Lands Purchased and Leased from Natives in North Island', AJHR, 1878, G-4, pp 2–3, 9.

close proximity to Whāngārei (we discuss the title determination in this block in chapter 9).[158]

Thus, the total area of blocks for which purchase was completed from 1875 to 1881 – funded chiefly by Vogel's large-scale borrowing programme, discussed in section 10.3.2.1 – amounted to 432,716 acres. This figure takes into account the former provincial government's purchase of the Opuawhanga and Otonga blocks (representing 61,229 acres) which were confirmed in 1878, and the final acquisition of the Pakiri 2 and 3 blocks (both 9,766 acres in size) which were confirmed in 1881.[159] It should be noted that, to assist its purchasing operations in Te Raki throughout this period, the Crown made extensive use of proclamations under the terms of the Government Native Land Purchases Act 1877 to exclude private competition.[160] The following year, a return on lands proclaimed under the Act recorded that the Opuawhango 1–4 blocks in Whāngārei (amounting to 20,507 acres), the 3,000 acre Motukaraka block and 8,374 acre Tapuwae block in Hokianga were under negotiation.[161] By October 1878, the Crown had issued proclamations notifying that 11 more blocks in the district were under negotiation, including the 20,000 acre Pakiri block in Mahurangi.[162] A further proclamation notifying that the 25,000 acre Puhipuhi block was issued in December 1878. We discuss the further examples of the Crown's use of proclamations in the Hauturu and Puhipuhi purchases in sections 10.4.2.3.2 and 10.4.2.4.3.

10.3.2.3 *The Crown steps back from purchasing: the 1880s*

The influence of John Bryce, and particularly his slashing of Native Department spending in 1879, was evident in the inquiry district from 1882 until 1890. Within this period, the Crown completed the purchase of only 14 blocks, four of which comprised five acres or less (for schools or roading). The combined area of all 14 blocks came to 31,718 acres.[163] This is not the entire extent of purchasing during this period however, as Hauturu (Little Barrier Island) had been 'under negotiation' since 1881, and the Crown had begun acquiring shares in the Parahirahi block

158. Mark Derby, '"Fallen Plumage": A History of Puhipuhi, 1865–2015' (commissioned research report, Wellington: Waitangi Tribunal, 2016) (doc A61), pp 114–115, 121, 139.

159. Figures based on Dr Barry Rigby's validation review of Crown purchase data: Rigby, 'Validation Review of the Crown's Tabulated Data' (doc A56), p 4, app A.

160. For a list of blocks subject to proclamations in 1878, see 'Lands Purchased and Leased from Natives in North Island', AJHR, 1879, C-4, pp 10–11.

161. 'Lands Proclaimend under "Government Native Land Purchases Act, 1877", 31 July 1878, AJHR, 1878, II, C-4, p 1; Lands Purchased and Leased from Natives in North Island', AJHR, 1879, C-4, p 9.

162. The other blocks proclaimed under negotiation in October 1878 included Patumutumu, Mokau 2, Te Whau, Te Mata, and Oikura in the Bay of Islands; and, Otaruru, Pahinu, Huehue 1, Tautehere, and Waitaha in the Hokianga. In addition to these blocks the Pukekauri block in Mangakāhia was proclaimed under negotiation in July 1879: 'Lands Purchased and Leased from Natives in North Island', AJHR, 1879, C-4, pp 10–11.

163. Figure based on purchase deed dates in Crown purchases index and accounts for the 673-acre Waitomotomo 3 block which was also included in the 8,945 acres for Waitomotomo in Rigby, 'Validation Review of the Crown's Tabulated Data' (doc A56), app A.

(which contained the Ngāwhā Springs) in 1886.[164] Of the acquisitions that had been completed, the largest comprised three of the five Puhipuhi partitions (with a combined area of 19,490 acres), which followed the final title determination of the Native Land Court in 1883.[165] Other substantial acquisitions were Waitomotomo 1 and 2 (8,272 acres), where the Crown had its shares partitioned out from the interests of the non-sellers without having made any pre-title payments on the block.[166]

Meanwhile, the limited private purchasing that had occurred throughout the 1870s continued to a lesser extent into the 1880s and beyond. As has been noted already, private purchases accounted for the alienation of 39,884 acres between 1875 and 1884, and a further 4,967 acres between 1885 and 1894 – a far smaller acreage than the Crown had acquired.[167] Again, the largest private purchases were driven by the needs of the timber industry; inland from Whāngārei, for example, Lanigan, a sawmill proprietor at Ngunguru, purchased the 3,396-acre Kopuatoetoe block in 1897, one year after title was awarded to Ngāti Hau and Te Waiariki.[168] Similarly, the Auckland Timber Company acquired the 2,706-acre Kauriputete block in Whangaroa from its Te Uri o Te Aho owners during the early 1880s.[169]

10.3.2.4 *The Liberal Government resumes large-scale land purchasing: the 1890s*

In the years 1891 to 1900, the Crown was able to purchase around 83,493 acres of Māori land within the inquiry district.[170] While this was much less than the acreage purchased during the 1870s, its significance cannot be ignored in light of McLean's 1876 warning about the dwindling sufficiency of Māori land even then. It is also apparent that owners' motivations for selling were often different from what they had been in the 1870s. In the wake of the economic downturns of the 1880s, numerous owners – such as those of Marumaru, Oue 2, and Tarakiekie – had sold land in an effort to alleviate their poverty. Other owners – such as those of Papakauri, Maraekura, and Kaurinui 3 – were driven by the need to pay off survey liens (an ongoing issue that predated the 1890s) or rates demands.[171] It should be

164. Ralph Johnson, 'Report on the Crown Acquisition of Hauturu (Little Barrier Island)' (commissioned research report, Wellington: Waitangi Tribunal, 1999) (doc E8), p 10; Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993* (Wellington: Brooker and Friend Ltd, 2006), pp 40–42.

165. Derby, 'Fallen Plumage' (doc A61), pp 174, 185.

166. Berghan, 'Northland Block Research Narratives' (doc A39(h)), vol 9, pp 213, 215, 222–223; 'Native Land Purchases in the North Island since 1 April 1884', AJHR, 1888, G-2, p 1. Note that Berghan gave the acreages as 8,332 acres and 40 acres as opposed to 8,232 acres and 40 acres.

167. Crown data (#1.3.2(c)); Thomas, 'The Native Land Court' (doc A68); p 132.

168. Berghan, 'Northland Block Research Narratives' (doc A39(c)), vol 4, p 448.

169. Berghan, 'Northland Block Research Narratives' (doc A39(c)), vol 4, p 363.

170. Figure based on purchase deed dates provided by Dr Rigby. However, it should be noted that this figures includes the acreage for Ruapekapeka 7A, for which the purchase date should have read 1899, not 1889. It also includes the total acreage for the Te Awaroa 1A1 block which is partly outside the inquiry district. We also note the Crown's submission that according to Dr Rigby's evidence 'the Crown purchased 81,473 acres in Northalnd in the 1890s': Crown closing submissions (#3.3.407), p 13; Rigby, 'Validation Review of the Crown's Tabulated Data' (doc A56), app A; Berghan, 'Northland Block Research Narratives' (doc A39(g)), vol 8, p 106.

171. Thomas, 'The Native Land Court' (doc A68), pp 203–204; Māori rural lands had been made liable for rates under the Highway Boards Empowering Act 1871: Stirling, 'Eating Away at the Land'

noted that rates on Māori land had become a more pressing issue after the Rating Act 1893 was passed, since these demands were no longer directed by local bodies to the Crown for payment.[172] Likewise, partitioning (and hence, fresh survey costs) increased as more and more owners were awarded interests in the remaining Māori land blocks.[173]

The Liberals' purchasing programme got off to a slow start in Te Raki, with only eight purchases completed in the years 1891 to 1894. Moreover, as noted, the two largest acquisitions – Parahirahi D (4,292 acres) and Hauturu (Little Barrier Island (6,960 acres) – had begun in the previous decade. In terms of shaping what was to come, perhaps the most significant Crown acquisitions in the early 1890s were Kauaeranga (3,672 acres) and Ngaturipukunui (462 acres) to the west of Whāngārei. Originally awarded solely to the Te Parawhau rangatira Te Tirarau (representing all the interests in the blocks), their ownership had since passed on to Taurau Kūkupa and Tito Tirarau. The former was now aging and indebted, and his land agent A R Cooke arranged for the sale of the blocks to the Crown – with the added bonus that Taurau Kūkupa would dispose of other interests to the Crown as well.[174]

The Crown's restoration of pre-emption under the Native Land Court Act 1894 signalled a new push towards land acquisition. It was only in 1895 that the bulk of Crown purchases began in our inquiry district continuing through until 1899. From 1895 onwards, the Crown's dedicated purchaser on the ground in Te Raki was the agent C H Maxwell. He came prepared with schedules of fixed per-acre prices for the blocks that the Crown was interested in acquiring, enabling him to buy shares from individual owners without needing to consult further with other Crown officials (although, in the cases of Rotokakahi and Te Awaroa, the offers had to be increased from four to five shillings per acre).[175]

As we discussed in chapter 9, the Native Land Court began awarding blocks to larger numbers of owners during the 1890s.[176] Unlike the purchasing of the 1870s when Crown agents paid tāmana prior to Court hearings, and as historian Paul Thomas put it, 'set the agenda', purchase blocks during this period were not subject to pre-title arrangements.[177] Furthermore, the Native Land Court Act 1886 had repealed the requirement under the Native Land Act 1873 that alienation restrictions be placed on each memorial of ownership (see section 10.5.2.3). This shift enabled the Crown to once again purchase individual, undefined shares, and subsequently, it could further apply to partition out the interests it had purchased

(doc A15), p 17.

172. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1199.

173. Thomas, 'The Native Land Court' (doc A68), pp 149–151.

174. Thomas, 'The Native Land Court' (doc A68), pp 214–217.

175. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1147–1150; 'Lands Purchased and Leased from Natives in North Island', AJHR, 1895, G-2, p 4.

176. Thomas gave evidence that the court awarded blocks to more than 55 owners on average: Thomas, 'The Native Land Court' (doc A68), p 193.

177. Thomas, 'The Native Land Court' (doc A68), p 194; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1157.

under the Native Land Court Act 1886 Amendment Act 1888 and the Native Land Court Act 1894.[178] Professor Ward commented that this raft of legislation 'streamlined the ways by which Maori land suitable for settler purposes could be identified and prepared for sale'.[179] Thomas gave evidence that 'the most important purchases during this period involved the Crown gradually acquiring the interests of hundreds of individual owners'.[180] Crown officers were assisted in their purchase efforts by the considerable survey and Court costs Te Raki hapū incurred; many of them had already lost much of their land, and there were few ways to pay off these debts apart from selling even more of their interests.[181]

The Crown's purchasing in Te Raki during the 1890s was centered in poverty-stricken areas including Hokianga and Mangakāhia.[182] Although the Crown acquired interests in numerous Whāngārei, Mangakāhia, and Hokianga blocks during this period (including 11 Hokianga blocks in 1897 alone), most comprised less than 1,000 acres; the only purchases of more than 5,000 acres were the partitions Rotokakahi A2 (5,134 acres) and Te Awaroa 1A1 (7,843 acres).[183] But once Taurau Kūkupa had been convinced to dispose of his interests in Mangakahia and Whatitiri, these blocks significantly boosted the acreage that the Crown was able to obtain in the late 1890s. As a result of hundreds of separate payments made by Maxwell to Whatitiri partition owners, the Crown had been awarded 15,780 acres from that block by 1900, supplementing the 11,515 acres it was awarded out of the Mangakahia block in 1896.[184]

10.3.2.5 *Te Raki whānau and hapū expectations of land transactions throughout this period*

As the Crown's purchasing objectives evolved over succeeding decades, so too did the expectations and aspirations of Te Raki whānau and hapū. But at the same time, many retained the fundamental understandings and expectations they had brought to their relationship with Pākehā in the earlier period. As the claimants told us, Te Raki Māori never resiled from their view that selling land did not 'amoun[t] to an "absolute alienation" in a Pakeha sense', that land sales 'never severed that intimate connection with Papatuanuku', and that the trade-off of making available their land to the Crown would be opportunity to participate in a new economic system affording them many benefits – benefits that the Crown had promised would flow to them alongside Pākehā settlement.[185]

178. Thomas, 'The Native Land Court' (doc A68), p 199.
179. Alan Ward, *National Overview*, 3 vols, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997), vol 2, p 247.
180. Thomas, 'The Native Land Court' (doc A68), pp 193–194.
181. Thomas, 'The Native Land Court' (doc A68), pp 201–203.
182. Thomas, 'The Native Land Court' (doc A68), p 201; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1147.
183. Rigby, 'Validation Review of the Crown's Tabulated Data' (doc A56), app A.
184. Thomas, 'The Native Land Court' (doc A68), pp 207, 209–211.
185. Claimant closing submissions (#3.3.213), pp 62–65.

At 1865 the effects of the new Native Land laws, including landlessness, debt, and disintegrating collective decision-making were not yet apparent, and many Te Raki rangatira hoped that the promise of partnership with the Crown, and economic prosperity for settlers and Māori alike, might yet be realised under this new system. At a time when other parts of the North Island were beset by conflict, Te Raki Māori had responded to policies such as Grey's rūnanga (or 'new institutions') positively, seeing this as a chance to participate in their own governance and the wider economy on their own terms,[186] just as they had done in the 1830s. The enthusiasm with which they greeted Grey's rūnanga reflected their wish for townships, as well as their hope for economic development through land settlement, the construction of public works, and the provision of educational and medical services while controlling the pace of alienation of their lands.[187] The *Daily Southern Cross* reported in 1866 that Māori in Whāngārei had 'commenced turning their attention to laying down grass paddocks in several places . . . [A]t Manua, they have given contracts to Europeans to clear, plough, and fence in with posts and rails, forty acres' for pastoral farming.[188] Another example was the March 1870 opening of flax and flour mills (owned by rangatira Hōne Mohi Tāwhai and his son) in Waima in the Hokianga. These mills demonstrated the renewed interest in the flax trade and were also used to grind wheat grown nearby, in the Waima Valley.[189]

To Māori, the main perceived benefit of land transactions, other than the money payment, was that they would promote settlement of the land in question. They also expected the Crown to invest in infrastructure which would facilitate the development of that settlement and of lands that they had retained.[190] When Governor George Bowen and Native Minister McLean toured northern districts in 1870, Te Raki Māori made their expectations clear: they wanted more mills, Pākehā settlers, townships, markets, and roads.[191] Similar representations were made to Governor James Fergusson on his visit to Northland in June 1874.[192] But there were other factors that could also motivate Māori owners to sell land. If they found themselves in difficult financial circumstances, they might decide to sell in order to raise money. Given that they lacked access to the commercial credit that Pākehā enjoyed, such transactions were out of necessity rather than choice.

Te Raki Māori opinion was divided, however, as to how much land should be made available to settlers. A snapshot of Māori views on transactions early in this

186. Vincent O'Malley, 'Northland Crown Purchases' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2006) (doc A6), pp 161–166.

187. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 66, 629.

188. 'Wangarei', *Daily Southern Cross*, 29 June 1866, p 4; see also Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 624.

189. 'Hokianga', *New Zealand Herald*, 17 March 1870, p 4; see also Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 626.

190. Vincent O'Malley, 'Summary of Northland Crown Purchases, 1840–1865' (doc A6(b)), pp 32–34.

191. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 568–569, 624–627.

192. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 892–896.

period comes from the 'Statements of Native Chiefs' collated for Thomas Haultain's report on the working of the Native Lands Acts, written in 1871 before Crown re-entry into the land market. In the opinion of Tāmati Waka Nene, Bay of Islands Māori had not parted with too much of their land, and while he thought that 'they may waste some of the money that they receive', they paid their debts, 'and purchase such things as they want with it'.[193] Based on his experience as an assessor in the Bay of Islands, Hemi Tautari was similarly largely untroubled by the prospect of future purchasing, observing that 'in very few instances' were Māori 'parting with their lands too rapidly or to too great an extent' and that they were getting 'a better price now than when the Government were the only purchasers'.[194] Eru Nehua, on the other hand, thought that more land needed to be reserved from sales, citing one instance where an owner from Te Kapotai hapū had become landless.[195] Meanwhile, Wiremu Pōmare was alarmed that Māori were not just 'selling their lands at too rapid a rate' and were 'anxious to sell more', but were also failing to accumulate the funds their sales had raised.[196]

In this period, perhaps the strongest initial Māori support for opening up land for settlement was to be found in Hokianga where, at the time, Māori outnumbered Pākehā by around 20 to one.[197] Here, initiatives such as the combined flax and flour mill that Hōne Mohi Tāwhai and his son established at Waima in 1870 prompted hopes of an economic resurgence.[198] When Governor Bowen met with Hokianga rangatira in the same year, most speakers uttered expressions of cordiality and friendship; Hōne Mohi Tāwhai, for example, declared that 'I am the brother of the Pakeha.'[199] Rangatira Moetara expressed a desire to 'show my goodwill to the Pakehas, and to encourage them in their flax mills and in getting kauri gum', while Ngakuku concluded his speech by stating that 'I am anxious that this district should be full of Europeans.'[200] Responding to these addresses, Governor Bowen welcomed the prospect of Māori and settlers working together to develop the land, albeit undertaking separate roles in which Maori supplied the resources and Pākehā the capital and expertise:

> I am truly glad that you are co-operating so zealously with the Europeans in developing the rich natural resources of this fair land – I mean, in particular, the flax, the timber, and the kauri gum. In this profitable industry each race is necessary to the

193. Tamati Waka, statement, 26 April 1871, AJHR, 1871, A-2A, p 25.
194. Hemi Tautari, response to questions, undated, AJHR, 1871, A-2A, pp 29–30.
195. Eru Nehua, statement, undated, AJHR, 1871, A-2A, pp 34–35.
196. Wiremu Pōmare, statement, undated, AJHR, 1871, A-2A, p 35.
197. 'Notes of Proceeding during the Visit of His Excellency the Governor to the Ngapuhi Tribes', AJHR, 1870, A-7, p 9.
198. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 626.
199. 'Notes of Proceeding during the Visit of His Excellency the Governor to the Ngapuhi Tribes', AJHR, 1870, A-7, pp 9–10.
200. 'Notes of Proceeding during the Visit of His Excellency the Governor to the Ngapuhi Tribes', AJHR, 1870, A-7, pp 10–11.

other – the Maori to supply the raw material, and the English the mills and manufacture, and to send it away in ships.[201]

Towards the end of the hui, another speaker, Aporo, lent his voice to the call for land settlement at Hokianga, saying, 'Bring Europeans! There is plenty of land here for them.'[202]

Over the next few years, other Hokianga and Mangakāhia landowners likewise expressed interest in selling their lands for the purposes of inducing settlement. Superintendent, and MHR for Auckland West, Thomas Gillies, wrote that he had received several offers from Māori wanting 'to encourage European settlement in the district' when he visited Mangakāhia in his official capacity in February 1873.[203] Two months later, Hokianga's resident magistrate, Spencer von Sturmer, noted 'the great desire of the whole of the Native people for the settlement of Europeans amongst them'. Von Sturmer went on to observe that the Karuhiruhi block at Whirinaki, one of only two large Crown purchases in 1872, 'was sold by the Native owners under the idea that it would be speedily laid out in farms and settled upon'.[204] When Governor Fergusson toured Northland in 1874, the same desire for settlement and infrastructure was again expressed by rangatira he met at Hokianga, with Henry Tacy Kemp recording that they had 'urged the extension of Native schools, and the establishment of a special settlement for the purpose of increasing the trade and commerce of the district'.[205]

Crown agents were keen to appeal to Māori expectations that land sales would be followed by settlement; and what was once informal encouragement now increasingly resembled official strategy. When, in mid-1873, McDonnell needed to deter Mangakāhia owners from accepting higher offers from private bidders, he did so by stressing that the land sold to speculators would be 'locked up'. But if they sold their lands to the Crown instead, they 'would derive a great and permanent benefit from the settlers who would be sent to occupy them'.[206] Likewise, H T Kemp persuaded Te Tirarau and other rangatira in January 1874 that they should make land available for immigrants on both sides of a new road the Crown was building, thereby 'promoting generally the development of the resources of the country, the benefits of which were now felt and enjoyed by both races alike'.[207] In his speech at Hokianga in 1874, Governor Fergusson applied further pressure

201. 'Notes of Proceeding during the Visit of His Excellency the Governor to the Ngapuhi Tribes', AJHR, 1870, A-7, p 12.
202. 'Notes of Proceeding during the Visit of His Excellency the Governor to the Ngapuhi Tribes', AJHR, 1870, A-7, p 12.
203. Superintendent Gillies to general government agent, 11 February 1873, AJHR, 1873, G-8, p 19.
204. Von Sturmer to McLean, 28 April 1873, AJHR, 1873, G-1, pp 2–3.
205. H T Kemp to Under Secretary, Native Department, 2 June 1874, AJHR, 1874, G-2, p 4.
206. McDonnell to Dr Pollen, 2 June 1873 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 758).
207. Kemp to Native Secretary, 5 January 1874 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 760–761).

on Māori to sell their lands, pointing out that they 'had in their hands the means of obtaining the advantages of European settlement by selling sufficient lands to induce it, but if they did not do so they could not receive the contingent advantages'.[208] Evidently, these messages had some success. In his 1876 statement to Parliament on North Island land purchases, Donald McLean observed: 'Appeals have on more than one occasion been made by the Natives to have these lands peopled by an English population, and they have readily disposed of some of the best of their lands to induce European settlement.'[209]

It is not surprising then, that the failure of the Crown to open up purchased lands to settlers led to frustration and disillusion among those who had once regarded land sales as a means to bring prosperity to both Māori and settler communities in the near future. In 1876, von Sturmer advised the Native Department that Māori living at Hokianga continued 'to express great anxiety for the introduction of European settlers amongst them'.[210] He made similar comments in 1879: Māori, he wrote, had insisted that 'when they sold large blocks of land to the Government it was held out, as an inducement to sell, that Europeans would settle amongst them: this, they say, has not taken place.' Thus, Māori were seeking the establishment of a special settlement so that 'the promise made by the agents of the Government who purchased the land [might be] fulfilled'.[211] There is evidence, however, that the Crown deliberately frustrated the possibility of Māori accessing any benefits from the rise in prices that settlement might bring. In January 1874, H T Kemp wrote to the Native Department in an effort to prevent the Crown from missing out on the full increase in land value that would follow road building and settlement. Kemp urged the department to ensure that nothing more than bridle tracks would be constructed through Māori land that the Crown proposed purchasing.[212] Native Secretary Clarke annotated Kemp's letter with the words 'Kemp is right', indicating the Native Department approved this approach.[213] In May 1880, von Sturmer noted among Māori an increasing distrust of Europeans and a growing disposition to resist selling land, both to the Crown and to private individuals.[214] By this time, then, many Māori appear to have decided that the Crown's promises of material benefits were empty (see chapter 11, section 11.4).

By the early 1890s, when the Liberals sought to resume large-scale purchasing in the region, Te Raki Māori had developed an even more negative perception of Crown purchase activity. This can be seen in the growing influence of the Kotahitanga movement and its promotion of boycotts of the Native Land Court

208. Governor Ferguson, 26 May 1874 (Armstrong and Subasic, supporting papers, 15 vols (doc A12(a),)),), vol 10, p 2:1718).
209. 'Statement relative to Land Purchases, North Island', undated, AJHR, 1876, G-10, p 1.
210. Von Sturmer to Under-Secretary, Native Department, 11 May 1876, AJHR, 1876, G-1, p 19.
211. Von Sturmer to Under-Secretary, Native Department, 26 May 1879, AJHR, 1879, G-1, p 2.
212. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 758.
213. H T Clarke, annotation dated 15 January 1874 (Berghan, supporting papers, 6 vols (doc A43), vol 1, p 65).
214. Von Sturmer to Under-Secretary, Native Department, 7 May 1880, AJHR, 1880, G-4, p 2.

(including the surveying and selling of land).[215] Such tactics emulated Ngāti Hine's rohe pōtae, which had held strong under the leadership of Maihi Parāone Kawiti (see chapter 11, section 11.4.2.5).[216] A sense of disillusion was also expressed during the hui at Waima which formed part of Premier Richard Seddon's nationwide tour in 1894. In relation to the Native Land Purchase and Acquisition Act 1893, Pene Taui complained that 'The Natives have no jurisdiction over the land now. The Government can buy where they see fit'; while the other main speaker, Wiremu Komene, queried why the Crown needed to purchase even more of the 7,000,000 acres remaining in Māori ownership throughout the country when 10,000,000 acres of Crown land remained unused.[217]

In reply to Komene, Seddon appeared insensitive to these concerns. He pointed to the rapidly increasing demand for land for settlement purposes, driven by high levels of immigration.[218] Some South Island settlers were now having to sell land back to the Crown so that it could be better utilised; he said it would therefore be unfair to leave Māori north of Auckland with 600,000 acres of land that had not been passed through the Native Land Court. The longer it remained in that state – uncultivated and unimproved due to ongoing uncertainty over its ownership – 'it means no one will go near it and the longer the titles are unascertained the greater the danger to the Natives', Seddon insisted. He reminded his audience that most of the land the Crown had purchased in the north to date 'is of very inferior quality. You have always taken care to sell us gum-land. We cannot put people on such land' – a comment that neatly sidestepped the fact that the price the Crown had paid for this 'very inferior' land did not include the value of the premium resource that stood on it.[219] Seddon also addressed Wiremu Komene's question about the rights of non-sellers to resist a proposed sale by simply asserting that 'majorities must rule'.[220]

In our view, Seddon's response was unlikely to have been well received by Hokianga Māori who could point to their significant contribution of land during the 1870s, when they transacted their timber lands with the Crown and private interests. They had seen the arrival of timber mills during this period, and Hokianga Māori were potentially able to derive income from squaring timber and bush work with the mill opening in Hokianga at Kohukohu in 1879. However, their expectations of ongoing participation in the booming timber trade were frustrated as immigration increased during the 1870s. Māori were pushed to the margins

215. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1284–1286, 1305.

216. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1285; Peter Clayworth, 'A History of the Motatau Blocks, c 1880-c 1980' (commissioned research report, Wellington: Waitangi Tribunal, 2016) (doc A65), p 53.

217. 'A Narrative of the Premier's Trip through the Native Districts of the North Island', AJHR, 1895, G-1, pp 26–28.

218. 'A Narrative of the Premier's Trip through the Native Districts of the North Island', AJHR, 1895, G-1, pp 26–28.

219. 'A Narrative of the Premier's Trip through the Native Districts of the North Island', AJHR, 1895, G-1, p 28.

220. 'A Narrative of the Premier's Trip through the Native Districts of the North Island', AJHR, 1895, G-1, p 29.

of the industry they had once controlled, unable to maintain their incomes as an increasingly European workforce came to dominate the mills and the bush gangs (see earlier sidebar on the Northland timber trade in the late nineteenth century).[221] David Alexander gave evidence that once the large mills were established, they relied heavily on timber from Crown-owned land, which it sold for low prices limiting the revenue Māori could generate from leasing their lands for this purpose. As a result, Māori were 'bypassed and, except where timber cutting rights on Maori owned land were required, largely irrelevant to the industry'.[222] The timber lands that had been purchased had either been cleared or were controlled by the Kauri Timber Company, which Alexander commented 'acquired many, indeed most, of the sawmills and their associated bush contracts in Northland'.[223] Overall, the Crown retained some 206,000 acres of unoccupied land in Hokianga at 1890 and had offered Hokianga Māori very few economic opportunities.[224] As historian Dr Nicholas Bayley observed, because of the limited economic opportunities available over this period, 'gum digging became an essential component of Maori economic survival from 1870 onwards'.[225] In all, although Māori were increasingly critical of the effects of the Native Land Court and Crown purchase practices, their options, other than further sale, were increasingly limited.

10.3.3 Conclusions and treaty analysis

The Crown and Te Raki hapū had fundamentally different expectations and objectives for the alienation of land in the latter part of the nineteenth century. The Crown wanted to create a purchasing system that would expedite large-scale acquisition of Māori land for Pākehā settlement without (in the words of Native Minister McLean) causing 'any risk of disturbance or revival of feuds'.[226] It sought to construct a new society and economy, free of the constraints Māori 'communalism' was believed to impose. Conversely, hapū wanted to keep a substantial proportion of their lands while also entering into a partnership with the Crown to facilitate settlement and the development of those lands they retained.

The speed with which the Crown achieved its objective of acquiring large areas of land in Te Raki between 1872 and 1875 illustrates the small regard officials had for Te Raki Māori expectations during this period. As we have discussed, the colonial Government had incurred significant debts in order to pursue a policy of settlement and development. To service these debts, the Crown expected to maximise its return on land purchased by ensuring it acquired land ahead of any developments that could raise prices.[227] The Crown relied on paying low prices and targeted lands bearing valuable resources, such as kauri, which could bolster

221. Alexander, 'Land-Based Resources, Waterways and Environmental Impacts' (doc A7), pp 143, 150, 179; Bayley, 'Aspects of Maori Economic Development and Capability' (doc E41), p 76.
222. Alexander, 'Land-Based Resources, Waterways and Environmental Impacts' (doc A7), p 144.
223. Alexander, 'Land-Based Resources, Waterways and Environmental Impacts' (doc A7), p 190.
224. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1030.
225. Bayley, 'Aspects of Maori Economic Development and Capability' (doc E41), p 77.
226. McLean to McDonnell, 30 November 1871, AJHR, 1873, G-8, p 17; see also section 10.4.2.1.
227. Vogel, 'Financial Statement', 28 June 1870, AJHR, 1870, B-2, p 13.

its returns. To meet its objectives, the Crown appointed agents, such as Brissenden and Kemp, directing them to acquire large blocks of forest land.[228] In contrast to pre-1865 arrangements, Crown agents also faced competition from private purchasing during this period, until the Government Native Land Purchase Act 1877 empowered the Crown to exclude private competition.[229] Another strategy adopted by Crown purchasing agents was to make advance payments, or tāmana, ahead of Native Land Court title determinations (we discuss tāmana and the purchasing practices of Crown agents further in section 10.4).

Te Raki Māori also supported further settlement in the district and sought to restore their economic partnership with the Crown. During the 1870s, Crown agents used the promise of development and economic benefits to induce Māori to enter into transactions with them, despite the higher prices offered by private purchasers. Many whānau and hapū held fast to the hopes and expectations – especially of retaining an ongoing relationship with their land – that had initially encouraged them to seek a mutually beneficial relationship with the Crown and shared prosperity going forward. However, when these benefits failed to materialise – and in the face of uncontrolled and apparently unstoppable processes unleashed by the Crown's Native Land legislation – Te Raki Māori lost faith in the Crown's promises. In 1874, Maihi Parāone established a rohe pōtae over Ngāti Hine territories, prohibiting the operation of the Native Land Court there, as well as surveys and land sales.[230] That year, Hōne Mohi Tāwhai and others petitioned the House seeking the repeal of the Native Land Act 1873. Further petitions were made in 1876 by Hirini Taiwhanga, Maihi Parāone Kawiti, and others; and in 1877, again by Tāwhai.[231] The latter sought to repeal existing Native Land Acts, an end to Crown purchasing, replacement of the new Native Minister John Sheehan, and establishment of 'clear laws, which will result in the union of the two races'.[232] We discuss these initiatives in detail in chapter 11.

Towards the end of the 1870s, the Crown began to consider paring back its land purchasing programme in Te Raki, aware that landlessness was becoming a real prospect for some Te Raki Māori communities. As Minister McLean told Parliament in 1876, in light of 'the large extent' of Māori land the Crown had purchased there already and recent representations made to the district officer about the quantity of land remaining to Māori – and with 'regard being had to the wants of the Natives' – the question of whether the Crown should acquire more Māori land in the district needed consideration.[233] The move to scale back purchasing in the district gained more momentum when the Government introduced its policy

228. Under-Secretary, Native Department, to Brissenden, 12 March 1874, AJHR, 1875, G-7, pp 7–8; McLean, evidence to Tairua Investigation Committee', 30 September 1875, AJHR 1875, I-1, p 40.

229. For a list of blocks subject to proclamations in 1878, see 'Lands Purchased and Leased from the Natives in North Island', AJHR, 1879, C-4, pp 10–11.

230. Peter Clayworth, 'A History of the Motatau Blocks' (doc A65), p 53.

231. Armstrong and Subasic, 'Northland Land and Politics' (doc A12), pp 695–696, 861, 865, 867.

232. Maihi P Kawiti and 269 others, petition, AJHR, 1876, I-4, p 27 (cited in Armstrong and Subasic, 'Northland Land and Politics' (doc A12), p 863).

233. 'Statement relative to Land Purchases, North Island', undated, AJHR, 1876, G-10, p 1.

of fiscal restraint and slashed Native Department spending in 1879 – a development that meant there were now few prospects that the Crown's earlier promises of economic benefits for Māori would be fulfilled. As we discuss in chapter 11, Te Raki Māori would increasingly turn to advocacy for self-government and recognition of their treaty rights during this period. When the Liberal Government once more resumed a large programme of land purchasing in the 1890s, its priority was again to open Māori land for settlement. It paid little heed to the proposals of the Kotahitanga parliaments until 1899 (see chapter 11, section 11.5) nor to the growing Māori landlessness that had been widely articulated, including in Parliament two decades earlier.[234]

In our view, the Crown's purchasing policy in the latter part of the nineteenth century primarily sought to secure land for Pākehā settlers to utilise and develop, despite the rhetoric of the two races joining together in this endeavour, and prosperity resulting for both through the process of title conversion and land sale. In response to economic pressures beginning in the 1870s, the Crown sought to strengthen its position as purchaser of Māori land (by granting itself monopoly powers). Correspondingly, the Crown took measures during this period to limit or restrict the ability of Te Raki hapū to exercise their rights as the owners of land (and weakened protections Māori had been able to secure) as we discuss further later. In these ways, the Crown failed or declined to recognise that empowering itself as land purchaser disempowered Māori as owners and vendors. We also note that by strengthening its position as purchaser, the Crown enhanced its obligation to actively protect the interests of Māori. However, the Crown's real concern was promoting economic growth through a single-minded quest to make Māori land available for settler use and finance further development with the proceeds. Successive Governments pursued this goal with little concern for the rights and interests of their treaty partner and despite the determined efforts of Māori leaders, such as Hōne Heke Ngāpua (MHR Northern Māori), who saw it as his 'duty, on every occasion possible to call the attention of honourable members to the different treatment accorded to the Natives from that which is given to Europeans.'[235] Instead, the Crown targeted Māori owners as a source of cheap land it could readily acquire to fund the colony.

Accordingly, we find that:

- By returning to land purchasing in the 1870s for the purpose of expediting Pākehā settlement, and doing so at the expense of Te Raki Māori rights to retain and develop large parts of their land within a mutually beneficial relationship, the Crown breached te mātāpono o te houruatanga/the principle of partnership, and te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development, as well as te mātāpono o te tino rangatiratanga.

234. For example, the Native Land Court Act 1894 made some provision for collective management of land by incorporated owners: Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, p 366. Armstrong and Subasic, 'Northland Land and Politics' (doc A12), pp 1304–1305.

235. 'Land for Settlements Bill', 3 October 1895, NZPD, vol 91, p 104.

- By assuming and imposing land purchase monopoly powers under the Government Native Land Purchase Act 1877 without the consent of Te Raki Māori and in the face of opposition, the Crown acted inconsistently with its duty to engage with Māori in good faith, in breach of te mātāpono o te houruatanga/the principle of partnership.
- By unilaterally reimposing Crown pre-emption through the Native Land Court Act 1894 in the face of express Te Raki Māori opposition and without adequate engagement with Te Raki hapū, the Crown breached te mātāpono o te houruatanga/the principle of partnership.
- By reimposing Crown pre-emption, the Crown denied Te Raki Māori potential benefits associated with a market in land. Its reimposition restricted the ability of Māori to develop and transfer their land in a way that other landowners were not subject to. This breached te mātāpono o te mana taurite/the principle of equity. Moreover, re-asserting its right to pre-emption actually heightened the Crown's obligations to protect the rights and interests of Māori landowners. Its failure to do so was thus a breach of te mātāpono o te matapopore moroki/the principle of active protection and te mātāpono o te kāwanatanga.
- By failing, through its legislation and policy, to promote land settlement opportunities and collateral benefits for Te Raki Māori equivalent to those afforded to Pākehā settlers, as promised, the Crown breached te mātāpono o te mana taurite me te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of equity and the principle of mutual benefit and the right to development.

10.4 Were on-the-Ground Purchasing Practices Consistent with the Crown's Treaty Obligations?

10.4.1 Introduction

In this section, we examine *how* purchasing was conducted, whether the Crown was aware of any difficulties Māori experienced because of the methods its agents employed, its response to any such problems, and whether the interests of Māori were effectively protected throughout the purchasing process.

Claimant counsel alleged that the Crown placed 'insurmountable pressure on hapū and Te Raki Māori to alienate their lands'.[236] The claimants argued that the Crown's purchasing practices fuelled conflict over customary rights and payments, which became more frequent as the Native Land Court system replaced the rūnanga and existing tribal structures. The use of tāmana, instances of individual owners acting without the authority of the collective, and boundary issues resulting from incorrect surveys (see chapter 9, section 9.7) all served to exacerbate disputes.[237] The claimants also submitted that the Crown's Native Land regime exposed Te Raki hapū to unscrupulous purchase practices and increased Māori

236. Claimant closing submissions (#3.3.213(a)), p 5.
237. Claimant closing submissions (#3.3.213(a)), p 12.

indebtedness.[238] The Crown, they submitted, employed aggressive tactics in an effort to pressure them into selling, failed to identify all owners before commencing purchase negotiations, negotiated with those willing to sell but disregarded the wishes of those unwilling to do so, conducted surveys in the face of Te Raki hapū opposition, and sometimes encouraged conflict between Māori.[239] Claimants drew particular attention to the conduct of Brissenden, the Crown purchase agent who acquired 231,552 acres on its behalf between 1875 and 1876 alone.[240]

The widespread practice of agents promising 'collateral benefits' to Māori who agreed to sell their land was another questionable tactic highlighted by claimants and researchers. According to Armstrong and Subasic, these promises were 'remarkably similar to the inducements held out to Northern Māori by Kemp in the pre-1865 Crown pre-emption period'.[241] As Māori had legitimate expectations of receiving the benefits they were promised, claimants said the Crown had an obligation to create circumstances that would enable Māori to achieve economic success once the Crown acquired their lands. They said the Crown failed to meet this obligation and used these inducements only to acquire land as cheaply as possible.[242] Little was done to ensure that the benefits held out to Māori actually materialised. On the question of pricing, claimants submitted that the Crown paid their tūpuna unfair prices and continued to sell land it had acquired from Māori for prices far exceeding those paid to them.[243] The Crown, they say, knowingly offered Māori much less than the true value of their lands. The Crown's purchase of Puhipuhi was cited as an example.[244]

Despite section 75 of the Native Lands Act 1865 making the payment of tāmana void, the claimants said that the Crown continued to use this prejudicial tool, in the absence of Crown pre-emption, to tie up lands in the Native Land Court and remove them from the purview of private purchasers.[245] The claimants submitted that tāmana often resulted in payments to the 'wrong people, and gave no option for non-sellers' interests to be heard'.[246] This occurred because tāmana was paid before the Native Land Court had determined ownership.[247] Claimant counsel

238. Claimant closing submissions (#3.3.213(a)), pp 11–12.

239. Claimant closing submissions (#3.3.213(a)), p 17; see also Waitangi Tribunal, *The Ngāti Kahu Remedies Report*, Wai 45 (Wellington: Legislation Direct, 2013) for discussion about Otangaroa.

240. Claimant closing submissions (#3.3.213(a)), p 14; Rigby, 'Validation Review of the Crown's Tabulated Data' (doc A56), p 4.

241. Claimant closing submissions (#3.3.213), p 39.

242. Claimant closing submissions (#3.3.213), p 39; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 954.

243. Claimant closing submissions (#3.3.213), p 51; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1029–1030.

244. Claimant closing submissions (#3.3.213), pp 37–38; Derby, 'Fallen Plumage' (doc A61), pp 154–155.

245. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 412 (cited in claimant closing submissions (#3.3.213), p 26).

246. Claimant closing submissions (#3.3.213), p 26; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 412.

247. The claimants cite the Crown statement of position and concessions to support this (#1.3.2), p 129.

submitted that tāmana was 'a particularly sinister purchase practice' which private purchasers, provincial agents, and Crown agents alike, used to acquire more land from Māori.[248] Further, the claimants submitted that tāmana was often paid before the final price had been determined. They again pointed to the alienation of the Puhipuhi block, discussed also in chapter 9, as a case in point.[249] The Mane Hotere claimants submitted that, even though it was tāmana paid by a private purchase agent that initiated the unhappy chain of events that followed, the Crown 'was directly responsible for permitting such practices' – which were, moreover, commonplace among its own agents.[250]

In response to these claimant arguments, the Crown conceded that it failed to ensure Te Raki hapū and iwi retained land required for their maintenance.[251] But Crown counsel contested many of the more specific allegations concerning its purchasing programme, the policies that it implemented, and the practices it employed.

For example, the Crown argued that land purchase agents were repeatedly cautioned over the use of tāmana, although counsel acknowledged it was 'a standard feature' of Crown purchase practice in Northland.[252] Crown officials censured agents who misused such payments, engaged in unscrupulous dealings, or failed to comply with the requirements of the Native Land Act 1873. Brissenden (whose activities the claimants especially condemned) had been removed from his post after just two years, counsel noted. Moreover, in 1879 the Government ordered that the practice of tāmana cease. Finally, Crown counsel rejected any suggestion that advance payments encouraged the Native Land Court to award title to those who had received tāmana. In fact, counsel argued, purchasing agents consulted with rangatira with the aim of confirming the strength of the claims of those offering to sell.[253] In the view of Crown counsel, claimants had based their conclusions about the use of tāmana on the high correlation between those who received advances and those to whom the land was awarded; but the Crown argued correlation was not causation.[254]

The Crown thus concluded that the use of tāmana payments in Northland 'did not demonstrate unfair dealing or a breach of the treaty'.[255] Counsel argued that the payments 'did not prevent a sale occurring on a collective basis', and that 'they were void and unenforceable at law, so the Crown had little recourse if an agreed sale was later repudiated'.[256] Rather, down payments were employed in an effort to

248. Claimant closing submissions (#3.3.213), p 26.
249. Claimant closing submissions (#3.3.213(a)), p 16; see also Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 662; Derby, 'Fallen Plumage' (doc A61), p 144.
250. Closing submissions for Wai 974 (#3.3.245), p 14.
251. Crown closing submissions (#3.3.407), pp 3–4.
252. Crown closing submissions (#3.3.407), p 25.
253. Crown closing submissions (#3.3.407), pp 25–28.
254. Crown closing submissions (#3.3.407), pp 27–28.
255. Crown closing submissions (#3.3.407), p 7.
256. Crown closing submissions (#3.3.407), p 7.

'facilitate the purchase of large continuous tracts of land for orderly settlement'.[257] The Crown did not explain how tāmana 'facilitated' purchase in this way; however, it did acknowledge that tāmana had 'the potential to disadvantage Northland Māori'.[258] Nonetheless, the Crown claimed that the Governments of the day took steps to ensure that the practice was not abused.[259] In other words, tāmana, suitably employed, had a valid and proper role to play in land purchasing, and indeed the Crown argued that 'in principle, there was nothing inconsistent with the treaty in offering advance payments to these rangatira'.[260]

Concerning the prices paid for hapū land, the Crown noted the difficulties involved in establishing what was 'fair'. It argued that comparisons between private purchase prices and those paid by the Crown failed to recognise the differences in land quality between the two types of purchase being undertaken. Private purchasers generally selected high-quality land, whereas the Crown purchased land of variable quality in large blocks. The Crown therefore maintained that 'each transaction requires a case-by-case assessment'.[261]

On the matter of land sufficiency, the Crown conceded 'that it did not have a system to ensure that Northland Māori retained sufficient land for their present and future needs'. The Crown also accepted that its failure to offer any definition of what constituted 'sufficient land' was a breach of the treaty.[262]

With respect to leasing, the Crown described Te Raki hapū as 'often willing' to lease land for gum and timber extraction purposes; this accounted in part for their strongly adverse response to the Crown's reassertion of pre-emption in 1894. Insofar as the leasing of papatupu land was concerned, the Crown noted it was the responsibility of Māori to protect their own interests.[263] On the other hand, legislative protections had been put in place with respect to the leasing of land that had passed through the Native Land Court. Section 74 of the Native Lands Act 1865 provided that any lease had to be interpreted to the lessor, and executed in the presence of and attested by a judge or justice of the peace. Under the Native Lands Frauds Prevention Act 1870, leases of lands that had passed through the Native Land Court had to be approved by a trust commissioner. In addition, section 59 of the Native Land Act 1873 required the Court to satisfy itself of the fairness and justice of the transaction, the rents payable, the assent of all owners, and the appointment of rent receivers. Such provisions, the Crown argued, were intended to prevent Māori from entering into unfair or unreasonable leases, although compliance with lease terms and conditions was not subsequently monitored.[264]

257. Crown closing submissions (#3.3.407), p 26.
258. Crown closing submissions (#3.3.407), p 26.
259. Crown closing submissions (#3.3.407), pp 26–27.
260. Crown closing submissions (#3.3.407), pp 7, 26, 28.
261. Crown closing submissions (#3.3.407), pp 28–29.
262. Crown closing submissions (#3.3.407), pp 4, 35, 42, 44.
263. Crown closing submissions (#3.3.407), p 36.
264. Crown closing submissions (#3.3.407), pp 36–38.

10.4.2 Tribunal analysis

10.4.2.1 *The practices of the Crown's land purchase agents*

We have already encountered Thomas McDonnell, H T Kemp, Edward Brissenden, Charles Nelson, and J W Preece who, at various times throughout the 1870s, were all engaged by the Crown as land purchase agents in the Te Raki inquiry district. In 1875, Native Minister McLean reported that when the Government was preparing to initiate its new programme, it had 'found itself with scarcely any officers of experience to carry out the delicate work of land-purchase negotiations'. Discovering that most seasoned agents had been employed by private purchasers, the Crown found it 'expedient to make terms with the most active and successful of [them], and offer them inducements to enter the Government service'.[265]

In theory, the Crown's purchasing agents should have acted in concert with each other. Doing so might have assisted Māori in some way (by achieving greater clarity about boundaries, for example) but it might also have exclusively benefited the Crown (if the agents had jointly agreed on a low price, for example, placing Māori in a very difficult negotiating position). In any event, the separate deployment of agents across the inquiry district, and the difficulties of communicating their dealings to one another and to the Native Department, worked against maintaining a common negotiating position. The Native Department was most alarmed by the potential for agents to end up bidding against each other, with one official noting in April 1874, that 'some instructions should be given to all of them or they [will] cut each other's throats'.[266] The relationship deteriorated between McDonnell and Brissenden, for example, after Brissenden was allowed to take over most of the purchasing (further incentivised by his moving from a salary to a per-acre commission), after which McDonnell's services as a land purchaser were dispensed with altogether.[267] Brissenden had first suggested to McLean in September 1874 that payment on commission would give him the 'confidence to proceed vigorously',[268] and the following month Brissenden was advised that he would be paid twopence for every acre to which the Government secured a clear and undisputed title.[269] McLean confirmed the arrangement in January 1875, although according to Armstrong and Subasic, he was reluctant to do so, apparently concerned that were Brissenden paid on commission, he would not give adequate attention to Māori interests nor to ensuring adequate reserves were set aside.[270]

McLean appears to have issued few instructions to agents, which is consistent with his earlier stance throughout his 1850s purchasing programme (we discuss McLean's operation of the Native Land Purchase Department during the 1850s in

265. 'Statement relative to Land Purchases, North Island', 30 June 1875, AJHR, 1875, G-6, p 2.
266. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 652–653.
267. H T Clarke to McDonnell, 15 August 1874, AJHR, 1875, G-7, p 18; McDonnell to H T Clarke, 9 June 1875, AJHR, 1875, G-7, p 31.
268. Brissenden to McLean, 4 September 1874, AJHR, 1875, G-7, pp 13–14.
269. St John to Brissenden, 30 October 1874, AJHR, 1875, G-7, p 19.
270. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 45.

chapter 8).[271] Nevertheless, McLean conveyed some of his expectations in a letter he sent McDonnell in late 1871 (when the latter was acting as a purchasing agent in the Whanganui region), and then re-sent in October 1873. McLean emphasised that 'careful inquiry should be made among the Native owners' to ensure that acquisitions could be completed without causing disturbances or the revival of feuds. McLean also required agents to make a full report on the potential of the land to be purchased, to supply a rough sketch identifying the boundaries, and also to report on any reserves that were required.[272] McDonnell's initial correspondence suggests he was attempting to comply with some of these directions, more particularly those of direct benefit to the Government. For instance, in his April 1873 report on the Omahuta block, he described meeting Hōne Mohi Tāwhai and other owners at Herd's Point, Rāwene; he noted the large quantity of first-rate kauri timber and kauri gum at hand, and concluded his report by listing the block's boundaries. His summary was silent on other matters McLean had asked his agents to report on, such as any requirements for reserves.[273]

McLean's directions gave no advice on fixing prices. However, in his early correspondence with McLean, McDonnell noted what price Māori owners were seeking for particular areas of land and what he thought that the Crown should offer (which was invariably much less).[274] In short, McDonnell was seeking an endorsement of the price that should be offered, or alternatively a maximum offer beyond which the Native Department was not prepared to go. The department still had ultimate control over the amounts being spent by its agents as it only forwarded the final payments needed to complete transactions after all terms, including the area to be purchased, had been agreed with the sellers.[275]

Generally, during the 1870s Crown purchase agents made tāmana payments to presumed landowners as a way to lock in sales even before the Native Land Court had determined title to the land in question.[276] Brissenden told the Native Land Purchases Committee of the Auckland Provincial Council in May 1875: 'We are in the habit of paying deposits on all blocks under negotiation.'[277] The remainder of the purchase price would then be settled after the Native Land Court had determined the ownership and a survey to determine the area had been completed (we discuss specific purchases involving the use of tāmana in section 10.4.2.3).

McLean expressed some caution about the payment of advances where ownership was contested. In November 1871, he issued a circular that emphasised

271. Brissenden to McLean, 18 March 1874, AJHR, 1875, G-7, p 8; Brissenden to Clarke, 8 April 1874, AJHR, 1875, G-7, p 9.

272. McLean to McDonnell, 30 November 1871, AJHR, 1873, G-8, p 17; McLean, instructions, November 1871, AJHR, 1875, G-7, p 7.

273. McDonnell to general government agent, 7 April 1873, AJHR, 1873, G-8, p 21.

274. McDonnell to general government agent, 24 December 1872, 11 February 1873, 26 February 1873, 7 March 1873, 7 April 1873, AJHR, 1873, G-8, pp 18–21.

275. See Brissenden's observation on the belated nature of payments: Brissenden to McLean, 3 August 1873, AJHR, 1875, G-7, pp 16–17.

276. This description echoes the Tribunal's analysis in the *Te Roroa* report, one of the first inquiries to address tāmana: Waitangi Tribunal, *Te Roroa Report*, Wai 38, p 59.

277. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 699.

the importance of agents being certain of the land ownership first so that transactions might be completed 'without incurring the chance of any future trouble or disagreement'.[278] He also wanted to avoid paying tāmana that might be lost if the recipient's ownership of the land in question was not eventually established – a concern that would be shared by Native Ministers who succeeded him. But McLean's purchase agents largely ignored his instructions and were prepared to risk the loss of the tāmana, knowing that private purchasers also sought to persuade Māori to discharge any debts through the sale of land.[279] There is evidence that Crown purchasing agents were confident that Māori would not repudiate tāmana payments;[280] evidence of the importance of mana and the strengthening of relationship with the Crown in the act of selling. Agents might also attempt to transfer tāmana payments onto other lands as a security against the interests Māori held in various blocks.[281]

In May 1875, Brissenden testified to the Auckland Provincial Council's Native Land Purchase Committee that he undertook 'careful enquiry amongst the principal Chiefs' to ensure that advances were paid to those with rights to dispose of the blocks concerned.[282] As we noted earlier, this statement seems questionable; certainly, the pace at which Brissenden was working throws doubt on the claim. By the spring of 1874, he was initiating purchases at the rate of three blocks per week. Speaking later of this period, agent H T Kemp told a magistrate that he had become aware of 'the reckless manner in which Mr Brissenden, assisted by Mr Nelson, paid money by way of advance to Natives having small or no interest in lands'.[283] In the case of Omahuta (discussed more fully in section 10.4.2.3.1), Judge Frederick Maning had been so concerned by the inter-hapū divisions that Brissenden's tāmana payments were creating that he withheld authorisation for the block's survey, in August 1874. He did the same with another Hokianga block, Maunganuiowae.[284] Brissenden's own purchasing return for December 1874 revealed that the survey of the Bay of Islands block Tautoro was also on hold because of owners objecting to the sale.[285] Meanwhile, McDonnell was running into trouble with his use of tāmana as well. By December 1874, McLean had been informed that the rangatira Hongi Hika and Paora Ururoa would not allow the survey of the Otangaroa and Patoa blocks because tāmana had been given, with-

278. McLean, instructions, November 1871, AJHR, 1875, G-7, p 7.
279. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 816.
280. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 703.
281. For example, in 1876 Kemp suggested that half of the Crown's 1876 tāmana payment of £200 to Maihi Parāone for his interests in the Aukumeroa block could be treated as a security against private purchasing in the Puhipuhi block. Derby commented that this was 'an example of the various and imaginative ways in which payments to those with interests in Māori land, or credit extended to them, could be regarded, by the prospective purchaser at least, as advance payments on those lands': Derby, 'Fallen Plumage' (doc A61), p 116.
282. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 699.
283. H T Kemp, undated evidence to inquiry into alleged improper sale of land north of Auckland, AJHR, 1876, C-6, p 19.
284. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 691–692.
285. Brissenden, return, 30 December 1874, AJHR, 1875, G-7, p 27.

out their knowledge or approval, to three individuals.[286] Reflecting on these situations, Judge Maning wrote to von Sturmer, Hokianga's resident magistrate, in 1874, observing that the Government's agents had 'laid the groundwork for much trouble in bargaining and paying earnest money to natives for lands to which they have only a partial right or in some instances no right at all'.[287]

The payment of tāmana was not the only way of pressuring owners to offer land for sale and undermining the collective capacity to retain lands or manage their disposal: another was organising surveys for land that had not yet passed through the Native Land Court, creating costs that could ultimately only be met by sale of the land concerned (or a portion of it, which then required further survey and entailed further expense). In the course of giving evidence to the Native Land Purchase Committee in Auckland, Brissenden observed that 'As a rule, when the Government purchase, [Māori] perform the surveys and pay for them. In some cases, the cost of surveys has been deducted from the purchase money to the Natives.'[288] A letter from McDonnell to Preece in April 1875, albeit in relation to blocks within the Muriwhenua inquiry district, suggests that owners also had to pay for the survey of any reserves made for them. Given the same officials were involved, it is highly likely similar was happening in this inquiry district during the corresponding period, though we have no direct evidence.[289] If so, this is consistent with the Crown's policy from 1873 onwards, after it switched to buying parcels of individual shares in blocks, of getting non-sellers to pay for their share of the partition. A third inducement for prospective sellers, was the repeated promise that land settlement would follow purchase. As we have already noted, this was a commitmant that the Crown failed to fulfil.

There is also evidence suggesting the agent Charles Nelson may have sometimes encouraged owners to believe they were not selling the timber on their blocks. Again, we can look to events in nearby districts for precedent. The *Te Roroa* report noted that, according to oral tradition, the trees on the Waipoua 1 block (which Brissenden purchased with Nelson's assistance) had not been sold.[290] Similarly, we were told of testimony given in support of a petition to Parliament in 1924 by Wiremu Rikihana, then a member of the Legislative Council, who explained that Nelson had agreed to the owners retaining the timber before the Crown purchased the Te Kauaeoruruwahine block in the Hokianga in 1875. In this instance, Judge Frank Acheson had surmised that the timber might have been reserved only for customary purposes, such as building waka, on the basis that Nelson would not have been authorised to make such an agreement at the time.[291] In 1880 however, Nelson did agree that the Crown would buy the land and not the timber on the Pahinui block, before approaching Eru Nehua soon after the sale to get him to

286. McLean to Brissenden, 29 December 1874, AJHR, 1875, G-7, p 25.
287. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 691.
288. Armstrong and Subasic, supporting papers (doc A12(a)), vol 8, p 2:1063.
289. McDonnell to Preece, 9 April 1875, AJHR, 1875, G-7, pp 30–31.
290. Waitangi Tribunal, *Te Roroa Report*, Wai 38, p 79.
291. Report and recommendation regarding petition of Tamaho Maika and others, AJHR, 1926, G-6A, pp 1–3.

agree to waiving his timber rights.[292] While this evidence is not conclusive, it does demonstrate what the *Te Roroa* report observed in relation to Waipoua 1:[293] that the texts of Crown deeds, and possibly the explanations of agents themselves, were unclear and inconsistent on what was being included in purchases.

Another tactic was available to land purchase agents if they found none of these inducements proved sufficiently persuasive, and if the owners were not seeking to raise capital for investment (as in the Hukerenui sale) or to clear debt (as in the instance of Pakiri). The agents could, and sometimes did, create doubt in the owners' minds about other offers, so that accepting the Crown's seemed the safest option. There is evidence that Thomas McDonnell cynically used the impending abolition of the provinces to encourage owners to accept a lower price in one purchase.[294] Once the Crown introduced proclamations in 1877 to prohibit private competition for blocks, of course the undermining of other offers was no longer necessary.

While it is true that Brissenden was working largely without the benefit of detailed instructions, his record of purchasing in Northland as a whole also shows his willingness to circumvent the requirements set out for purchasing in the Native Land Act 1873, in the interests of speed. In June 1874, he had to resubmit deeds for two Kaipara blocks (Arakiore 2 and Owhetu – outside our inquiry district) after H T Clarke, Under-Secretary for the Native Department, reminded him that all instruments of disposition of Māori land were invalid unless explained to Māori and certified by an interpreter appointed under the Act. Furthermore, Brissenden was reminded, the signatures of owners on such instruments had to be attested by a resident magistrate or a judge of the Native Land Court 'and at least one other adult credible witness'.[295] Clarke's reproof came only a month after Brissenden had failed to ensure that the two signatories on the Pakiri deed (a purchase which we review in section 10.5) were both entitled to act as sellers.

In Brissenden's view, the difficulty of meeting purchasing requirements could be solved by relaxing them; in an undated memorandum to McLean, he argued that investigations in respect of blocks under negotiation by the Crown 'should not be governed by the cast-iron rules which are applied, and properly applied, to private purchases'. In addition, he suggested that the 1873 Act be amended to allow surveying to take place at the same time as (rather than after) purchase negotiations; he considered this would allow the Crown to purchase much more land more expeditiously and for lower prices. Changing the Act, he suggested, would accelerate the process and would keep the Government in good stead with Māori who had accused purchasing agents of using tāmana to 'tie up their lands'.[296] While McLean did not implement the suggested changes, Brissenden's fast-and-loose approach to purchasing during this period may have influenced McDonnell, who

292. Berghan, supporting papers (doc A43), vol 1, pp 380–383.
293. Waitangi Tribunal, *Te Roroa Report*, Wai 38, p 79.
294. McDonnell to McLean, undated, AJHR, 1875, G-7, pp 30–31.
295. Clarke to Brissenden, 12 June 1874, AJHR, 1875, G-7, p 12.
296. Brissenden to McLean, 3 August 1874, AJHR, 1875, G-7, pp 16–17.

had demonstrated caution in his earlier operations. In October 1874, McDonnell's report to Clarke described one purchase as 'another block, acreage not known, price to be fixed in future, but survey is to commence at once'.[297] Soon afterwards, he was (unwillingly) relieved of his land purchasing role after he tried to push through the Otangaroa and Patoa survey in the face of owner opposition.[298]

Evidently, the Crown's land purchase agents could also be party to the out-of-court arrangements for determining the titles of blocks that the Crown wished to purchase. We know this as a result of the clash between Judge Maning and Preece at the Orowhana block title hearing in October 1875 (we discussed Maning's dislike of tāmana and apparent preference for recording all owners in chapter 9). The claimants to the block had acknowledged that it had a substantial number of owners; however, Preece expected Maning to approve a short list of representative owners, based on the provision for adopting out-of-court arrangements in section 46 of the Native Land Act 1873. In turn, Preece expected these owners would unanimously support sale to the Crown, thus satisfying section 49 of the same Act.[299] Despite Preece's pleading that 'some of the other parties if named might decline to sell their shares, or require an exorbitant payment for them', Judge Maning refused to adopt the shortened owner list.[300] He adjourned the hearing and even threatened to resign, warning that '[i]nterference by [the] land purchase department before a claim is settled will surely lead to disaster'.[301] The Solicitor-General, whose opinion was sought, stated that the Judge had interpreted the Act correctly (see chapter 9, section 9.6.2).[302]

Otherwise, the Court's practice of endorsing arrangements to designate only a small number of owners when the Crown was purchasing had been widespread, and it continued after the Orowhana battle (which itself was resolved in the way Preece and the claimants had wished when heard by Judge Monro in 1877).[303] In the case of Kauaeoruruwahine, for example, the Court had split the block between three claimant groups. This allowed Brissenden to complete the purchase the following day when, in the interests of speed, 'he did not pay all the awardees, but just

297. McDonnell to Clarke, 22 October 1874, AJHR, 1875, G-7, p 23.

298. Waitangi Tribunal, *Te Roroa Report*, Wai 38, p 58.

299. Section 49 of the Native Lands Act 1873 provided restrictions on alienation could be removed if all owners of a block agreed to a sale or partition of the land.

300. As we explain in chapter 9, Maning refused on the basis of his interpretation of sections 46 and 47 of the 1873 Act. Section 46 provided that the court might adopt voluntary arrangements entered into between claimants and counter-claimants, and section 47 provided that the names of all those found to be owners (that is, by the court) or those 'thenceforward to be regarded as the owners thereof under any voluntary arrangement' were to be recorded on a memorial of ownership. In the case of Orowhana, Maning stated that all those awarded title were claimants; there was no dispute between claimants and counter-claimants: Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 714.

301. Maning to Fenton, 9 November 1875 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 708).

302. Thomas, 'The Native Land Court' (doc A68), pp 112–114.

303. Thomas, 'The Native Land Court' (doc A68), p 114.

one representative of each group.'[304] In the case of Punakitere, the Court awarded the block solely to Hori Karaka Tawiti, even though he had originally argued that 12 people held rights to the land. But part way through the hearing, Tawiti told the Court that 'it had been arranged' for his to be the sole name on the memorial of ownership. Ten days after the title hearing, Brissenden completed the purchase of the block for the Crown.[305] The Native Land Court's accommodation of purchasers (and vendors) was not limited just to Crown purchasing though. As Wiremu Pōmare told Haultain's inquiry into the workings of the Native Land Court in 1871, 'Pakehas often advise the Natives to get as few names as to grant for the conveniences of selling.'[306] As late as 1882, the Kahakaharoa block was awarded to just two individuals and sold shortly afterwards to a timber-milling company, despite Haki Whangawhanga having asked for 'a great number of names' to go on the title at the start of the hearing.[307]

Brissenden's conduct as a land purchase agent (and to a lesser extent, that of Nelson and Preece) would be called into question over the course of multiple official inquiries into the agents' actions during 1875 and 1876. The first was launched by the Auckland Provincial Council in May 1875.[308] The council – as the beneficiary of Crown purchasing in the inquiry district, since all land acquired would be transferred to it for disposal to settlers – was justifiably concerned about any potential misuse of funds.[309] The first witness to appear before the council's inquiry was Provincial Councillor John Lundon. He made several allegations against Brissenden: among them, that he was purchasing land for private interests while working for the Crown, receiving kickbacks from surveyors whose work he was commissioning, paying hush money in order to cover up his activities, and having owners plied with drink during Court hearings so that the publican's charge was included in the purchasing expenses.[310] Theophilus Heale, the Inspector of Surveys, appeared next; he observed that several surveyors had told him of overtures to pay commission to land purchase agents (which was usual with private surveys), but stated that he had taken measures to prevent this occurring where Crown purchasing was concerned.[311] Brissenden himself then appeared, denying Lundon's allegations.[312] However, the next Crown witness, Major Green, Agent General for the Central Government in Auckland, explained that he was under instructions not to cooperate with the inquiry; this was at the behest of the Colonial Secretary, who considered such an investigation should properly be con-

304. Thomas, 'The Native Land Court' (doc A68), p 109; Berghan, 'Northland Block Research Narratives' (doc A39(c)), vol 4, p 333.
305. Thomas, 'The Native Land Court' (doc A68), pp 107–110.
306. Wiremu Pōmare, statement, undated, AJHR, 1871, A-2A, p 35.
307. Thomas, 'The Native Land Court' (doc A68), p 25.
308. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 697–700.
309. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 697.
310. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 697–698; Armstrong and Subasic, supporting papers (doc A12(a)), vol 8, pp 2:1032–2:1042.
311. Armstrong and Subasic, supporting papers (doc A12(a)), vol 8, pp 2:1056, 2:1060.
312. Armstrong and Subasic, supporting papers (doc A12(a)), vol 8, pp 2:1064, 2:1069–2:1070.

ducted by Parliament. The provincial council's inquiry promptly ended, without reaching any definitive findings.[313]

In response to allegations made during the inquiry, JW Preece defended Brissenden's purchasing record in his report to McLean at the start of July 1875. Preece observed that the Native Land Court had found only one fault in Brissenden's many purchases involving tāmana: namely, the payment made to Wī Tana Pāpāhia in the case of Omahuta. As for the contention that owners had been paid with credit to be used with storekeepers and publicans rather than being paid in cash, Preece said it was 'entirely without foundation'.[314] McLean in turn gave a statement to the House of Representatives in August, emphasising the difficulties faced by land purchase agents and praising their success in acquiring as much land as they had at lower rates than private buyers would pay.[315]

However, by late August it became clear that Brissenden's activities would be further investigated. Sir George Grey, an opponent of McLean's purchasing programme, had first successfully moved in Parliament that all correspondence about the employment of land purchase agents be published. Grey then sought the expansion of an inquiry into two block purchases south of Auckland (Tairua and Pakarirahi) so that all purchasing undertaken by McDonnell, Brissenden, and James Mackay could be examined.[316]

Much of the evidence before Parliament's Tairua investigation committee centred on Brissenden and was presented by Thomas McDonnell (who was thus effectively both a witness at, and subject of, this inquiry). McDonnell advanced several serious allegations. He alleged Brissenden had told him that he had authorisation to acquire Northland timber leases and land for himself and others, including McLean, Vogel, and the current Premier, Daniel Pollen. He also claimed that Brissenden had attempted to swindle a tāmana recipient out of a payment and had directed survey work to particular individuals in exchange for kickbacks of 50 per cent.[317] McDonnell's evidence may have been coloured by his resentment at Brissenden having displaced his own purchasing role, and some of his evidence was inconsistent.[318] However, JE Dalton (employed by Brissenden as an interpreter and part-time 'surveyor') testified that he, and allegedly other surveyors, arranged to pay Brissenden 'a percentage' of the moneys received from the Government for surveys in Northland – which substantiated McDonnell's claim

313. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 699–700. Major Green's instructions came from Colonial Secretary Pollen.

314. Preece to McLean, 3 July 1875, AJHR, 1875, C-4, p 2.

315. 'Land Purchases, North Island', 10 August 1875, NZPD, vol 17, pp 224, 229; McLean, 'Statement relative to Land Purchases, North Island', 30 June 1875, AJHR, 1875, G-6, pp 1–2, 8.

316. McDonnell to Pollen, 10 July 1872, AJHR, 1875, G-7, p 1; 'Report of the Tairua Investigation Committee', AJHR, 1875, I-1, p [2].

317. McDonnell, evidence to Tairua Investigation Committee, 13 August 1875, 26 August 1875, AJHR, 1875, I-1, pp 9–10, 15–16.

318. McDonnell, evidence to Tairua Investigation Committee, 26 August 1875, AJHR, 1875, I-1, p 13.

of kickbacks.[319] Brissenden appeared before the inquiry in person and also submitted a detailed statement. In it, he refuted these allegations and addressed rumours that he had allowed land to be reserved for later private acquisition. He made a counter-allegation against McDonnell that he had squandered money by paying more than an agreed rate for some purchases.[320] On the matter of possible kickbacks, Brissenden argued that because his assistant Charles Nelson doubled as a surveyor, he was technically entitled to a commission from anyone to whom he had subcontracted the survey work. When it came to the allegations that he had acted in league with private purchasers, Brissenden suggested that these were based on his having refrained from interfering in private deals made before 1873, an approach which McLean had endorsed.[321] Brissenden's statement also referred to the use of 'treating' (that is, using food and drink in lieu of cash) in relation to the Pakanae block, but as Nelson had already told of engaging in the practice in a letter to the *New Zealand Herald*, Brissenden merely praised his contribution to acquiring the land.[322]

Ultimately, the Tairua investigation committee established on Grey's orders made no mention of Brissenden or McDonnell in its final report, and merely observed that it had been unable to resolve the large amount of evidence 'of a most conflicting character'.[323] In the meantime, however, Brissenden had been dismissed from Crown service; as noted, this was due to another inquiry finding that he had fraudulently issued mining rights in the Ohinemuri goldfield for personal gain.[324]

Brissenden's and Nelson's purchasing operations in Northland received further scrutiny in yet another inquiry the following year. Conducted by the Resident Magistrate J C Barstow, it concerned the alleged improper purchase of the Waipoua and Maunganui blocks. These two blocks are outside the Te Raki inquiry district. However, Barstow's investigations into the complaints brought on behalf of the blocks' two owners, Tiopira and Parore Te Āwha, by solicitor Joseph Tole – a friend of Nelson – concerned the purchase of the Opouteke block as well, so are relevant here.[325] In the case of Waipoua and Maunganui, Brissenden and Nelson had recognised Tiopira's interests in these blocks, but not those of Parore Te Āwha. While Tiopira ended up selling his interests for £2,000, Parore Te Āwha – having

319. Dalton, evidence to Tairua Investigation Committee, 16 September 1875, AJHR, 1875, I-1, p 29.

320. Brissenden, evidence to Tairua Investigation Committee, 31 August 1875, AJHR, 1875, I-1, pp 18–19; Brissenden, sworn statement to Tairua Investigation Committee, 7 October 1875, AJHR, 1875, I-1, pp 51–52.

321. Brissenden, evidence to Tairua Investigation Committee, 31 August 1875, AJHR, 1875, I-1, p 19; Brissenden, sworn statement to Tairua Investigation Committee, 7 October 1875, AJHR, 1875, I-1, p 52.

322. Native Land Agents', *New Zealand Herald*, 23 July 1875, p 1 (cited in Coralie Clarkson, 'Pakanae and Kokohuia Lands: 1870–1990', report commissioned by the Waitangi Tribunal (doc A58), p 54).

323. 'Report of the Tairua Investigation Committee', 11 October 1875, AJHR, 1875, I-1, p iv.

324. 'Report of the Ohinemuri Miners' Rights Inquiries Committee', 4 October 1875, AJHR, 1875, I-3, p 2.

325. Papers relative to inquiry into alleged improper sale of land north of Auckland, AJHR, 1876, C-6, pp 1, 15, 24.

proved his claim in the Native Land Court – negotiated the larger sum of £2,500 and a 250-acre reserve with Preece.[326] Tole had argued that Tiopira had been duped out of an equivalent payment to Parore Te Āwha's, while Preece and Kemp blamed the situation on the flawed distribution of tāmana by Brissenden and Nelson.[327]

Similarly, in the case of Opouteke, the Crown had only dealt with Kamariera Te Wharepapa, and the Court had accorded him sole ownership of the block on the understanding that he would compensate Haurangi and Heta Te Hara for their interests (which proportionately were worth around £650). When this did not happen, Preece had persuaded Haurangi to accept £100 to extinguish his interests.[328] Tole argued that the Crown needed to get Kamariera Te Wharepapa to pay the money he owed, and if not he would seek to have the purchase rescinded.[329] Neither Tiopira's bid for restitution nor Haurangi and Heta Te Hara's claim for action against Kamariera Te Wharepapa was successful, with Barstow commenting sternly on the conduct of the Crown purchasers. Of Brissenden and Nelson, Barstow stated that 'I refrain from commenting upon conduct so dishonorable.'[330] Even so, within two years Nelson was (like Preece) working as a land purchase agent for the Crown. He had been employed in this role by the Native Minister John Sheehan, who had earlier worked closely with Nelson and Brissenden on the contentious Pakiri purchase.

In our view, the Crown failed to exercise effective control over agents acting on its behalf and had little interest in doing so. The Crown did not seek to comprehensively inform itself whether the conduct of agents compromised the rights and interests of Māori owners or indeed invalidated any of the purchases they had concluded. If McLean is taken at his word, then he did not see fit to dismiss Brissenden for his activities in Te Raki and elsewhere, despite the conduct that had been disclosed in the various inquiries. Dismissal may have raised very difficult questions; claimant counsel suggested, that possibly McLean was anxious to avoid any more searching investigation into the conduct of the Crown's Te Raki land purchasing that could leave him open to the charge of complicity in actions that he knew were questionable, at least.[331]

326. Waitangi Tribunal, *Te Roroa Report*, Wai 38, pp 74–76.

327. Papers relative to inquiry into alleged improper sale of land north of Auckland, AJHR, 1876, C-6, pp 3–4, 11, 15, 19.

328. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 740–741; Tole to superintendent, 13 March 1876, inquiry into alleged improper sale of land north of Auckland, AJHR, 1876, C-6, pp 7–8.

329. Preece, memorandum, 20 April 1876, inquiry into alleged improper sale of land north of Auckland, AJHR, 1876, C-6, pp 8–9.

330. Barstow, 'Report on Purchase of Maunganui and Waipoua Blocks', undated, inquiry into alleged improper sale of land north of Auckland, AJHR, 1876, C-6, p 15; Waitangi Tribunal, *Te Roroa Report*, Wai 38, pp 76–77, 80. We do not disagree with the findings of the *Te Roroa* report that '[i]n completing the purchases, Crown agents were unfair to Tiopira and breached the voluntary agreement between Tiopira and Parore which was explicit in the terms of sale', but note that evidence from the Te Raki inquiry district does not support the impression of Nelson as the altruistic whistleblower, which that report suggests.

331. See Tribunal questioning of claimant counsel Te Kani Williams, transcript 4.1.28, Te Whakamaharatanga Marae, p [337].

Brissenden's activities lay at the heart of many of the claims submitted to us concerning the Crown's purchase methods during the 1870s. Both the terms on which Brissenden was engaged, and the advice he and other land purchase agents offered McLean, placed on the Crown a particular responsibility; namely, to insist and ensure that negotiations were conducted openly and fairly, with the interests of all rightful owners recognised and respected. The Crown did not fulfil this responsibility. McLean's failure to issue proper instructions to his agents, to monitor their activities, and maintain control over them – along with his willingness to adopt a commission model for Brissenden – effectively incentivised irresponsible and potentially corrupt practices. By the time the activities of Brissenden and certain other agents came under scrutiny, they had already managed to execute an enormous and irreversible transfer of land out of Te Raki Māori possession. As a result, the Crown directly benefited from practices that fell well short of its own stated standards.

10.4.2.2 *Private purchasing and leasing*

The available data suggests that the scale of private purchasing in Te Raki during the period from 1865 to 1900 was much smaller than that undertaken by the Crown. Purchasers – some of them settlers with whom Māori landowners had existing relationships– typically offered and paid higher prices for land than the Crown.[332] Henry Walton, for example, was able to acquire several small blocks around Whāngārei due to his being a business partner and relative by marriage of the rangatira Te Tirarau Kūkupa.[333] If the right opportunity presented itself, Māori might choose to sell to private buyers for essentially the same reasons they chose to sell to the Crown. Landowners could also decide to sell an area of land that they considered too small for its loss to harm their interests.[334]

The records detailing the nature and extent of private purchasing are incomplete or imprecise;[335] as the Crown submitted, little is known about most private transactions 'beyond the bare details of block, owners, purchase price and the name of the purchaser'.[336] Historians Dr Barry Rigby, Paul Hamer, and Rose Daamen cited an unpublished list of private purchases in Auckland Province between 1865 and 1869 which recorded the alienation of 184,558 acres over this period. Included in this figure were three large Mangakāhia blocks: Maungaru (21,319 acres), Nukutawhiti (12,168 acres), and Te Karaka (11,710 acres).[337] Another

332. Thomas, 'The Native Land Court' (doc A68), pp 84, 220–221; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 676, 731, 758, 1029.

333. Henry Walton, for example, was able to acquire several small blocks around Whāngārei due to his being a business partner and relative by marriage of the rangatira Te Tirarau Kūkupa: Thomas, 'The Native Land Court' (doc A68), p 41.

334. See, for example, the sale of the 50-acre Taurangakotuku block near Whāngārei: Tony Walzl, 'Overview of Land Alienation', report commissioned by Crown Forestry Rental Trust, 2015 (doc U1), pp 91, 188.

335. Thomas, 'The Native Land Court' (doc A68), pp 257–288.

336. Crown closing submissions (#3.3.407), p 17.

337. All three are listed in the 'Return of lands granted in Auckland Province, sold or leased to Europeans, April 1865 – 15 June 1869', which was enclosed with a letter from the Registrar-General,

return was produced for Parliament in 1883 that only included private purchases under the Native Land Act 1873, but recorded that 7,153 acres had been privately purchased in the Bay of Islands, Hokianga and Mangonui districts, and a further 128,202 acres was privately purchased during this period in the Whāngārei and Kaipara districts.[338] Private purchasing records compiled by Crown counsel identified transactions involving more than 61 blocks, which resulted in 39,884 acres being alienated between 1875 and 1884. (Between 1885 and 1894, private transactions involving a further 22 blocks would lead to the alienation of another 4,967 acres.)[339] However, only a quarter of the blocks in question comprised more than 300 acres, meaning accumulated private sales over the period involved much less land than Crown purchasing.

The distribution of sales also reflected the location of the Pākehā population, with most private purchase activity focused on blocks near Whāngārei; there were hardly any such purchases in Hokianga. The timber industry's demand for future forest supplies continued to be responsible for the largest private transactions. The sawmiller George Holdship bought the 3,439-acre Otangaroa 2 block at Whangaroa in 1876,[340] and his fellow sawmiller Pierce Lanigan the 3,396-acre Kopuatoetoe block at Ngunguru north of Whāngārei.[341] The respective purchasers of Maungaru and Te Karaka, namely Charles Walton and Randall Johnson, had both been directly involved in the titling process. Walton had acted for the claimant, Paikea Te Hekeua, at the Maungaru title hearing, while Johnson had contributed £100 towards the cost of surveying the Te Karaka block.[342] The Maungaru block was later on-sold to W S Grahame, who wanted to mill the timber on it.[343]

Many sales to private purchasers were driven by the familiar spectre of indebtedness.[344] Store debt, and debt from Court proceedings over land, would have

Alfred Domett, to the Native Minister, Donald McLean, in June 1869: NS69/704 – Domett, Reg-Gen. [General Registry] of Land, to Native Min. [Minister], 29 June 1869. Enclosure (iii), AECW 18683 MA-MT1/2/[157], Archives New Zealand, Wellington. This return is referred to in Rose Daamen, Paul Hamer, Barry Rigby, *Auckland* (doc H2), p 244; see also Berghan, 'Northland Block Research Narratives' (doc A39(l)), vol 8, pp 137–138, 286–287, 370.

338. A total of 25 purchase blocks made up this acreage in the Bay of Islands, Hokianga and Mangonui; and 65 purchase blocks make up this acreage in Whāngārei and Kaipara. A portion of these blocks were in our inquiry district. We estimate that out of the total area purchased approximately 1,300 acres were in the Bay of Islands, 3,800 acres in Hokianga, 216 acres in Whangaroa, 10,000 acres in Whāngārei, and 1,260 acres in Mahurangi over this period: Return of lands passed through the Native Land ourt since the Native Land Act 1873 came into operation, undated, AJHR, 1883, G-6, pp 2–4.

339. Crown data (#1.3.2(c)); Thomas, 'The Native Land Court' (doc A68), p 132.

340. Alexandra Horsley, 'A History of the Otangaroa, Te Pupuke, and Waihapa Blocks (Whangaroa), 1874–1990', report commissioned by the Waitangi Tribunal, 2016 (doc A57), p 90.

341. Berghan, 'Northland Block Research Narratives' (doc A39(c)), vol 4, p 448.

342. Berghan, 'Northland Block Research Narratives' (doc A39(l)), vol 812, pp 137–138, 286–287.

343. Paul Thomas, 'The Crown and Maori in the Northern Wairoa, 1840–1865', report commissioned by Crown Forestry Rental Trust, 1999 (doc E40), p 245; Thomas's report does not specify Maungaru as the land sold by Walton to Grahame, but Grahame is identified as its owner by a *New Zealand Gazette* notice in 1876: 'Land Transfer Act Notices', *New Zealand Gazette*,13 July 1876, no 41, p 508.

344. Thomas, 'The Native Land Court' (doc A68), pp 129–136.

loomed large during the 1880s and early 1890s in our inquiry district too. As we have discussed, at that time the general economic downturn had forced many Māori to turn to gum-digging, while opportunities for employment in road construction and other public works had dwindled,[345] and no short-term income was being generated by land sales to the Crown. The example of the Otaniwha block – 1,206 acres in the Whāngārei district – is illustrative. The block was initially brought before the Court for title determination by Eru Pakere, who sought to pay off a debt incurred by one of his people involved in a case before the Supreme Court. The Native Land Court process itself proved costly, due to survey costs and Court fees (see chapter 9, section 9.7); these were paid for by a 'European friend', who may well have been a prospective purchaser. Title was awarded to Pakere alone in 1885, and he sold the block in 1887.[346] Similar cases occurred elsewhere in the district, such as the Bay of Islands in 1885. The first concerned the 127-acre Honohere block, which Maihi Parāone Kawiti intended selling to repay debt and raise development money. The Court awarded the block to Kawiti and three others, who then sold it the following year to a Kawakawa store owner.[347] As already illustrated by the Otaniwha example and the Te Karaka purchase by Randall Johnson in 1868, paying advances for surveys – which had become legal in 1867– was another means by which private parties could gain interests in blocks.[348] It would have been an attractive enticement for Māori landowners, who had been generally required to meet survey charges in their entirety during this period (see chapter 9, section 9.7.2).

Leasing provided an alternative for Māori landowners to generate income from their land. As early as 1866, the Ketenikau block owners entered into a 99-year coalmining lease, and title to the Orokaraka block was also obtained so that it could be leased to facilitate the shipping trade.[349] As noted, we did not receive any systematic evidence on the extent of private leasing during this period. However, it appears that demand for timber saw a significant number of blocks being leased for 21-year terms during the 1870s. The first was the Stannus Jones lease over the Pakiri block (which the Crown bought out in 1874) and a lease taken out over the Rotokakahi and Te Awaroa 1 and 2 blocks in Hokianga in 1873.[350] These were followed by Te Tirarau granting leases to Charles Walton of two western Whāngārei blocks (Marumaru and Raihara) in 1875,[351] while George Holdship sought a

345. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 926–927, 971, 1130, 1227.
346. Thomas, 'The Native Land Court' (doc A68), p 134.
347. Thomas, 'The Native Land Court' (doc A68), p 134; Berghan, 'Northland Block Research Narratives' (doc A39(c)), vol 3, p 158.
348. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 2, p 808.
349. Alexander, 'Land-Based Resources, Waterways and Environmental Impacts' (doc A7), p 119; Thomas, 'The Native Land Court' (doc A68), pp 41–42.
350. Berghan, 'Northland Block Research Narratives' (doc A39(j)), vol 11, pp 335–340; Berghan, 'Northland Block Research Narratives' (doc A39(l)), vol 13, pp 476–477.
351. Berghan did not specify Walton as the lessee of both, but Te Tirarau Kūkupa was the lessor of both, and the leases started on the same day: Berghan, 'Northland Block Research Narratives' (doc A39(l)), vol 13, pp 263–264, 603.

lease over the whole of Otangaroa before switching to purchasing the partition Otangaroa 2 after the lease proposal failed.[352]

A number of Mangakāhia and western Whāngārei blocks – Kauaeranga, Mangaroa, Ngaturipukunui, Opouteke 2, Oue 2, Pipiwai, Pukehuia, Ruataewao, and Tarakiekie – were then leased during the late 1870s.[353] As we discussed in chapter 9, the Kauaeranga and Ngaturipukunui blocks were awarded to Te Tirarau Kūkupa alone in July 1877, who signed 21-year timber leases over the blocks a few days later.[354] Paul Thomas noted that Te Tirarau 'received the proceeds for the timber lease, some of which, it would seem, he distributed to others who held (non-legally recognised) rights to the land'.[355] The next year, J Symonds, resident magistrate for the Kaipara district, reported that the system of leasing was providing Māori sufficient income, 'so much so that they are not so industrious as in former times'.[356] However, Armstrong and Subasic observed that leasing was not favoured by the Crown as a means of opening up land, and it was not widespread outside certain timber lands.[357]

Fewer lease agreements seem to have been entered into during the 1880s and 1890s. Notable was the Ngunguru Coal Company's lease on the Kiripaka block (the company had initially sought to secure it for coalmining purposes along with 'almost all the lands on both sides of the Ngunguru River'; by 1896, though, it appears that next to no coal had been discovered).[358] When the 21-year timber leases expired, a number of blocks where the valuable timber had been cut out were purchased by the Crown in the 1890s (we discuss the Kauaeranga and Ngaturipukunui purchase in section 10.5).[359]

10.4.2.3 *Tāmana*

Tāmana was the practice by which purchasers (both the Crown and private individuals) paid advances to individuals presumed to be owners, even before the Native Land Court had determined title over the land in question.[360] As the Tribunal said in the Central North Island district inquiry, purchasers thereby '[took] the risk that those they were paying would later be confirmed as the "correct" owners'[361] – a risk considered worthwhile in order to secure and expedite

352. Horsley, 'A History of the Otangaroa, Te Pupuke, and Waihapa Blocks' (doc A57), pp 88–90.
353. Berghan, 'Northland Block Research Narratives' (doc A39(l)), vol 13, pp 140, 142, 234–235, 392, 449, 518, 576–577, 628, 676.
354. Thomas, 'The Native Land Court' (doc A68), pp 214–215; Te Tirarau had been awarded the title of the 380-acre Pukehuia block in March 1875 and had signed a 21-year lease agreement for the block with the Kauri Timber Company: Berghan, 'Northland Block Research Narratives' (doc A39(l)), vol 13, p 576.
355. Thomas, 'The Native Land Court' (doc A68), p 215.
356. Symonds to Under-Secretary, Native Department, 16 May 1878, AJHR, 1878, G-1, p 4.
357. Armstrong and Subasic, 'Northland Land and Politics' (doc A12), p 935.
358. Berghan, 'Northland Block Research Narratives' (doc A39(l)), vol 13, pp 163, 167.
359. Berghan, 'Northland Block Research Narratives' (doc A39(l)), vol 13, pp 142, 150, 450–451, 577.
360. As noted earlier, this definition of tāmana payments is based on the Tribunal's analysis in the *Te Roroa Report*: Waitangi Tribunal, *Te Roroa Report*, Wai 38, p 59.
361. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 590.

a purchase. Elsewhere, the Tribunal has characterised the practice, at least as undertaken by the Crown, as 'making initial payments to favoured rangatira away from the eyes of other leaders and resident hapū.'[362] In Northland, the practice of advance payment was also referred to as 'sprinkling mana.'[363] This is a telling description.

The payment of advances was not new to Northland; McLean himself had used this means when purchasing Pakiri South in the 1850s (see chapter 8, section 8.5.2).[364] The practice had since been sanctioned by Native Land legislation, when undertaken by Crown agents. Section 75 of the Native Lands Act 1865 made pre-title contracts for land owned by Māori but for which the Court had not issued a certificate of title 'absolutely void'; that is, not valid or legally binding. However, section 83 allowed for pre-title determination agreements between Māori owners and Crown purchasing agents. Where an agreement was made, the Governor was empowered to refer the matter to the Court for title determination, and the apportionment of interests between the parties to the transaction.[365] A series of ambiguous and confusing provisions followed. In discussing sales under memorials of ownership (whether to Crown or private purchaser), section 59 of the Native Land Act 1873 referred to 'advances of money made to the Native owners by way of earnest money to bind the agreement for such sale', which could be deducted from the purchase amount. On the other hand, section 87 of the same Act stated that conveyances of Native land before it was vested in freehold tenure by order of the Court would be 'absolutely void' although, as we pointed out in chapter 9, the provision failed to ban the practice absolutely. Section 107 also provided that the Governor, or Māori land-owners, could seek an order from the Court in cases where 'money has been paid on account of such land, but no perfected agreements have been made nor possession acquired by her Majesty'. In determining the title to such land the Court had four options; it could,

- order the completion of the agreement;
- partition out the interests of the Crown;
- order the repayment of advances received by Māori; or,
- declare that the land be vested in the Crown.[366]

Private purchasers would eventually be explicitly prohibited from using tāmana by section 7 of the Native Land Laws Amendment Act 1883, which prohibited parties from entering into purchase negotiations until 40 days had lapsed from the date on which a title had been ascertained[367] – a provision from which the Crown was exempt.[368] It was not until Crown pre-emption was restored in 1894 that its

362. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 1, p 186.
363. Armstrong and Subasic, 'Northern Land And Politics' (doc A12), pp 27, 354, 410.
364. O'Malley, 'Northland Crown Purchases' (doc A6), pp 215–216.
365. Williams, *Te Kooti Tango Whenua*, p 330.
366. Williams, *Te Kooti Tango Whenua*, p 331.
367. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 612.
368. The exemption was contained in section 13 of the Act.

purchase agents abandoned the use of advance payments, despite the Native Minister's earlier directives to stop the practice.[369]

The Crown paid tāmana on most lands in the inquiry district it sought to acquire during the 1870s. Despite McLean's repeated cautions to his agents about the risk that payments could stoke rivalry between competing parties, or where there was a risk that payments might be lost, his instructions were largely ignored without sanction.[370] Brissenden's December 1874 return listed 66 blocks for which he and McDonnell had initiated purchase. Most were in Te Raki, and money had been advanced on all but one. The total sum involved amounted to almost £6,953 – a sizeable unsecured liability for the Crown. The block area had been estimated in just seven cases, and the price per acre varied widely: across 55 blocks, it ranged from fourpence to 3s 6d. The largest advance was for Pekapekarau, at £375,[371] while at the other end of the scale, tāmana of just £5 had been paid for the Poniwhenua block, which was subsequently acquired by private purchasers.[372]

Many of the payments were modest – effectively small tokens scattered around as many potential owners as possible. In part, this was an attempt to minimise loss should recipients not be declared owners by the Native Land Court. Brissenden relied on tāmana to exclude private purchasers, who he complained had 'money in hand' and thus 'a great advantage' over him while he was still waiting for funds to be advanced. Private purchasers were also likely to make offers that he could not match.[373] Consequently, the trick was to get in first. As described in the case of the Otangaroa and Patoa blocks, the Crown's land purchase agents also saw the payment of tāmana as grounds for going ahead with commissioning surveys.[374] Once completed, surveys gave the Crown an even more secure stake in the land in question.

The practice of making pre-title hearing advances attracted considerable contemporary criticism. It was one of three complaints Hōne Mohi Tāwhai and others made about the Native Land Act 1873 in a petition to Parliament in 1874. The Native Affairs select committee agreed with the petition on this point, resolving 'That it is not expedient that money should be paid by the Government by way of advance to Natives on account of their lands until they are satisfied as to who are the real owners thereof.'[375] In the Legislative Council, in September 1876, Mōkena Kōhere (Māori member for Auckland) began a debate about whether the Government's practice of sending purchase officers to make a 'payment of monies' for lands

369. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1176–1177.
370. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 679.
371. Brissenden, return, 30 December 1874, AJHR, 1875, G-7, p 26; Berghan, 'Northland Block Research Narratives' (doc A39(l)), vol 13, pp 469, 515.
372. Brissenden, return, 30 December 1874, AJHR, 1875, G-7, p 26; 'Detail of Expenditure to 30 June 1875, Negotiations in Progress', AJHR, 1875, G-6, p 17; Berghan, 'Northland Block Research Narratives' (doc A39(j)), vol 13, pp 232, 295–296.
373. Brissenden to Pollen, 14 April 1874, AJHR, 1875, G-7, p 10; Brissenden to McLean, 4 September 1874, AJHR, 1875, G-7, p 14.
374. McLean to district officer, Bay of Islands, 20 January 1875, AJHR, 1875, G-7, p 29.
375. 'Report on the Petition of Mohi Tawhai and Others', 20 August 1874, AJHR, 1874, I-3, p 2.

that had not gone through the Native Land Court 'was contrary to law, and . . . likely to result in serious difficulties, and perhaps bloodshed'. Kōhere sought to have advance payments declared unlawful, while G S Whitmore (Hawke's Bay) described them as a bribe employed to prejudice the interests of owners.[376]

In 1876, Premier Daniel Pollen acknowledged that in acquiring the right to deal with land in advance of title determination, the Crown had acquired 'exceptional powers'. He added, however, that 'the completion of such transactions was contingent upon the action of the Native Land Court'.[377] This did not assuage concerns about the desirability of any pre-title payments or indeed the broader dealings of the Native Land Purchase Department, and doubts were raised over whether agents ever explained to Māori the purpose of such payments or the consequences that attached to accepting them.[378] In 1879, Native Minister Bryce issued instructions to the land purchase officer J C Young (who was operating in Tauranga) to make no further payments 'to natives on lands that have not been before the Native Land Court for investigation of title'.[379] The following year, during parliamentary debates about the Native Land Sales Bill in 1880, Bryce also offered some pointed criticisms of both private and government purchasing agents' tactics, notably pre-title advances, which he described as 'scattering money among . . . [Māori] like dirt'. His many concerns included the fact that tāmana had been paid for land of unknown quality and uncertain area, and that the payments constituted an unsecured liability for the Crown.[380] That the practice might also have disadvantaged Māori was not a matter on which he commented, although he did note that the agents' conduct 'has done more to demoralize and degrade the Maori race than all our efforts at colonization can ever redeem'.[381]

Notwithstanding Bryce's remarks, while the Crown was aware that paying tāmana undermined Māori capacity to retain land, criticism of the practice focused primarily on the possibility of payments being lost.[382] So long as this did not eventuate to any great extent, warnings about paying tāmana could be ignored in Te Raki as elsewhere – including by private purchasers. While the reassertion of the Crown's pre-emptive right of purchase brought the practice of tāmana to an end in 1894, the new policy has been described as a 'double-edged sword,' since it meant that Māori had no available money to meet their heavy Court costs.[383]

The following examples illustrate how the practice of tāmana played out in various parts of the inquiry district throughout the 1870s, and its destabilising effects for hapū and iwi.

376. 'Native Land Purchases', 21 September 1876, NZPD, 1876, vol 22, pp 437, 439.
377. 'Native Land Purchases', 21 September 1876, NZPD, vol 22, p 438.
378. 'Native Land Purchases', 21 September 1876, NZPD, vol 22, p 439.
379. Transactions of Messrs. Young and Warbick as Officers of the Land Purchase Department, 10 June 1880, AJHR, 1880, G-5, p 14.
380. 'Native Land Sales Bill', 15 June 1880, NZPD, vol 35, pp 267–272.
381. 'Native Land Sales Bill', 15 June 1880, NZPD, vol 35, p 267.
382. See Michael Macky, 'Crown Purchasing in the Central North Island Inquiry District, 1870–1890', report commissioned by Crown Law Office, 2004 (Wai 1200 ROI, doc A81), pp 82–83.
383. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 87–88, 996–997.

10.4.2.3.1 Use of tāmana at Omahuta

The dispute over the Omahuta block (in Whangaroa) involved numerous hapū – Ngāti Kahu, Ngāti Miru, Ngāti Hau, Ngāti Korokoro, Ngāi Tūpoto, and Te Uri o Te Aho of Māhurehure – and numerous individuals, some with multiple affiliations to these and other hapū.[384] Colonel McDonnell inspected the block in March 1873 in the company of Hōne Mohi Tāwhai and other owners. He observed that it included 'many millions of feet' of quality kauri timber. Tāwhai and the other owners had requested 12s an acre, but McDonnell considered they would accept a price closer to 3s an acre, or slightly lower.[385]

In July 1874, Brissenden made the first of three advance payments for the block on behalf of the Crown. Brissenden's initial payment of £100 to Hōne Mohi Tāwhai and two others was followed by another £100 to Wiremu Tana Pāpāhia, also in July, and £30 to Rihara Raumati and two others in September 1874.[386] Brissenden also reported that the purchase rate was set at just 1s 6d per acre, much lower than the original per-acre rate sought by Tāwhai or suggested by McDonnell.[387] As noted earlier, Judge Maning was sufficiently concerned by Brissenden's payments to contact Resident Magistrate von Sturmer. Maning informed him that, as the hapū disputing the block were trying to resolve their differences, Brissenden making payments to only some representatives of hapū without reference to others was inflaming matters. Judge Maning recommended to von Sturmer that no purchase should take place until the dispute about the block's ownership had been resolved. According to Maning, the payment of tāmana to only some of the owners of this land would make resolving questions of title more difficult in the future, and also alarm those who had missed out.[388] Te Uri o Te Aho hapū oral traditions, which Pairama Tahere related during hearings, tell us that the tāmana for Omahuta was accepted by 'junior rangatira'; nonetheless, their hapū 'felt obligated to follow through with the agreement to sell'.[389]

When Omahuta came before the Native Land Court in June 1875, Judge Monro found in favour of Hōne Mohi Tāwhai's claim for Te Uri o Te Aho, Ngāti Korokoro, and Ngāti Hau, rejecting the opposing cases put by Wiremu Tana Pāpāhia for Ngāti Kahu, Wiremu Hau for Ngāti Miru, and Pairama Te Tihi for Ngāti Tūpoto.[390] The successful parties then submitted ownership lists for three partitions to the Court. Hōne Mohi Tāwhai was one of five owners for Omahuta 2, while there were four owners for Omahuta 1, and three for Omahuta 3.[391] Within a week, the Court had approved the Crown's purchase of both Omahuta 1 (1,722 acres) for

384. Pairama Tahere (doc G17), p 12.
385. David Armstrong, 'The Native Land Court and Crown Purchasing in Te Waimate-Kaikohe in the Nineteenth Century', report commissioned by the claimants, 2016 (doc AA52), p 44.
386. Berghan, 'Northland Block Research Narratives' (doc A39(e)), vol 6, p 63.
387. Brissenden, schedule, 24 July 1874, AJHR, 1875, G-7, p 16.
388. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 692.
389. Pairama Tahere (doc N20(b)), p 56.
390. *Omahuta* (1875) 2 Northern MB, 128, 130, 164 (doc A49); Armstrong, 'The Native Land Court and Crown Purchasing' (doc AA52), p 45.
391. *Omahuta* (1875) 2 Northern MB, 173–174 (doc A49).

£129 3s and Omahuta 2 (6,048 acres) for £453 12s, leaving only Omahuta 3 (678 acres) in Māori ownership.[392] To complete the Omahuta purchase, the Crown paid £99 to the owners of Omahuta 1, and £353 12s to Hōne Mohi Tāwhai – apparently accounting for £130 of the advances it paid in 1874.[393]

As for the advance of £100 to Wī Tana Pāpāhia, this appears not to have been deducted from total purchase price of £582 12s.[394] According to Crown purchase officer Preece, this was the only occasion when a recipient of tāmana from Brissenden was not subsequently confirmed as an owner by a title investigation. Nevertheless, Preece defended the advance, arguing that Wiremu Tana Pāpāhia would not have let the Omahuta survey go ahead otherwise, and he asserted that Pāpāhia had received a portion of the purchase money from the successful claimants.[395] This claim cannot be confirmed however. As researcher David Armstrong commented, 'just why the other claimants had opposed Papahia's claim, if Preece's comments are accurate, remains a mystery'.[396]

10.4.2.3.2 Use of tāmana at Puhipuhi

Another example of the Crown using advance payments to facilitate sales concerns the acquisition of the 25,000-acre Puhipuhi block, the subject of several claims in this inquiry. Ngāti Hau claimants allege that the Crown succeeded in getting owners to sell the land for less than it was worth by employing tāmana payments and proclaiming that Puhipuhi was under negotiation.[397] Ngātiwai and Ngāti Hine claimants also argue that the advances paid affected the outcome of the title hearing.[398]

The prolonged Court process to settle the title is discussed in the Native Land Court chapter (see section 9.6); here, we focus on how the Crown used advance payments on a block whose ownership was known to be contested in order to further its purchasing objectives.

The timber industry was booming in Auckland Province in the late 1870s, which made Puhipuhi's kauri forest a significant asset. According to the agent Charles Nelson, around 1876 the Auckland timber merchant George Holdship – who would go on to purchase approximately half the Otangaroa block the following

392. Armstrong, 'The Native Land Court and Crown Purchasing' (doc AA52), p 45.

393. Berghan, 'Northland Block Research Narratives' (doc A39(e)), vol 6, p 63.

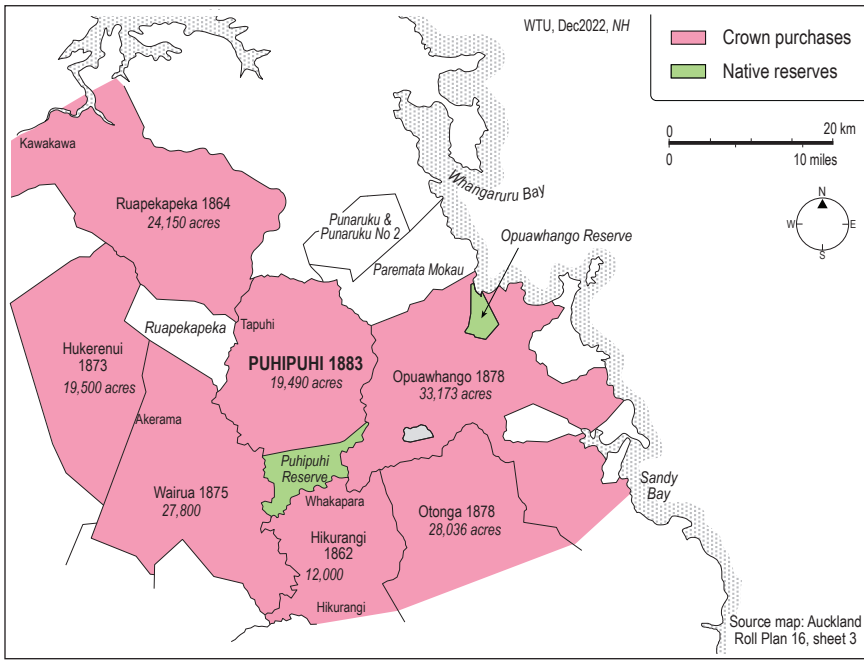
394. Pāpāhia's advance was recorded as part of the Crown's outlay on the purchase in the Land Purchase Department ledgers:see Preece to McLean, 3 July 1875, AJHR, 1875, C-4, p 2.

395. Preece indicated that the owners gave Wī Tana Pāpāhia some of the purchase money, which could have been in recognition of rights over the block, although another possibility is that this was reimbursement for his contribution to the cost of the block's survey: Preece to Native Minister, 3 July 1875, AJHR, 1875, C-4, p 2; *Omahuta* (1875) 2 Northern MB, 133 (doc A49).

396. Armstrong, 'The Native Land Court and Crown Purchasing' (doc AA52), p 46.

397. Closing submissions for Wai 246 (#3.3.249), pp 82–84.

398. Closing submissions for Wai 1509, Wai 1512 and Wai 1539 (#3.3.301), p 7; closing submissions for Wai 1384, annex B (#3.3.286(b)), pp 89–90; closing submissions for Wai 1509, Wai 1512, and Wai 1539 (#3.3.301), p 7; closing submissions for Wai 49 and Wai 682 (#3.3.382(b)), pp 89–91.



Map 10.2: Crown purchasing in Puhiuhi.

year – considered Puhipuhi worth £30,000, or more than £1 per acre, for the timber alone.[399]

At the time, the ownership of the Puhipuhi block was still unclear. Title hearings had been held in 1873 and 1875, with Eru Nehua of Ngāti Hau, Hoterene Tawatawa of Ngātiwai, and Maihi Parāone Kawiti of Ngāti Hine as the main claimants; however, these proceedings were adjourned without a determination having been issued (see chapter 9, section 9.6). Over this period, Judge Maning proposed a number of options for the division of the land and the claimants' interests, but the outcome remained unclear. Furthermore, as we discussed in chapter 9, Maning's private discussions with Nehua and Maihi Parāone created confusion about what had been proposed, and tensions between the parties increased over the subsequent years.[400] It was not until 1878, when the Crown became interested in acquiring the valuable timber on the block, that officials took any action to resolve the dispute.[401]

399. Nelson had referred to Holdship as Holdership: Derby, 'Fallen Plumage' (doc A61), pp 114–115, 118; Horsley, 'A History of the Otangaroa, Te Pupuke, and Waihapa Blocks' (doc A57), pp 35, 90–91.

400. Mark Derby, 'Fallen Plumage' (doc A61), p 87; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 725–727.

401. Derby, 'Fallen Plumage' (doc A61), pp 105, 114–116.

Native Land Purchase Under-Secretary RJ Gill saw purchasing the interests of Eru Nehua and Maihi Parāone Kawiti as a way of acquiring a forest for the Crown, while also bringing a seemingly intractable inter-hapū dispute to a conclusion.[402] Puhipuhi was proclaimed as a block under negotiation for purchase in November 1878, locking out any private buyers.[403] Over the next 12 months, officials would make six advance payments, with a total of £620 going to Eru Nehua and others, £400 to Hoterene Tawatawa, and £1,000 to Maihi Parāone Kawiti. Additionally, the Crown reimbursed Eru Nehua for the £312 cost of surveying the block.[404] Deals were also struck privately, whereby the Crown agreed to pay Kawiti a total of £2,500 for his interests. The Crown accepted Nehua's request to set aside land that Ngāti Hau were currently farming as well. The reserve area was surveyed in 1880, remarkably, before a formal title was made granting ownership to Nehua and Ngāti Hau. Researcher Mark Derby suggested that the Crown considered that Ngāti Hau were likely to be awarded some interest in the block, and that they would only agree to the Crown purchasing that interest 'if their retention of the reserved area was guaranteed in advance'.[405] However, these deals further stoked tensions between the parties.[406]

A few days before the title investigation hearing began in April 1882, Gill informed Native Minister Bryce that the Crown had already advanced a total of £2,332 and the claimants expected the payment of the balance, £3,668 (for a total of £6,000), at the Court. Bryce responded that the land should be purchased if it could be acquired at that price. But during the first day of the hearing, Gill withdrew the application to determine the Government's interest, on the basis that the original application was made before the survey of Nehua's reserve was approved by the Surveyor-General in March 1882, and as a result, it was not excluded.[407] Correspondence between Crown officials and Bryce illustrates their initial concern about the size of the tāmana payments, and how the Court's decision would align with these arrangements. They initially developed a 'fallback option' in case the Court awarded some Puhipuhi land to claimants other than those who had already received tāmana. In that case, officials indicated they would seek another Court hearing where (they hoped) the Court would award the Crown 'land equivalent in value to what it had already paid in advances'.[408] But as the 1882 hearing got underway, Crown officials and the Native Minister increasingly favoured another outcome: that the Court would determine the rightful owners of Puhipuhi in its entirety, not just the owners of those areas to whom the Crown had already paid advances. In which case, the Crown hoped, any further Puhipuhi owners could be persuaded to sell.[409] As we noted in chapter 9, the Court awarded 16,000 acres to

402. Derby, 'Fallen Plumage' (doc A61), pp 117–118.
403. Derby, 'Fallen Plumage' (doc A61), pp 117, 121.
404. Derby, 'Fallen Plumage' (doc A61), pp 121–122, 128–131.
405. Derby, 'Fallen Plumage' (doc A61), p 136.
406. Derby, 'Fallen Plumage' (doc A61), pp 126, 135–136.
407. Derby, 'Fallen Plumage' (doc A61), pp 150.
408. Derby, 'Fallen Plumage' (doc A61), pp 149–151.
409. Derby, 'Fallen Plumage' (doc A61), p 151.

Ngāti Manu, Ngāti Te Rā, and Ngātiwai, and 9,000 acres to Eru Nehua and Ngāti Hau.[410]

Then, after the Court delivered its judgment, the Crown sought to have Hoterene Tawatawa – who had earlier accepted advance payments on behalf of Ngātiwai – added to the Ngātiwai owner list. According to Derby, Crown officials maintained that the other Puhipuhi owners had left off Tawatawa's name in the hope of nullifying any obligation to abide by the purchase price of six shillings per acre the Crown had offered when paying Tawatawa his first advance.[411] In order to forestall that possibility, Derby notes that 'the Crown agreed to the registrar of the court adding Tawatawa's name to the certificate of title'.[412] The Crown can be seen intervening to ensure that the final title determination was consistent with the advance payments it had paid out, rather than the owners' wishes.

The judgment was protested by all parties. In chapter 9, we discussed the petitions for a rehearing made by Iwi Taumauru of Te Atihau, Nehua and Maihi Parāone (see section 9.6). Maihi Parāone made two appeals to Native Minister Bryce for a rehearing in May 1882, pointing out that he had received advanced payments for the block:

> If you do not agree to a rehearing, what is to be done about the five hundred pounds that I have received – you have proclaimed that 25,000 acres because of advances made upon it which we have received . . . grant a new hearing of that land, lest you should altogether lose the money you have advanced on this land.[413]

In June 1882 Hone Tiaki and 34 members of Ngātiwai petitioned the Government, claiming that they had received a share of the advances and objecting to the per-acre price of six shillings that had been the basis for those payments that they claimed they had not received a share of. The petitioners noted that 'Kauri timber in the vicinity of the said block is selling for fifteen shillings a tree and a great many trees grow upon an acre.'[414] They complained, that the Crown had secured the land for less than half that amount, and the proclamation over the land was preventing them from accepting a higher price from private purchasers for their interests.[415] Bryce's response was to blame private interests whose 'unlawful' interference was, he thought, 'doubtless at the bottom' of the petition. It was, he noted, 'the intention of the Government 'to purchase the block or as much of it as they can'.[416] Subsequently Nehua, Tawatawa, and Kawiti wrote jointly to the

410. Derby, 'Fallen Plumage' (doc A61), pp 152–153.
411. Derby, '"Fallen Plumage"' (doc A61), p 154.
412. Derby explained that the Crown was apparently authorised to take such action under section 25 of the Native Land Court Act 1880: Derby, 'Fallen Plumage' (doc A61), p 157.
413. M P Kawiti to J Bryce, 8 May 1882 (cited in Derby, 'Fallen Plumage' (doc A61), p 157).
414. Derby, '"Fallen Plumage' (doc A61), p 157.
415. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 731; Derby, '"Fallen Plumage' (doc A61), p 157.
416. Bryce, marginalia to petition of Hone Tiaki and 34 others, 12 June 1882 (Derby, 'Fallen Plumage' (doc A61), p 158).

Native Minister in 1882 to ask if they could repay their advances and be free of their sale obligation. But Bryce rejected this request, and Derby considered this was 'an indication that the Crown believed it had secured a good deal with its initial advances and was determined to hold the vendors to the original terms of that deal'.[417]

After the vigorous Māori opposition to the Court's 1882 decision, and an armed confrontation between members of Ngāti Hau and Ngātiwai in June 1882 (see chapter 9), a rehearing was granted, and the final adjudication of the Puhipuhi title took place in 1883.[418] The Crown was now even more determined to protect its investment, with Under-Secretary Gill instructing the Native Land Court clerk John Greenway to see that, 'should the Court award the land to the hapus to which Eru Nehua, Hoterene Tawatawa and Marsh Brown Kawiti belong, that the names of those who participated in the [advance] payments are registered as owners of the land'.[419]

It is unclear how effective this instruction was, as Judges Loughlin O'Brien and William Gilbert Mair opted to weigh up the parties' cases according to how consistent they had been across the various hearings. Ultimately, they awarded the bulk of the block, some 20,000 acres, to Eru Nehua and Ngāti Hau (see chapter 9 for details of the block's subdivision, and also how the remaining land in the block was awarded among Ngāti Hine, Ngāti Manu, Ngāti Te Ra, and Ngātiwai claimants).[420]

Once the title to the various Puhipuhi subdivisions had been decided, the Crown then set about completing its purchase. During the hearing, Greenway had warned Gill that Ngāti Hau and Ngāti Hine would not complete the sale 'except at a large advance on price already fixed'.[421] Gill therefore proposed to Native Minister Bryce that the Crown raise its initial offer of six to 15 shillings per acre for the timber areas (which Gill thought covered 6,000 acres), and 7s 6d per acre for the remaining land.[422] A valuation made by Assistant Surveyor-General S Percy Smith gives us a fairer indication of its market value at the time; he thought that it contained 4,000 acres of prime kauri forest, worth £6 per acre; 5,000 acres of first-class land, worth 15 shillings per acre; with the remainder, in his opinion, worth 9s 6d per acre. Percy Smith also noted that he had valued the kauri 'at very much less than private individuals do'.[423] Eru Nehua and Maihi Parāone Kawiti made counter-offers of £20,000 for 14,190 acres (Puhipuhi 1, less reserves) and £4,500 for 3,000 acres (all of Puhipuhi 2), which still would have resulted in the Crown outlaying less than the value suggested by Percy Smith. However, Gill and Bryce

417. Derby, 'Fallen Plumage' (doc A61), pp 158–159.
418. Derby, 'Fallen Plumage' (doc A61), pp 159–160.
419. Gill to Greenway, 3 May 1883 (cited in Derby, 'Fallen Plumage' (doc A61), p 162).
420. Derby, 'Fallen Plumage' (doc A61), pp 167–170; Thomas, 'The Native Land Court' (doc A68), p 148.
421. Greenway to Gill, 20 May 1883 (cited in Derby, 'Fallen Plumage' (doc A61), p 176).
422. Derby, 'Fallen Plumage' (doc A61), p 176.
423. Derby, 'Fallen Plumage' (doc A61), p 177.

continued to insist that Eru Nehua and Maihi Parāone Kawiti accept a purchase price closer to what the advances had been paid out on.[424]

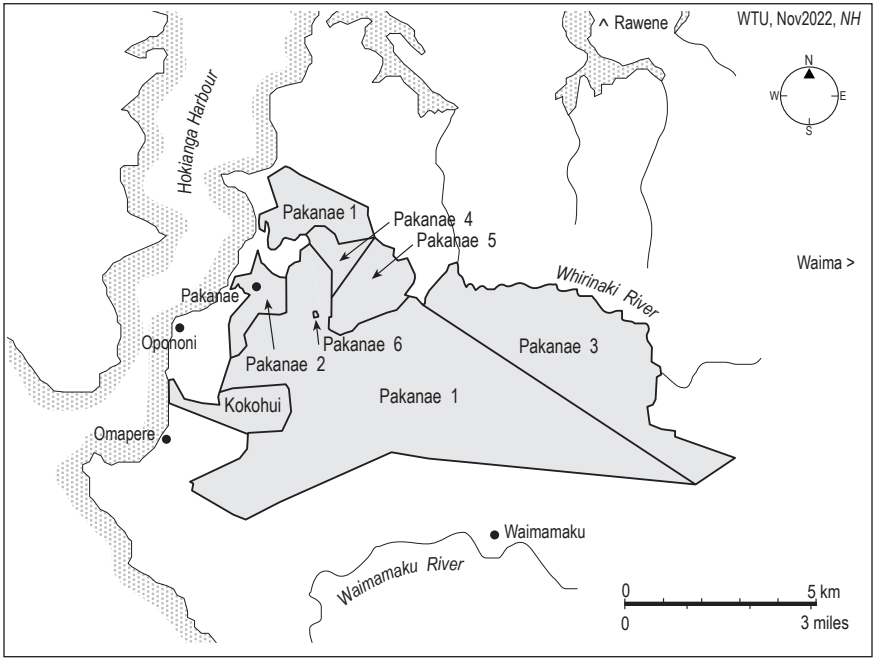
Ultimately, this approach, together with its purchasing monopoly while the proclamation remained in place, enabled the Crown to purchase 14,490 acres of Puhipuhi 1 for £8,574, the 3,000 acres of Puhipuhi 2 for £1,800, and the 2,000 acres of Puhipuhi 3 for £1,000. These sums included the advances already paid. The per-acre price for the three blocks – approximately 12 shillings in the case of Puhipuhi 1 and 2, and 10 shillings for Puhipuhi 3 – can be instructively compared with the market prices indicated earlier by Percy Smith.[425] Altogether, the Crown had acquired almost four-fifths of the Puhipuhi lands, while only paying the owners about one-third of what it knew its value to be.

10.4.2.3.3 Use of tāmana at Pakanae

Te Wahapū o Hokianga nui a Kupe claimants submitted that Pakanae 1 (9,064 acres) and Pakanae 3 (3,150 acres) were both sold to the Crown within a week of the Native Land Court granting titles to them in June 1875.[426] Together, these two partitions encompassed more than 89 per cent of the Pakanae block. Their rapid sale contrasted with the other four Pakanae blocks, the largest of which was Pakanae 5 (740 acres). None of the land these four blocks encompassed was sold before 1900, although two of the owners of Pakanae 5 invited the Crown to offer 15 shillings per acre for it in 1897.[427]

Brissenden, assisted by Nelson, organised the payment of tāmana for undefined shares in Pakanae. As he was shifting from a salary to a per-acre commission, Brissenden was keen to acquire as much land as he could in the shortest possible time.[428] As noted earlier, one of Nelson's tactics was to discredit private bids; he did this in Pakanae by inflating owner expectations. Brissenden claimed that Nelson told them that he would pay them 10 shillings per acre (although the owners later told Brissenden's interpreter that Nelson offered them 30 shillings per acre). Regardless, Nelson's offer resulted in negotiations with other prospective purchasers being 'broken off' (Brissenden's description). The land was surveyed, and ultimately the Pakanae owners accepted Brissenden's offer, even though it was far less than Nelson had indicated, amounting to only around 1s 3d per acre overall.[429] Further, researcher Coralie Clarkson refers to evidence indicating that Nelson and Brissenden may have employed 'treating' to secure what became Pakanae 1 and 3.[430] She explained: 'The practice of "treating" refers to land purchase agents

424. Derby, 'Fallen Plumage' (doc A61), pp 178–182.
425. Derby, 'Fallen Plumage' (doc A61), p 185.
426. Closing submissions for Wai 250 and Wai 2003 (#3.3.272(b)), pp 36–37.
427. Clarkson, 'Pakanae and Kokohuia Lands' (doc A58), pp 57–58.
428. Clarkson, 'Pakanae and Kokohuia Lands' (doc A58), pp 52, 55.
429. Referring to the subsequent court hearing to determine title, Clarkson commented that 'The large discrepancy between the offered prices of 10 shillings and 30 shillings an acre, versus the eventual price accepted by Maori — 1 shilling 3 pence – was not explained in the [Native Land Court] minutes': Clarkson, 'Pakanae and Kokohuia Lands' (doc A58), p 55.
430. Clarkson, 'Pakanae and Kokohuia Lands' (doc A58), pp 53–55.



Map 10.3: The Pakanae block.

colluding with or acting as shopkeepers to provide Maori with goods, and in turn getting them into debt that they then had to sell land to clear.'[431]

A list compiled by Clarkson shows that of the four tāmana payments made during September and October 1874, two (totalling £80) were to Hapukuku Moetara of Ngāti Korokoro and others, while the other payments (of £50 each) went to Pairama Te Tao and others, and Hōne Mohi Tāwhai and others.[432] At the Pakanae 1 title hearing in June 1875, Hapukuku Moetara asserted that Ngāti Korokoro had agreed his name alone should be entered onto the memorial of ownership. The minutes record that 'Hone Mohi Tawhai said Hapakuku Moetara is the person who has the mana over this land', and a number of witnesses then 'rose in succession to corroborate H Moetara's statement'.[433] This helped expedite the block's sale to the Crown, as section 49 of the Native Land Act 1873 allowed alienations where all owners were in agreement.[434] In contrast, Pakanae 2 (425 acres) – which contained Ngāti Korokoro's ancestral kāinga – was later awarded to 66 owners, while Pakanae 4 (258 acres) and 5 (740 acres) were awarded to 10 and eight owners

431. Clarkson, 'Pakanae and Kokohuia Lands' (doc A58), p 53.
432. Clarkson, 'Pakanae and Kokohuia Lands' (doc A58), pp 52–53.
433. *Pakanae* (1875) 2 Northern MB 175 (doc A49); Clarkson, 'Pakanae and Kokohuia Lands' (doc A58), p 40.
434. Clarkson, 'Pakanae and Kokohuia Lands' (doc A58), p 41.

respectively. Pakanae 6 was also awarded to one owner, but it was a five-acre burial reserve.[435] When it came to the sale of Pakanae 1, which occurred only eight days after the title award, three of the tāmana payments (totalling £130) were counted as a deposit, leaving the Crown to pay the £429 balance for the block.[436]

Shortly afterwards, Pakanae 3 – which Hapukuku Moetara acknowledged was not Ngāti Korokoro land and had been claimed by Te Waharoa for Te Hikutū – was awarded to 10 owners.[437] With all owners assembled in Court, the Crown could obtain their signatures for the purchase deed and have the sale confirmed by the Court on the same day. The block payment for Pakanae 3 consisted of £50 tāmana, plus the balance of £149 6s 3d.[438]

10.4.2.3.4 Use of tāmana by private purchasers

Although we received little evidence about the manner in which private purchasing was conducted in the inquiry district, it is clear – as the following example illustrates – that private purchasers also paid tāmana (until the enactment of section 7 of the Native Land Laws Amendment Act 1883 prevented the practice). Like the Crown, they paid advances before title determination in an effort to exclude rivals and bind all owners to an agreed price. And the use of tāmana payments by private purchasers could likewise have destabilising and divisive effects for Te Raki hapū and iwi.

For example, the Ngā Hapū o Hokianga, Te Uri o Hau, Mane Hotere hapū, and Ngāti Kahao Taou Maui hapū claimants allege that tāmana paid by a private agent led to a deadly clash in September 1879 (which later became the subject of a report to Parliament, 'Native disturbance at Otaua, Hokianga').[439] The dispute pitted the Ōtāua-based Ngāi Tū hapū, led by their rangatira Hoterene Wī Pou, against the Ngāi Tāwake hapū of Matarāua and Kaikohe. At issue was the Mangamaru block, situated between Ōtāua and Matarāua, which both hapū considered belonged to them.[440] According to Armstrong and Subasic, the private purchase agent John Lundon (also MHR for the Mangonui and Bay of Islands electorate from 1879 to 1881) had given money to Hoterene Wī Pou. But Ngāi Tāwake had no plans to bring the block before the Native Land Court and therefore opposed its survey. When Ngāi Tāwake told the local magistrate, Edward Williams, of their opposition, he warned the surveyors that the land was under dispute. Then, when a party of Ngāi Tū started clearing lines for a survey, they were fired on by Ngāi

435. Clarkson, 'Pakanae and Kokohuia Lands' (doc A58), pp 43–46.
436. Clarkson, 'Pakanae and Kokohuia Lands' (doc A58), pp 9, 55–56.
437. Clarkson, 'Pakanae and Kokohuia Lands' (doc A58), pp 39–40, 42; *Pakanae* (1875) 2 Northern MB 175 (doc A49).
438. Clarkson, 'Pakanae and Kokohuia Lands' (doc A58), pp 42, 56–57. The £50 tāmana was presumably the payment to Hōne Mohi Tāwhai and others, as Pairama Te Tao was the second listed owner of Pakanae 4 and the sole owner of Pakanae 6: *Pakanae* (1875) 2 Northern MB 223–224 (doc A49).
439. Rosaria Hotere and Jane Hotere, amended statement of claim, May 2017 (Wai 974 ROI, claim 1.1.108(b), SOC), p 9; closing submissions for Wai 974 (#3.3.245), pp 13–14; see 'Papers relating to Native Disturbance at Otaua, Hokianga', AJHR, 1879, G-9.
440. Closing submissions for Wai 974 (#3.3.245), pp 13–14.

Tāwake, leaving two dead; in the ensuing return fire, two Ngāi Tāwake were also killed. Senior Ngāpuhi rangatira Hōne Mohi Tāwhai, Mangonui Kerei, and Maihi Parāone Kawiti intervened and calmed tensions, with both parties accepting that these rangatira should take charge of the disputed block.[441]

The rangatira were, however, unable to broker a long-term agreement between Ngāi Tū and Ngāi Tāwake. In 1887, Hoterene Wī Pou and others from Ngāi Tū applied to the Native Land Court for title investigation, and Ngāi Tāwake had no option other than to counter-claim. As it turned out, Judge Edward Puckey found in favour of the Ngāi Tū applicants, awarding both Mangamaru (1,327 acres) and the neighbouring block of Ninihi (303 acres) to Hoterene Wī Pou and Eruera Whakamautara (Ngāti Tautahi).[442]

10.4.2.3.5 Summary: the use of tāmana in Te Raki

Despite McLean's cautions about the use of tāmana, Crown purchase commissioners made widespread use of this tactic during the 1870s.[443] From 1865, the Crown's Native Land legislation made provision for the Crown to use advance payments and pre-title determination purchase agreements to overcome private competition, which appears to have been a greater concern than ensuring their payments were made to the correct owners. McLean's early instructions on the use of advance payments and pre-title determination purchase agreements were totally ignored, which suggests that his agents understood that they were in little danger of rebuke. The evidence shows that when the Crown's agents employed tāmana, they did so with several objectives in mind. These included:

- drawing land held in customary ownership into the title adjudication and partitioning processes;
- committing owners to sale;
- excluding private purchasers (and thus exercising a large measure of control over price);
- circumventing any opposition to alienation collectively voiced by claimants, or any demands over price and reserves they may have presented;
- binding owners to the low prices paid in advance of title-determination, which they were able to set without informing the owners of the value of their land and resources such as timber; and,
- establishing a basis on which they might hope to influence, guide, or induce the Native Land Court to reach decisions over titles that favoured the Crown's purchasing ambitions.

Tāmana generated uncertainty, disunion, and tensions because numbers of Māori found themselves drawn, willing or unwillingly, into title adjudication and partition proceedings that were both costly and divisive. Even Brissenden

441. William Webster to Native Minister, 4 September 1879, AJHR, 1879, G-9, p 2; S von Sturmer to Under-Secretary, Native Department, 3 October 1879, AJHR, 1879, G-9, pp 2–3; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 742–743.

442. *Mangamaru* (1887) 9 Northern MB 3, 28 (doc A49); Berghan, 'Northland Block Research Narratives' (doc A39(d)), vol 5, pp 69, 428.

443. McLean, instructions, November 1871, AJHR, 1875, G-7, p 7.

admitted to McLean that Māori regarded small advance payments as 'a trick to tie up their lands'.[444] Section 59 of the Native Land Act 1873 did direct the Court to inquire into all transactions for sale and purchase and to satisfy itself that all owners agreed to alienation, but offered little if any protection when all of the rightful owners had not been identified – much less their names entered upon the memorials of ownership.

The introduction of the Government Native Land Purchases Act 1877 gave the Crown an even freer hand which it deployed in Te Raki. Once the Crown had made any payment for land or had begun negotiations to do so, it could – without consulting landowners – simply issue a proclamation asserting its prior rights over the land in question. Any ongoing negotiations that owners might be having with private purchasers were effectively shut down.[445] According to the purchasing agent James Preece, if those who received tāmana were not ultimately found to be owners, then the successful claimants would share the balance of the payments with them nonetheless; however, he stated that the vast majority of those who were paid tāmana were awarded title.[446]

Whether or not this is true, it does not adequately answer the question of whether the Crown's payment of tāmana may have predetermined the outcome of the Court's title investigations – something the Crown disputed in its closing submissions. Arguing that 'correlation is not causation', the Crown submitted that the question 'turns on the facts of particular block investigations and title awards' and thus can only be answered on a case-by-case basis.[447] Without such granular evidence, we recognise a direct causal connection between the receipt of advance payments and the Court award of title may be impossible to prove; the influence of such a consideration was unlikely to be acknowledged in any court judgment. But at the very least, it is clear the Crown's practice of paying tāmana had the deleterious effect of drawing individuals with uncertain claims to particular parcels of land into the Crown's purchase net, put pressure on others with rights in the land concerned to accede to Crown purchase, or forced them into court to defend their interests and undermined collective decision-making and control over land and resources. It was a practice which was designed to advantage the Crown.

10.4.2.4 *Purchasing individual interests*

With Te Raki hapū becoming increasingly resistant to selling, the Crown changed tack during the late 1880s and 1890s. Increasingly, it targeted blocks that had not been subject to pre-hearing advance payments but were vulnerable for other reasons. Compared with the 1870s, the sheer number of owners to whom the Native Land Court now generally awarded Te Raki block titles was notable – 55 on average by the 1890s, compared with an average of eight owners in the late-1870s (see

444. Brissenden to McLean, 3 August 1874, AJHR, 1875, G-7, p 16.
445. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 702–703.
446. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 703.
447. Crown closing submissions (#3.3.407), pp 27–28.

chapter 9, section 9.5.2.1).[448] This proliferation of individual owners possessing shares that were undivided and undefined on the ground has been called 'a new form of Court-inspired individualisation'.[449] Generally, the many owners 'did not control their own distinct, viable piece of land' but were effectively 'tenants in common . . . [who] often saw little way of deriving benefit from their land except through selling their interests'. The Crown's purchase agents were only too willing to oblige, and throughout the 1890s set about steadily acquiring the undivided interests of of Te Raki landowners identified by the Court.[450]

The Crown's largest acquisition in the district that decade illustrates the process, and its consequences for Māori. It involved the 21,362-acre Whatitiri block, where the Crown acquired at least 15,670 acres by means of 29 separate purchase deeds between 1895 and 1899. The Court then carried out 'multiple' partitions of seller and non-seller interests. Thomas describes individual Māori owners struggling to protect their interests at partition hearings in the face of the Crown's 'overwhelming power'.[451] At the end of the partitioning process, while Māori retained around a quarter of the Whatitiri lands, 'their holdings were scattered into numerous small, isolated parcels hemmed in by Crown-owned land'.[452]

Typically, some time would elapse between the Crown purchasing individual interests and applying to the Native Land Court for a partition order. During this interval, more pressure could be placed on the remaining owners to sell. The delay also restricted owners' ability to use the land as they chose. For example, after the Court awarded title over two Mangakahia blocks (2A and 2B) to 150 and 58 owners respectively in 1895, the Crown moved swiftly to acquire individual interests before partition – at a time when many Te Raki landowners were experiencing dire poverty. The recovery from the economic depression of the 1880s had largely bypassed Northland, and more especially Te Raki Māori.[453] During the winter of 1896, the Te Oruoru school teacher observed with alarm that 'the unfortunate people are actually starving for want of food!'[454] Against this background, many Mangakāhia landowners sold their interests to the Crown in order to buy food or pay off debt. By July 1896, all but 33 of the 208 owners of the two blocks had done so. Those who refused to sell came under intense pressure when the Crown moved to prevent them from cutting down timber in the blocks in order to generate income, but they remained defiant. Finally, the Crown applied for the Court to partition out its share, and in 1896 it was awarded the bulk of Mangakahia 2 – 11,515 acres out of the original 13,987 acres. The 11 non-sellers of Mangakahia 2B were awarded 1,696 acres, while the interests of the 22 non-sellers in Mangakahia 2A were split into four separate areas totalling just 772 acres. Over the decades that followed, the

448. Thomas, 'The Native Land Court' (doc A68), p 193.
449. Thomas, 'The Native Land Court' (doc A68), pp 149, 194.
450. Thomas, 'The Native Land Court' (doc A68), pp 183–184, 193–195.
451. Thomas, 'The Native Land Court' (doc A68), p 196.
452. Thomas, 'The Native Land Court' (doc A68), p 196.
453. Bayley, 'Aspects of Maori Economic Development and Capability' (doc E41), pp 67, 73–74, 77–83.
454. Thomas, 'The Native Land Court' (doc A68), p 209.

remaining Māori-owned land in the Mangakahia block was progressively divided into ever-diminishing parcels.[455]

While some of the Crown's purchasing in the region was initiated by the owners themselves,[456] from 1894 onwards the land purchase agent C J Maxwell was actively promoting the Crown's offers. Indeed, he was so active that the rangatira Taniora Arapata sought to have an alienation restriction placed on Kaingapipiwai to stop him from harassing its owners. However, his request was ignored.[457] Maxwell's arrival more or less coincided with the restoration of pre-emption, which gave the Crown an effective monopoly on purchasing. Hōne Heke Ngāpua, then MHR for Northern Māori, bitterly opposed the return of pre-emption, describing its effect on land prices as 'legalised robbery'.[458] The Crown's offers were now fixed, on the advice of the Survey Department,[459] in conjunction with Maxwell, and were not subject to negotiation (although there was some scope for increasing offers where collective refusal began frustrating the Crown's purchasing ambitions).[460]

The Crown's purchasing during the 1880s and 1890s – and, just as importantly, its participation in partition hearings – also shows an intent to acquire the mineral resources of the Te Raki inquiry district wherever possible. Representing the Crown at the 1894 Native Land Court hearing where its interests in the Parihirari blocks were to be defined, Gilbert Mair found that 'the non-sellers wanted the best of the block including all the Cinnabar [mercury] workings'. After some hectic out-of-court discussions, Mair was able to report that he had secured all local mercury deposits for the Crown: 'the 4290 acres awarded to the Crown, contain all the Quicksilver [mercury] deposits and are therefore, the most valuable portion of the estate', he advised.[461] Meanwhile, the promise of copper and silver deposits on Omaunu 2 and coal on Whakapae 2 prompted higher than usual offers from the Crown of 10 shillings per acre, which it subsequently raised to 15 shillings per acre in the case of Omaunu 2.[462] However, some owners still resisted the Crown's purchasing proposals, including Taniora Arapata – said to be 'the leading man of the Hapū interested' – who was holding out for the £1 per acre he said potential private purchasers had offered him.[463] But the Crown persisted, with the assistance of James Stephenson Clendon (a Native Land Court judge), who took over negoti-

455. Thomas, 'The Native Land Court' (doc A68), p 209.
456. Thomas, 'The Native Land Court' (doc A68), p 202.
457. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1147, 1150–1151.
458. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1146.
459. See Berghan, 'Northland Block Research Narratives' (doc A39(j)), vol 11, pp 157, 165, 379–380, 382, 484–485, 501.
460. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1150, 1155.
461. Waitangi Tribunal, *Ngawha Geothermal Resource Report*, Wai 304, pp 49–51. It is assumed that Mair's discussions were with non-sellers Hōne Heke Ngāpua and Te Tane Haratua, who are recorded as having addressed the court; there is no evidence that any 'sellers' attended the hearing or that they had even been notified of it.
462. Thomas, 'The Native Land Court' (doc A68), pp 222–223; Berghan, 'Northland Block Research Narratives' (doc A39(i)), vol 10, pp 135–139; Berghan, 'Northland Block Research Narratives' (doc A39(l)), vol 813, pp 800–801.
463. Berghan, 'Northland Block Research Narratives' (doc A39(e)), vol 6, p 96.

ations with landowners.[464] Ultimately, the Crown acquired 2,376 acres of Omaunu 2 (the one remaining owner retained 45 acres) and 517 acres of Whakapae 2 (the remaining five owners retained 78 acres).[465]

The Crown's strategy of purchasing individual interests from numerous listed owners gravely undermined tino rangatiratanga and the ability of hapū to retain lands in their ownership at the very time when they needed to muster all their resources to protect both. As the Tribunal has commented in the *Turanga Tangata Turanga Whenua* report, the Crown's pursuit of individual interests allowed the sale of community assets 'without the community even knowing that they had been sold', without their consensus, and without the traditional bulwark of communal decision-making.[466] The 1891 Commission on Native Land Laws concluded that under the Native Land Act 1873,

> The old public and tribal method of purchase was finally discarded for private and individual dealings. . . . All the power of the natural leaders of the Maori people was undermined. . . . The crowds of owners in a memorial of ownership were like a flock of sheep without a shepherd . . . suddenly possessed of a title to land which was a marketable commodity. . . . The strength which lies in union was taken from them. The authority of their natural rulers was destroyed.[467]

This had been apparent early on.

The Crown's purchasing of individual interests especially undermined plans that owners might have collectively prepared for investment, development, and management – such as those made by the owners of Omaunu 2 who refused the Crown's offer to purchase the land for 7s 6d per acre in 1896. They asked for a loan of £120 from the Crown 'for the purpose of improving that land' and to enable them to access the resources, with the land as a security.[468] However, this was rejected by Maxwell and Native Minister Sheridan on the basis that it would be better for the Crown to purchase shares in the land 'outright'.[469]

The Crown's policy also meant those owners who retained their interests were drawn more deeply into uncertainty and debt. The mounting costs were usually registered as interest-bearing liens over those very lands. The Crown's targeting of absentee owners or those with less affinity with blocks was also a cause of community discord. For example, Paihia Pukerewa and others wrote to the Native Minister complaining that shares in Motukaraka East had been sold by individuals who had been included in the owner list only out of aroha.[470] For those owners

464. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1150, 1154.
465. Berghan, 'Northland Block Research Narratives' (doc A39(i)), vol 10, p 145 n; Berghan, 'Northland Block Research Narratives' (doc A39(l)), vol 813, p 801.
466. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, pp 441–444.
467. 'Report of Native Land Laws Commission', AJHR, 1891, G-1, p x .
468. More Tukariri to Maxwell, 9 March 1896 (Berghan, supporting papers (doc A39(n)), vol 4, p 2,796); Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1153.
469. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1153–1154.
470. Berghan, 'Northland Block Research Narratives' (doc A39(j)), vol 11, p 162.

who did not want to sell, the process could still entail multiple Court hearings and multiple surveys. The associated costs were then apportioned on the basis of the share of the block awarded to the remaining owners and the Crown respectively. We described earlier how this incremental, or serial, partitioning of blocks played out in the case of Whatitiri.

As blocks fragmented during the 1880s and 1890s – either through subdivision into smaller blocks with 'manageable' numbers of owners, or through the Court partitioning out Crown interests – the burden of fresh survey costs fell on ever-smaller areas of land. As described in chapter 9.7 where such costs could not be paid, they remained as liens on the land which increased with interest; eventually, the Crown often took them over. At least two blocks in the inquiry district, Omaunu 1E and Waiaruhe 2A, were subdivided specifically for the purpose of being awarded to the Crown in lieu of survey costs.[471] A number of other blocks, such as Mareikura F, Kaurinui 3 and Motukaraka West, were also offered for sale in order to pay off survey liens.[472]

The Crown has argued there was no necessary relationship between the Native Land Court system and land alienation – citing the examples of the Parahirahi and Kokohuia blocks. According to Crown counsel, the delay between the original award of title and the Crown's eventual purchase of these blocks shows that individualisation of title was not necessarily related to alienation.[473] However in our view, the Crown's delay in purchasing the Parahirahi block was more attributable to the alienation restrictions recorded in the memorial of ownership in 1873, which delayed subdivision until 1885.[474] Purchase negotiations for the block took place from 1885 to 1894, and by the time they concluded, the Crown had acquired most of its 5,097 acres.[475] The evidence supports the claimants' allegation that the delay between titling and acquisition was the product of the Crown's strategy of acquiring individual shares through a process of attrition. As to the Kokohuia block, the limited evidence we received suggests that the delays in alienation were caused by the requirements of the Native Lands Act 1867, under which the land was titled. Section 17 acted as a protection against alienation by requiring all owners to be recorded on the title and the land to be partitioned into blocks with fewer than 10 owners before it could be sold (see chapter 9, section 9.5). As a result, the Kokohuia block was not brought before the Court for partitioning until 1904.[476]

471. Walzl, 'Overview of Land Alienation' (doc U1), p 93; Berghan, 'Northland Block Research Narratives' (doc A39(l)), vol 13, pp 741–742.

472. Berghan, 'Northland Block Research Narratives' (doc A39(d)), pp 155–163; Berghan, 'Northland Block Research Narratives' (doc A39(j)), vol 11, pp 168–169; Berghan, 'Northland Block Research Narratives' (doc A39(k)), vol 12, pp 128–129.

473. Crown closing submissions (#3.3.407), p 18.

474. Rose Daamen, 'Report on the Alienation of the Parahirahi Block', report commissioned by the Waitangi Tribunal, 1992 (doc E1), pp 10–14.

475. Daamen, 'Report on the Alienation of the Parahirahi Block' (doc E1), p 15; Berghan, 'Northland Block Research Narratives' (doc A39(f)), vol 7, p 140.

476. Clarkson, 'Pakanae and Kokohuia Lands' (doc A58), pp 32–33. Clarkson recorded that the land was titled under both section 17 of the 1867 statute and under section 23 of the Native Lands Act 1865.

10.4.2.4.1 The purchasing of individual interests at Parahirahi

The Crown set about acquiring individual interests in the 5,097-acre Parahirahi block – which contained both valuable minerals and the Ngāwhā Springs – in the late 1880s. The Tribunal has previously commented on the Crown's acquisition of Parahirahi in its 1993 report into claims concerning the ownership and control of the Ngāwhā geothermal resource;[477] however, the treaty compliance of the purchase of the land itself rather than its geothermal reseurces was also the subject of multiple claims in this inquiry. For this reason we discuss the block here. Claimants from Ngā Hapū o Hokianga, Te Uri o Hau, Mane Hotere hapū, and Ngāti Kaha o Taou Maui argued that when the Crown's interests were partitioned out in 1894, the remaining owners were left with the least productive parts of the block (the Crown acquired 4,293 acres as Parahirahi D that included – restrictions on alienation notwithstanding – most of the parcel containing the Ngāwhā Springs – as outlined in the *Ngawha Geothermal Resource Report*).[478] Similarly, the Pārahirahi C1 Trust and Ngā Hapū o Ngāwhā's claim also argued that the Crown exploited its capacity to purchase individual shares to acquire most of the Parahirahi block, which had significant quicksilver (mercury) deposits. It is alleged that the Crown then took interests throughout the three partitions, irrespective of their reserve status or the wishes of the owners. The claimants say that the Crown's award included four out of the five acres of the reserved land that had been set aside to protect the Ngāwhā Springs.[479]

The initial title investigation hearing for the Parahirahi block was held in July 1873. It followed a lease agreement reached the previous year between Wiremu Hongi Te Ripi (and nine others of Te Uri o Hau hapū) and John White, which allowed the mining of Parahirahi's quicksilver deposits.[480] Rose Daamen observed that no records survived from the hearing, but Judge Maning issued a certificate of title to 10 owners, and recorded a further 17 owners under section 17 of the Native Lands Act 1867.[481] At a rehearing in November 1874, the 5,097-acre block was awarded to a larger group of 37 owners; 36 were from Te Uri o Hau, while the other was from Ngāti Rangi hapū.[482] Parahirahi was partitioned in October 1885. In accordance with the owners' wishes, a five-acre triangle on the northern boundary containing the Ngāwhā Springs was set aside as Parahirahi C. The other 5,092 acres were split along a diagonal from north-west to south-east to become Parahirahi A and B. The Court also restricted the alienation of Parahirahi A (the

477. See Waitangi Tribunal, *Ngawha Geothermal Resource Report*, Wai 304.

478. Closing submissions for Wai 974 (#3.3.245) pp 16–17; closing submissions for Wai 53(#3.3.370(b)) pp 22–33.

479. Closing submissions for Wai 53 (#3.3.370(b)), pp 27–31.

480. Daamen, 'Report on the Alienation of the Parahirahi Block' (doc E1), pp 4, 6.

481. Daamen notes that Maning 'crossed out 1869 and wrote 1867 on the standard form': Daamen, 'Report on the Alienation of the Parahirahi Block' (doc E1), p 8.

482. As with the initial title investigation, no record of the rehearing survived: Daamen, 'Report on the Alienation of the Parahirahi Block' (doc E1), p 9; Waitangi Tribunal, *Ngawha Geothermal Resource Report*, Wai 304, p 36.

western half) and C so that they could not be leased for more than 21 years or sold without the Governor's consent.[483]

Despite, these restrictions Crown officials paid £25 to Hirini Taiwhanga in April 1886, on account of his 'interest in Parahirahi blocks A, B and C'. This amounted to six shillings per acre (making his share worth £41 6s 6d) after an earlier offer from two owners to sell their shares at the rate of £1 per acre had been declined.[484] Under the Native Lands Act 1873 the Crown ostensibly required the consent of all owners to for the removal of the restrictions, or a majority who would partition out their interests (we discuss alienation restrictions in section 10.5.2.3).[485] By August 1886, the Crown had extended its offer to include all owners, but at only three shillings per acre, a reduction which may have been prompted by an unfavourable assessment of the commercial value of the block's mineral deposits by the Director of the Geological Survey, Sir James Hector.[486] At this reduced rate, the Crown's total potential outlay would be £764 11s.[487] A *Gazette* notice was published in October 1886 declaring the block subject to Crown negotiation, thereby excluding any private buyers.[488] This action should not have legally overridden the Court-imposed restrictions on alienation.[489] However, over the next 12 months, the Crown was able to increase its holding in the block to almost 28 of the 37 shares. In 1889, it paid Taiwhanga the remaining amount it owed for his share, at the rate of six shillings per acre.[490]

After a final share-buying push, which boosted its interests to 32⅓ shares out of 37, the Crown sought to have its portion partitioned out of the block at a Native Land Court hearing held in 1894.[491] Here, the Crown produced a purchase deed that proved to have several defects which would have put the sellers at a disadvantage; quite apart from being undated and unsigned by the Crown, it did not identify any of the partitions or areas that the Court had previously reserved from sale, most notably the springs. Furthermore, the deed listed all the owners as sellers,

483. Daamen, 'Report on the Alienation of the Parahirahi Block' (doc E1), pp 12–14.

484. Treasury voucher (cited in Donald Loveridge, 'The Acquisition of Parahirahi D Block by the Crown', report commissioned by the Waitangi Tribunal, 1992 (doc E5), p 26; Daamen, 'Report on the Alienation of the Parahirahi Block' (doc E1), pp 18–19.

485. Williams, *Te Kooti Tango Whenua*, p 277.

486. Loveridge, 'The Acquisition of Parahirahi D Block by the Crown' (doc E5), Loveridge, 'The Acquisition of Parahirahi D Block by the Crown' (doc E5), pp 27–29.

487. Loveridge, 'The Acquisition of Parahirahi D Block by the Crown' (doc E5), pp 29–30.

488. Loveridge, 'The Acquisition of Parahirahi D Block by the Crown' (doc E5), p 32.

489. Differing legal opinions were presented on this question to the Ngawha geothermal resource (Wai 304) inquiry. However, the Tribunal observed that 'the qualified restriction on alienation made by the court in 1885 was clearly within its powers under s 4 of the Native Land Division Act 1882'. We furthermore note that section 5 of the Government Native Land Purchase Act 1877 stated that the provisions of that Act 'shall not alter or repeal any other enactment restraining the purchase or acquisition of Native lands, or any estate or interest therein': Waitangi Tribunal, *Ngawha Geothermal Resource Report*, Wai 304, pp 70–71.

490. Loveridge, 'The Acquistion of Parahirahi D Block by the Crown' (doc E5), p 51; Daamen, 'Report on the Alienation of the Parahirahi Block' (doc E1), pp 25–26.

491. Loveridge, 'The Acquisition of Parahirahi D Block by the Crown' (doc E5), p 103; Daamen, 'Report on the Alienation of the Parahirahi Block' (doc E1), p 37.

apparently in the expectation that the Crown would be able to acquire all the shares.[492] The potential for sellers to have a say in exactly where the Crown took its share of the block was further diminished by the Crown's failure to notify them of the hearing.[493] Ultimately, in return for conceding fragmented areas around the kāinga and mahinga kai on the periphery of Parahirahi, the Crown was also able to secure all the potentially valuable quicksilver (mercury) deposits.[494] In total, the Crown award amounted to 4,293 acres, while the various non-seller enclaves had a combined area of 804 acres.[495]

The discrepancies that arose from the 1894 determination of the Crown's interests in the Parahirahi block are worth noting. In summarising a case brought by petitioners in 1945, Judge Ivor Pritchard considered the non-sellers to have been 'exceedingly generously treated as regards value' since they were 'treated on an acre basis only, although the acre with almost all the springs on was awarded to them and the 4 acres contains only two springs'.[496] However, they were neither awarded the land they desired nor did they all receive payment – as the case of Marara Eparaima illustrates. While acknowledged as non-sellers in May 1894, neither she nor her husband were listed at the hearing of 19 October 1894. It was later identified that they had not received payment for the land the Crown had acquired, shares of which (at three shillings per acre) should have equated to £5 3s 4d. Marara later stated that they had not agreed to sell their interest in the block as it was a 'native reservation' belonging to their elders.[497] Thus the Crown had exempted itself from and actively undermined restrictions on alienation; it procured the most valuable portion of the block following subdivision, regardless of earlier efforts by the hapū to retain these areas and the right of non-sellers to an area of proportionate value.

10.4.2.4.2 The purchasing of individual interests at Oue 2

The evidence of claimants representing the Mangakāhia Māori Komiti and Ngā Uri o Mangakāhia alleged that the Crown acquired land from their tūpuna by exploiting their economic distress. The claimants described the Crown's acquisition of Oue 2B in 1896 as the result of 'land being sold out of necessity' because their tūpuna – who, according to block records, did not wish to sell when the Crown initially sought to purchase – were in 'a desperate state'.[498]

The 1,186-acre Oue 2 block had gone before the Native Land Court for title determination in 1876, but the application had been withdrawn because of objections to the award being made solely to Komene Te Aranui. Three years later, the block was awarded to 16 owners, who entered into a 21-year timber lease with the

492. Daamen, 'Report on the Alienation of the Parahirahi Block' (doc E1), pp 35–37.
493. Daamen, 'Report on the Alienation of the Parahirahi Block' (doc E1), p 36.
494. Daamen, 'Report on the Alienation of the Parahirahi Block' (doc E1), pp 41–42, 46–47.
495. Closing submissions for Wai 974 (#3.3.245), p 17; closing submissions for Wai 53 (#3.3.370), p 29.
496. Daamen, 'Report on the Alienation of the Parahirahi Block' (doc E1), p 93.
497. Daamen, 'Report on the Alienation of the Parahirahi Block' (doc E1), p 85.
498. Closing submissions for Wai 990, Wai 1467, and Wai 1930 (#3.3.274(a)), pp 21–22.

Union Steam Company.[499] There is no record of these owners offering to sell interests in the block until January 1895, when Mitai Penetau wrote to the Minister of Lands informing him of his willingness to sell the block 'for what will be a proper price'.[500] Soon after, the Crown had other offers to consider, this time from Komene Matiu Te Aranui and Hare Mokena Wharepapa of Mangakāhia. On 7 February 1895, they wrote to the Native Minister, setting out plainly both their desire to sell and their motives for doing so:

> we have land which we cannot under the present law sell to Europeans, we are therefore willing to sell it to the Government and have applied to the Government Land purchase officer to sell lands, but he is a long time before he comes to buy them. We have no money and our people have no stores & no food, the winter is coming on and Maungakahia [*sic*] is far from good roads. We do not wish our people to starve, we wish to sell [our] lands & buy food for them.[501]

These owners met with Crown land purchase officer Maxwell in Whāngārei in March to discuss matters further. Afterwards, he confirmed to Native Minister Sheridan that the land the letter-writers wished to sell was Tarakiekie and Oue 2. He advised he had promptly purchased Komene Matiu's share in the former but now found him resistant to selling his interest in Oue 2. Indeed, he told Sheridan, 'The natives who have been agitating through their agents for the sale of their lands did not evince much inclination to sell when I was in Whangarei prepared to purchase interests.'[502]

However, Maxwell considered Oue 2 suitable for settlement and had been recommending it for purchase for some time. There was also support from the Surveyor-General, who advised Sheridan on 7 March 1895 that purchasing Oue 2 'would consolidate the Crown's lands in the area.'[503]

The Native Land Purchase Department subsequently offered five shillings per acre for the block; this equated to £18 10s 7d for each owner's 74-acre share. After acquiring 11 out of 16 shares, the Crown had its 815-acre interest partitioned out from Oue 2 by the Court in October 1896, leaving five owners with the remaining 373 acres (the Oue 2B block).[504] According to the claimants, only 239 acres of Oue 2 remain in Māori ownership today, making this a particularly telling example

499. Berghan, 'Northland Block Research Narratives' (doc A39(e)), vol 6, pp 271–272.
500. Mitai Penetau to Minister for Lands, 4 January 1895 (cited in Berghan, 'Northland Block Research Narratives' (doc A39(e)), vol 6, p 273).
501. Aranui and Wharepapa to Native Minister, 7 February 1895 (cited in Berghan, 'Northland Block Research Narratives' (doc A39(e)), vol 6, p 272); closing submissions for Wai 990, Wai 1467, and Wai 1930 (#3.3.274(a)), p 22.
502. Maxwell to Sheridan, 22 March 1895 (cited in Berghan, 'Northland Block Research Narratives' (doc A39(e)), vol 6, p 273).
503. Berghan, 'Northland Block Research Narratives' (doc A39(e)), vol 6, p 274.
504. Berghan, 'Northland Block Research Narratives' (doc A39(e)), vol 6, p 274.

of the consequences of land being sold by individual owners out of economic desperation.[505]

10.4.2.4.3 The purchasing of individual interests at Hauturu

The Crown's manner of purchasing Hauturu (Little Barrier Island) was the subject of a number of claims (some of which have been fully settled by the Ngāti Manuhiri Claims Settlement Act 2012 and the Te Kawerau ā Maki Claims Settlement Act 2015).[506] Generally, claimants argued that the Crown used its powers under Native Land legislation to reduce and, ultimately, remove the owners' ability to retain their interests on Hauturu. They highlighted the Crown's repeated imposition of restrictions on land being alienated to any party except itself, either by invoking clauses in legislation or by intervening in Native Land Court hearings.[507] In closing submissions for Ngāti Rehua/Ngāti Wai ki Aotea, claimant counsel argued that these restrictions deprived owners of the opportunity to benefit from the island's kauri timber resource.[508] According to claimants Elvis Shayne Reti, Henry Murphy, and Merepeka Henley (Ngātiwai), the timber alone was worth more than what the Crown eventually paid for the island.[509] Claimants also noted that the Crown's Native Land laws divided ownership among individual shareholders, which benefited the Crown, as it was able to acquire the shares on the island piecemeal, rather than by negotiating with owners collectively.[510]

Several submissions also pointed to the Crown's subsequent compulsory acquisition by way of the Little Barrier Island Purchase Act 1894 of shares it had been unable to purchase, and the forced eviction of Tenetahi and Rāhui Te Kiri and their whānau in 1896.[511] Counsel for Mr Beazely alleged that the Crown forged the signatures of Tenetahi and Wī Taiawa on a 1893 deed in order to give the impression that they had agreed to the disposal of their shares.[512] Finally, Te Hokingamai e te iwi o te Motu o Mahurangi and Nga Wahapu o Mahurangi-Ngāti Whātua/Ngāpuhi claimants submitted that the Crown rationalised its compulsory acquisition of Hauturu by saying a wildlife reserve was needed for conserving native birds.[513]

505. Closing submissions for Wai 990, Wai 1467, and Wai 1930 (#3.3.274(a)), p 22.

506. The Hauturu claims settled by the Ngāti Manuhiri Claims Settlement Act 2012 and the Te Kawerau ā Maki Claims Settlement Act 2015 include Wai 280, Wai 487, Wai 532, and Wai 567.

507. Closing submissions for Wai 1544 and Wai 1677 (#3.3.261(b)), p 19; submissions in reply for Wai 678 (#3.3.519), p 5.

508. Submissions in reply for Wai 678 (#3.3.519), p 5; closing submissions for Wai 1384 (#3.3.286(b)), p 89.

509. Closing submissions for Wai 1384 (#3.3.286(b)), p 89.

510. Closing submissions for Wai 2206 (#3.3.400), pp 238–239.

511. Tamihana Akitai Paki, statement of claim, August 2008 (Wai 2243, claim 1.1.376, SOC), p 1; closing submissions for Wai 1544 and Wai 1677 (#3.3.261(b)), p 19; closing submissions for Wai 1384 (#3.3.286(b)), p 89; submissions in reply for Wai 678 (#3.3.519), pp 3–4.

512. Submissions in reply for Wai 678 (#3.3.519), p 6.

513. Closing submissions for Wai 1544 and Wai 1677 (#3.3.261(b)), p 19; submissions in reply for Wai 678 (#3.3.519), p 5.

The Crown made several concessions with respect to the purchase of Hauturu in its closing submissions on public works and other takings. Referring to section 8(9) of the Ngāti Manuhiri Claims Settlement Act, counsel acknowledged that the Crown:

> 6.1 used monopoly powers to exclude private purchases and prevent owners from generating revenue from the timber resources of the island;
> 6.2 negotiated with individual share-holders rather than with the owners as a whole;
> 6.3 promoted special legislation, the Little Barrier Island Purchase Act 1894, and used it to compulsorily acquire the shares of those individuals who refused to sell;
> 6.4 showed blatant disregard for those Ngāti Manuhiri resident on the island, including persons who had refused to accept compensation for their shares taken under the Act, by forcibly evicting them in 1896.[514]

We note here that the latter concession was reserved for resident Ngāti Manuhiri for the purposes of the Act concerned. However, it is reasonable to infer that it would apply equally to the other owners living on the island who were subjected to the very same actions.

To fully understand the Crown's concessions, we need to consider the manner in which the Crown gained possession of Hauturu between 1881 and 1896. We do so next, before reviewing how the Crown's actions adversely impacted on the claimants in this inquiry whose claims have not already been settled with the Crown.

Although Wiremu Pōmare first raised the possibility of selling Hauturu to the Crown in 1844,[515] the Crown only started actively trying to acquire the island in 1881. Officials at the time considered Hauturu had strategic value for the naval defence of Auckland. Therefore, in May 1881, during the first Native Land Court rehearing into Hauturu's ownership (see chapter 9), the Commissioner of Lands for Auckland had asked the Court for an order making the island inalienable except to the Crown.[516] However, as Chief Judge Francis Fenton and the Native Assessor reached conflicting conclusions as to whom ownership should be awarded, no such order was made at that time.[517] A month later, a new rehearing presided over by Judges Monro and O'Brien, and assessor Petera Pukuatua, determined that ownership should be awarded to the five Ngātiwai claimants, and the requisite order was made. Their decision overturned the earlier award of Hauturu to Te Kawerau a Maki claimants (made at a hearing at which Ngāti Wai had been largely unrepresented).[518]

With the title question seemingly resolved, the Native Land Purchase Department determined in July 1881 that it would offer £2,500 for the whole of

514. Crown closing submissions (# 3.3.405), pp 3–4.
515. Peter McBurney, 'Northland: Public Works & Other Takings: c1871–1993', report commissioned by Crown Forestry Rental Trust, 2007 (doc A13), p 462.
516. Johnson, 'Report on the Crown Acquisition of Hauturu' (doc E8), p 6.
517. Johnson, 'Report on the Crown Acquisition of Hauturu' (doc E8), pp 7–8.
518. Johnson, 'Report on the Crown Acquisition of Hauturu' (doc E8), pp 8–9.

Hauturu. The department estimated the timber value at £1,500.[519] A gazette notice was issued declaring Hauturu subject to the Government Native Land Purchase Act 1877, thereby excluding any other buyers.[520] The Ngātiwai owner Paratene Te Manu subsequently sought £700 per owner (or £3,500 in total) in late 1882. But Native Minister Bryce remained uneasy about the matter of title, and the Crown was already considering having Hauturu's ownership reinvestigated,[521] a course of action for which the Te Kawerau a Maki claimants had been vigorously agitating. They were implacably opposed to the Court's decision to favour Ngātiwai's recent occupation over their own ancestral rights through conquest and subsequent occupation, and had even threatened to reassert those rights through a waka taua.[522] In the view of Pāora Tūhaere, one of the leading claimants on the Te Kawerau a Maki side, the Crown needed either to purchase the island from a much larger group of owners, or to 'withhold the offer and let Little Barrier Island remain without Government interference'.[523]

With the passage of the Special Powers and Contracts Act 1883, the Crown annulled all the Native Land Court ownership determinations in respect of the island to date. Hauturu reverted to its former status as land 'held by the Native owners according to Native customs or usages', which enabled the Court to investigate its title again.[524] As we discussed in chapter 9, a new hearing was held in February 1884, presided over by Chief Judge Edward Williams who, after nine days of argument, awarded the title to the Te Kawerau a Maki claimants.[525] In view of the Crown's prior interest in purchasing Hauturu, MacDonald had warned the Native Minister during the hearing that there were other potential buyers, and he therefore advised the Crown to ask again for alienation to be restricted.[526] Ultimately, Hauturu's 18 new owners did not want restrictions entered on the title, and so Judge Williams simply cautioned them that they could not negotiate any sale until the 40-day window for rehearing applications had elapsed.[527]

In September 1884, Te Hemara Tauhia informed the Native Land Purchase Department that the Te Kawerau a Maki owners would not accept less than £2,700

519. Berghan, 'Northland Block Research Narratives' (doc A39(l)), vol 813, p 60.

520. Johnson, 'Report on the Crown Acquisition of Hauturu' (doc E8), pp 10–11. The Act was able to be invoked once an offer had been made for the block in question.

521. McBurney, 'Northland: Public Works & Other Takings: c 1871–1993' (doc A13), p 468.

522. Peter McBurney, 'Traditional History Overview of the Mahurangi and Gulf Islands Districts', report commissioned by the Mahurangi and Gulf Islands Districts Collective Committee in association with Crown Forestry Rental Trust, 2010 (doc A36), pp 567–568; Johnson, 'Report on the Crown Acquisition of Hauturu' (doc E8), pp 9–11.

523. Tuhaere to Rolleston, 11 March 1882, p 4 (cited in Johnson, 'Report on the Crown Acquisition of Hauturu' (doc E8), p 11).

524. Local schedule to the Special Powers and Contracts Act 1883 (no 27), https://nzetc.victoria.ac.nz/tm/scholarly/tei-BIM1083Spec-t1-g1-t2-body1-d2.html, accessed 8 August 2022; Johnson, 'Report on the Crown Acquisition of Hauturu' (doc E8), p 12.

525. Johnson, 'Report on the Crown Acquisition of Hauturu' (doc E8), p 4; McBurney, 'Northland: Public Works & Other Takings' (doc A13), pp 470–472.

526. McBurney, 'Northland: Public Works & Other Takings' (doc A13), pp 470–471.

527. McBurney, 'Northland: Public Works & Other Takings' (doc A13), pp 471–472.

for Hauturu.[528] In the meantime, the Ngātiwai party of claimants were voicing staunch opposition to the award having been made to the Te Kawerau a Maki party. Chief Judge Macdonald refused a rehearing, but the Legislative Council's Waste Lands Committee was more sympathetic and made provision for another hearing through the Special Powers and Contracts Act 1884. In protest, Edmund Dufaur, the solicitor for Ngāti Whātua (with whom the Te Kawerau a Maki claimants had affiliations),[529] complained that the then-Government had only introduced this provision because the Te Kawerau a Maki owners that the timber alone was worth thousands of pounds more than 'the Government offer for land and timber'.[530] Despite this protest, the rehearing was gazetted in December 1884, which again had the effect of making Hauturu inalienable.[531]

Historian Peter McBurney observed that at this point 'the Government was committed to having the Native Land Court rehear the case'. Nevertheless, purchase negotiations continued and McBurney cited an internal memorandum that indicated the Crown was prepared to purchase Hauturu for £2,700, 'the price agreed to by Te Hemara Tauhia and others'.[532] Officials also proceeded to make an advance payment for Hauturu to Te Hemara Tauhia of £40 in February 1886.[533] Eventually, the new hearing was held in October 1886, and thanks in part to former Chief Judge Fenton's advocacy for Ngātiwai (which had seen him seize upon any discrepancies in the testimony of Te Kawerau a Maki claimants),[534] it was the Ngātiwai party of 14 claimants that prevailed after 10 days.[535] As a result of the judgment, Pāora Tūhaere returned Te Hemara Tauhia's advance.[536]

Throughout the late 1880s, purchasing negotiations between the Crown and the Ngātiwai owner group remained at a stalemate, as neither budged from their respective positions (an offer of £2,700, versus an asking price of £4,000).[537] In 1890, the Crown raised its offer to £3,000. Under a deadline threat from the Native Minister, Alfred Jerome Cadman, three of the owners (Tenetahi, Kino Reweti, and Wī Taiawa) conditionally accepted the offer in September 1891. They insisted, however, that all the owners would have to agree to the sale before the payment was made, and all of it would go to Tenetahi for distribution to the others. However, Cadman later withdrew the offer, deciding that there were higher spending priorities elsewhere.[538]

528. Berghan, 'Northland Block Research Narratives' (doc A39(l)), vol 13, p 66; McBurney, 'Northland: Public Works & Other Takings' (doc A13), p 472.
529. McBurney, 'Northland: Public Works & Other Takings' (doc A13), p 473.
530. McBurney, 'Northland: Public Works & Other Takings' (doc A13), pp 472–473.
531. Johnson, 'Report on the Crown Acquisition of Hauturu' (doc E8), p 17.
532. McBurney, 'Northland: Public Works & Other Takings' (doc A13), pp 473–474.
533. Berghan, 'Northland Block Research Narratives' (doc A39(l)), vol 13, p 67; we note McBurney states this payment was £30: McBurney, 'Northland: Public Works & Other Takings' (doc A13), p 474.
534. McBurney, 'Traditional History Overview of the Mahurangi and Gulf Islands Districts' (doc A36), pp 571–577.
535. Johnson, 'Report on the Crown Acquisition of Hauturu' (doc E8), pp 18–19.
536. Johnson, 'Report on the Crown Acquisition of Hauturu' (doc E8), p 18.
537. Johnson, 'Report on the Crown Acquisition of Hauturu' (doc E8), pp 24–26.
538. Johnson, 'Report on the Crown Acquisition of Hauturu' (doc E8), pp 26–27.

In the absence of the offer, nine of the 14 owners now threw their support behind plans to exploit the island's kauri timber. Tenetahi had bought a scow for this purpose before signing up to the September agreement.[539] He entered into a £1,000 contract with the Auckland timber merchant, Simon Welton Browne, in March 1892. Tenetahi later told Henry Wright, who had gone to Hauturu to report to the Government on the timber cutting, that the other owners had permitted him to sell the timber so that he could pay off debts he had incurred during the Native Land Court hearings.[540] In Wright's opinion, the kauri timber on the island was worth as much as £5,000. As the owners came to appreciate its value, their purchase expectations also increased. In December 1892, Paratene Te Manu – who, we noted earlier, had sought a purchasing price of £3,500 a decade before – now asked for £10,000 for the island.[541]

Meanwhile, Premier John Ballance remained determined to secure a sanctuary for native birds and instructed Cadman to reinstate the £3,000 offer.[542] In June 1892, the Crown issued notices threatening prosecutions for cutting timber, given that Hauturu was still subject to Crown purchasing negotiation (and the 1881 gazette notice). This threat against Pākehā merchants proved effective.[543] Following negotiations between officials and the owners' agents in August 1892, individual owners began to give their agreement for the Crown to acquire their shares.[544] Nevertheless, as an owner, Tenetahi still had rights to cut timber, and so he took over operations himself in late 1892.[545] Over the course of the following year, the Crown continued to sign up owners. Then, in October 1893, officials opted to speed up the acquisition process by simply copying the signatures of Tenetahi, Kino Reweti, and Wi Taiawa from the abandoned 1891 agreement. The new deed was dated 24 October 1893, giving the impression that this was the date on which it had been finalised, when in fact Rāhui Te Kiri and her daughter Ngāpeka had still not signed – to say nothing of the deed's reliance on signatures that had been copied over from the earlier agreement that Tenetahi (at least) had subsequently repudiated.[546]

Tenetahi's final attempt at a compromise, set out in his petitions to Parliament during 1893, was to have his share of the island partitioned out. While the Native Affairs Committee favoured the purchase of his interests, it supported a partition if Tenetahi would not sell. Gerhard Mueller, the Crown Commissioner of Lands, was convinced, however, that the Crown needed exclusive possession to prevent

539. McBurney, 'Northland: Public Works & Other Takings' (doc A13), pp 477, 479.
540. McBurney, 'Northland: Public Works & Other Takings' (doc A13), pp 479–480, 482.
541. McBurney, 'Northland: Public Works & Other Takings' (doc A13), pp 482, 485–496.
542. McBurney, 'Northland: Public Works & Other Takings' (doc A13), p 479.
543. McBurney, 'Northland: Public Works & Other Takings' (doc A13), pp 481–482. Johnson noted that Cadman's withdrawal of the offer was not publicly notified, and so legally the 1881 gazette notice had remained in force: Johnson, 'Report on the Crown Acquisition of Hauturu' (doc E8), p 32.
544. Berghan, 'Northland Block Research Narratives' (doc A39(l)), vol 13, pp 77–78; McBurney, 'Northland: Public Works & Other Takings' (doc A13), pp 481–483, 491.
545. McBurney, 'Northland: Public Works & Other Takings' (doc A13), p 484.
546. McBurney, 'Northland: Public Works & Other Takings' (doc A13), p 491.

further milling.[547] In order to compel the Crown to come to terms, Tenetahi then threatened to import bees, which would jeopardise the Crown's bird sanctuary plans (since bees would likely interfere with the birds' feeding habits).[548] The Seddon Government's response was equally drastic: it passed the Little Barrier Island Purchase Act 1894, thereby taking over the unpurchased interests of Tenetahi, Kino Rewiti, Wi Taiawa, Rāhui Te Kiri, and Ngāpeka, while their respective entitlements to the £3,000 purchase price were lodged with the Public Trustee.[549] Hōne Heke Ngāpua, MHR Northern Māori, objected strongly to the legislation during the parliamentary debates, noting that the Bill had been brought forward in the late stages of the parliamentary session, and Hauturu Māori had not been informed of the Crown's intentions.[550] As historian Ralph Johnson observed, this Act again falsely used the signatures on the 1891 agreement as evidence of all the owners' consent to the sale. In what historian Peter McBurney called a 'highly dubious piece of law-making', the Act also stated that even though Rāhui Te Kiri and Ngāpeka had not signed the agreement, 'according to Native custom and usages they are bound by [its] terms'.[551] Tenetahi and Rāhui Te Kiri would later confound the Crown's ambitions by refusing to leave their home on the island. They departed only when, with great show, a bailiff supported by a group of soldiers evicted them in January 1896.[552] It is not clear that Tenetahi and Rāhui Te Kiri ever collected the amounts held by the Public Trustee or if they were compensated for their other losses, about which Tenetahi was still petitioning Parliament in 1910.[553]

This narrative clearly demonstrates how much the Crown's use of legislation to exclude all other purchasers of land and timber – a tactic the Crown itself acknowledges it used – cost the owners of Hauturu. Wright's assessment of what the island timber was worth in 1892 (£5,000) was 60 per cent more than the Crown paid out for Hauturu the following year. If the land was worth £1,000 (out of £2,500) in 1881, then – given the increase in the value of the timber – a fair value in 1892 would have been at least £6,000. We note that the restriction on alienation had been in place from the time ownership was intially determined right through until the Crown's compulsory purchase, which in our view should have put a greater onus on the Crown to provide the owners with an independent valuation and a fair price at the time of purchase.

The Crown has conceded that, in acquiring Hauturu, it bought up individual shares – a commonly used strategy (provided for in the legislation) that reduced the effectiveness of non-sellers to resist purchasing efforts. However, the Crown's

547. McBurney, 'Northland: Public Works & Other Takings' (doc A13), pp 491–492; Berghan, 'Northland Block Research Narratives' (doc A39(l)), vol 13, pp 80–81.
548. McBurney, 'Northland: Public Works & Other Takings' (doc A13), p 492.
549. McBurney, 'Northland: Public Works & Other Takings' (doc A13), pp 493–496.
550. 'Little Barrier Island Purchase Bill', 18 October 1894, NZPD, vol 86, p 893.
551. Johnson, 'Report on the Crown Acquisition of Hauturu' (doc E8), p 46.
552. McBurney, 'Northland: Public Works & Other Takings' (doc A13), pp 497–499.
553. McBurney, 'Northland: Public Works & Other Takings' (doc A13), p 500; Johnson, 'Report on the Crown Acquisition of Hauturu' (doc E8), pp 57–58.

ultimate resort to compulsory purchase, also the subject of a Crown concession, meant that dealing with the owners as a group would not have changed the final outcome. What was more extraordinary was the falsification of signatures on the 1893 purchase deed in order to convince Parliament that the owners had universally accepted the Crown purchase offer of £3,000. The 1894 Act, based on this false premise, lent legal and seeming moral authority for the subsequent eviction of Tenetahi, Rāhui Te Kiri, and their whānau. (We will return to consider what Crown actions such as these reveal about its commitment to its treaty obligations – namely, to act with good faith and honour – in section 10.4.3.)

The owners of Hauturu were also prejudiced by the Crown's insistence on exclusive possession of the island. Had the Crown accepted Tenetahi's petition to Parliament in 1893 seeking the partitioning-out of his interests, then the 1896 eviction would have been unnecessary. It might also have bolstered the Crown's plans for a bird sanctuary. The Auckland Native Land Court Registrar, Herbert Frank Edger, had proposed Tenetahi as custodian of the Crown's new wildlife sanctuary; as the *Observer* newspaper remarked, birds would in fact have been much safer under Tenetahi's watch than they were under the Crown-appointed ranger, who was accused of illegally collecting specimens for the ornithologist Walter Buller.[554] The Crown also ignored its long-standing obligation to provide reserves for the retention of urupā, kāinga, and cultivations.

10.4.2.5 *Valuations*

The Crown submitted in our inquiry that the value of land is fundamentally determined by market forces: 'it is worth whatever a would-be purchaser is willing to pay for it and whatever its owners are willing to accept for it'.[555] As a result, its position was that there is no formula to determine whether a price was fair, and that 'each transaction requires a case-by-case assesment'.[556] That said, the Crown acknowledged that 'there was no clear policy for how the price for Northland Māori land was set, or how land valuations were made'. Instead, the limited evidence suggested that the Native Ministers 'set a maximum price per acre that would be offered for a particular block, with the understanding that the purchase agent would endeavour to obtain the land at the lowest price possible'.[557] For land covered by proclamations, Crown counsel told us that a 'market-derived value or price' could not be ascertained for land; instead, 'owners had to rely on the value set by the Crown'.[558]

The possibility of Māori land valuation was expressed in land legislation at an early stage but many years elapsed before there was any attempt to establish an effective system. Section 55 of the Native Lands Act 1865 provided for the imposition of duties on the first sale or other disposal, except by mortgage of 'any

554. McBurney, 'Northland: Public Works & Other Takings' (doc A13), pp 486–487, 490–491.
555. Crown closing submissions (#3.3.407), pp 28–29.
556. Crown closing submissions (#3.3.407), pp 28–29.
557. Crown closing submissions (#3.3.407), p 31.
558. Crown closing submissions (#3.3.407), p 33.

hereditaments or Native Land', with such duties payable to the Crown by the purchaser, lessee, or other person in whom the new estate was intended to be vested. A purchaser, for example, was required to pay a duty at the rate of 10 per cent of the purchase moneys. But where no consideration or nominal sum was expressed in the deed, the duty payable was calculated upon a valuation of inheritable aspects of Māori land and property, or parts thereof, by a valuer who could be appointed for the purpose by the Registrar of Deeds. It was not until 1905, however, that a formal valuation by a competent valuer became a legal prerequisite for Crown purchase of Māori land and the basis of the minimum price the Crown could offer.[559] Evidence suggests that during the nineteenth century, the Crown was prepared to formally value lands in Māori ownership only when it suited its purposes – such as when its own taxation or revenue interests were involved.

The Crown's tendency to forgo formal valuations of Te Raki hapū land was demonstrated when, in 1873, Maihi Parāone Kawiti asked the Government for £800 to erect a mill at Kawakawa. The rangatira offered as security about 7,000 acres known as Touwai, which straddled the Waiōmio River. However, Kemp, acting for the Crown, did not undertake a detailed valuation of the land intended for security when considering making a loan but rather 'approached the whole question as a land purchase'. Ascribing to the land a value of 1s 6d per acre – Kawiti thought it worth two shillings per acre – Kemp also suggested that the surveyor 'include sufficient lands within the block to generate the cash needed by Kawiti'. He wrote to the Under-Secretary of the Native Department that Kawiti was so eager to secure the funds, he was willing to convince others in the surrounding area to sell. Kemp perceived this as a huge benefit to Crown plans since extending the block would connect it with other large blocks that could also be purchased at the same rate.[560] Ultimately, the negotiation ended with a purchase of 19,500 acres. The Crown paid £1,512 10s for the land, of which it forwarded £800 to Maihi Parāone as a loan, with the remainder going to six others of Ngāti Hine. The net effect, Armstrong and Subasic comment, was that the Crown acquired almost 20,000 acres on favourable terms.[561]

A different approach was taken in the case of land owned by Pākehā. The abolition of the provincial governments in 1876 led to Parliament passing the Rating Act 1876, the preamble of which noted that it was 'expedient that a uniform system for the valuation of property upon which rates are assessed, and for the making and levying of rates, should prevail throughout New Zealand'. The Act established a colony-wide rating scheme based upon annually renewable valuation rolls, but it applied only to Pākehā-owned land: the definition of rateable property set out in section 37 excluded customary lands 'and lands in respect of which a certificate of

559. See the evidence of Dr Donald Loveridge to the Central North Island inquiry on the impact of the minimum price requirement: Donald Loveridge, 'The Development of Crown Policy on the Purchase of Maori Lands, 1865–1910: A Preliminary Survey', report commissioned by Crown Law Office, 2004 (Wai 1200 ROI, doc A77); Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 582.

560. Kemp to Under-Secretary, Native Department, 24 June 1873, AJHR, 1873, G-8, p 23.

561. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 937–938; Berghan, 'Northland Block Research Narratives' (doc A39(c)), vol 6, p 194.

title or memorial of ownership has been issued, if in the occupation of aboriginal natives only'. Yet the scheme was clearly capable of being extended to all lands in Māori ownership. In brief, the political will was absent and the idea was resisted.

The potential for injustice to Māori was recognised at the time but the imperative of acquiring land cheaply continued to prevail. In the course of an 1879 investigation into expenditure by the Native Land Purchase Branch of the Native Department, a Legislative Council committee concluded that '[t]he present system of acquiring Native Lands is attended with such serious disadvantages that it is expedient it should cease absolutely.'[562] It particularly noted the Crown's resistance to having prices for Māori freehold land being set by valuation. However, Under-Secretary of the Native Land Purchase Department, R J Gill, argued that the need to completie transactions quickly and at a low price precluded formal valuations.[563]

After the Crown and Native Lands Rating Act 1882 significantly expanded the extent of Māori land liable to rates demands, county councils had reason to include property tax assessments of Māori land blocks in their rates rolls. It is questionable how reliable these were, given that under the terms of the legislation, the Crown paid rates to county councils on the owners' behalf. This practice gave rise to contemporary suspicions that councils inflated the assessed values in order to boost their rates income.[564] These direct payments from the Crown to county councils were phased out after the Act was repealed in 1888,[565] thus removing the incentive for inflating the assessments. Evidence from several Hokianga blocks, which we draw on in the following section on prices, suggests that the property tax assessments, as published in a nationwide return of Native Land Court blocks still in Māori ownership in 1891, were on the generous side. They nevertheless serve as an indicator of relative value; for most of the blocks concerned, they were at or slightly above the amount for which the Crown estimated they could be on-sold following its intended purchase. However, as table 10.2 illustrates, Māori received much lower prices for all the purchase blocks for which we have evidence available on the valuations.

Subsequently, the Liberal Government made provision in the Native Land Purchase and Acquisition Act 1893 (in section 6(1)(c)) for Māori-owned land to be valued by 'three indifferent [that is, impartial] persons', including one appointed by the owners. However, valuation first required that the owners agreed to have their lands dealt with under the Act. In other words, valuation – and fair consideration, it appears – were contingent upon owners handing over their lands to the Native Land Purchase Board for sale or lease. Crown Ministers pointed to these provisions as a marked improvement for Māori. In 1895, when responding to Te Raki Māori concerns over the Act, Premier Seddon argued that, before it was passed, 'you never had an opportunity . . . of having . . . land valued before it was

562. AJLC, 1879, sess II, no 6, p ii.
563. AJLC, 1879, sess II, no 6, pp 6–8.
564. Stirling, 'Eating Away at the Land' (doc A15), pp 135–136, 142; Tom Bennion, *Maori and Rating Law*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997), pp 20, 24.
565. Bennion, *Maori and Rating Law*, p 24; Crown and Native Lands Rating Repeal Act 1888, s 6.

sold, and of having independent persons as representatives of the Native race to fix the fair value before it was offered for sale.' He insisted that the Act would ensure that 'The Natives get the full market value for their land', and indeed described it as 'the most liberal Native land purchase law ever passed by Parliament'.[566] Additionally, Seddon claimed that 'There has always been in my mind a doubt as to whether the Natives got a fair value for their land'. He then acknowledged that 'the expenses of partition came upon the Natives who had not sold. Where the interest was small, the expenses of survey and putting it through the Court ate up the land, and the Natives got little or nothing.' Seddon argued that this new Act offered Māori the same advantages as those enjoyed by Pākehā wishing to sell land to the Government under the Land for Settlements Act 1894.[567] He was being less than frank, although we consider his admission significant. While both statutes made provision for independent valuations, under the Native Land Purchase and Acquisition Act, Māori were required to sell at the value fixed by the Native Land Purchase Board.

The Native Land Purchase and Acquisition Act 1893 was overtaken by the Crown's reassertion of pre-emption under the Native Land Court Act 1894; the idea of setting minimum payment rates by valuation, which the 1893 Act had provided for, was thus deferred.[568] Eventually, the Maori Land Settlement Act 1905 set the Government's own capital valuation, determined in accordance with the Government Valuation of Land Act 1896, as the minimum price that it would pay for lands acquired from Māori. While we lack evidence specific to our inquiry district, we note that between 1900 and 1910, prices–per-acre paid for lands the Crown acquired from Māori across the whole colony rose by around 50 per cent, compared with what it had paid, on average, pre 1900.[569] This likely illustrated the extent to which the Crown, in the period leading up to 1900, had acquired land at substantially less cost than would have been the case if it had to pay even minimum payment rates set by valuation – quite apart from its market value.

In our view, systematic and contestable valuations would have constituted an important protective mechanism for Māori during a period in which the Crown was constantly seeking to strengthen its position as purchaser – by excluding private competitors, by weakening restrictions on alienation (discussed in section 10.5), and by undermining collective control over land. As noted earlier, the Crown successfully reinstated its monopoly on land purchasing through the Native Land Court Act 1894, using that privileged position to support its policy objectives. Claims (such as that R J Gill made to the 1879 Native Department investigations)

566. 'A Narrative of the Premier's Trip through the Native Districts of the North Island', AJHR, 1895, G-1, p 18.

567. 'A Narrative of the Premier's Trip through the Native Districts of the North Island', AJHR, 1895, G-1, p 27.

568. Donald Loveridge, 'The Development of Crown Policy on the Purchase of Maori Lands, 1865–1910: A Preliminary Survey', report commissioned by Crown Law Office (Wai 1200 ROI, doc A77), p 190.

569. Loveridge, 'The Development of Crown Policy on the Purchase of Maori Lands' (Wai 1200 ROI, doc A77), p 192.

that formal valuations would have impeded the Crown's acquisition of land and allowed land to fall into the hands of private purchasers are without substance; we consider this argument to have served merely to obscure its determination to acquire land at the lowest possible price. We explore the relationship between valuations and prices in the following section.

10.4.2.6 *Prices*

The prices paid for Te Raki land over the period 1865 to 1900 are a key issue of dispute between the Crown and claimants.[570] The claimants challenge the Crown's position that the prices paid were set by market forces,[571] arguing instead that the Crown exploited its purchasing privileges in order to deny owners a fair price. They say it did so through strategies such as the payment of tāmana or the gradual, piecemeal acquisition of shares, as well as its ability to exclude private competition altogether by using proclamations and, later, Crown pre-emption. The claimants also allege that the lack of readily comparable private purchases in Te Raki, and the absence of formal valuations prior to purchase by the Crown, further complicate the assessment of what a fair price would have been.

Comparing the prices paid by the Crown with those paid by private purchasers does provide some insight, albeit limited. As described earlier, from 1865 to 1900 private purchasers acquired far less land than the Crown in Te Raki, favouring (as the Crown argued at the time) small blocks of higher quality. Even so, the differences between the payments made to effect the two different types of purchase are striking. For example, Brissenden told the Auckland Provincial Council's Committee on Native Land Purchase in May 1875 that he had paid as little as fourpence per acre and not more than three shillings per acre for Māori land.[572] The cumulative record of 135 block purchases by the Crown in Northland between 1872 and 1883 shows an average price paid of 2s 6d per acre, although this drops to 2s 2d per acre if the purchase of Puhipuhi (for which around 12 shillings per acre was paid) is excluded.[573] In the Mangonui, Whangaroa, Bay of Islands, and Hokianga districts during essentially the same period (1874 to 1883), there were 25 private transactions involving a total of 7,154 acres, for which an average price of 7s 2d per acre was paid. In the Whāngārei and Kaipara districts, 65 private transactions were recorded: they involved a total of 128,202 acres and an average price of almost 3s 7d per acre. The lowest amount paid for any block in these private purchases was 1s 6¾d per acre.[574] Admittedly, private buyers could be pickier when they were securing small blocks, but even the purchases over 1,000 acres

570. See, for example, claimant closing submissions (#3.3.213), pp 35–39; claimant submissions in reply to Crown closing submissions (#3.3.429), pp 11–13; claimant submissions in reply (#3.3.462), pp 4–5, 10.

571. Crown closing submissions (#3.3.407), p 28.

572. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 699.

573. It should be noted that this did not include eight purchases by Auckland's Provincial Government for which no price data was available: 'Lands Purchased and Leased from Natives in North Island', AJHR, 1885, C-7, pp 2–5.

574. 'Dealings with Native Lands', 20 June 1883, AJHR, 1883, G-6, pp 2–4.

generally accord with the trend of private buyers paying more than the Crown. The per-acre rates paid by private purchasers in the 1870s for Kopuatoetoe (3.396 acres) and Otangaroa 2 (3,439 acres) blocks were five shillings and 4s 9d per acre respectively.[575]

It is a similar picture if we look at purchasing figures for Auckland Province as a whole. Trust Commissioner Haultain recorded that, during the year ended 30 June 1876, the Crown acquired from Māori 437,788 acres for £33,669, or almost 1s 4d per acre. In the same year, private individuals acquired 60,182 acres for £10,187 or almost 3s 4d per acre. Meanwhile, 13 town lots were sold for £915 or almost £7 8s per acre.[576] Purchasing in the following year was on a smaller scale, but the difference in the prices paid by the Crown and private individuals remained significant. Haultain recorded that, during the year to the end of June 1877, the Crown acquired 75,748 acres for an average of 2s 2d per acre. Over the same period, private individuals acquired 55,927 acres at an average of 6s 9d per acre.[577]

While this quantitative analysis has its limitations, contemporary observations by those involved in land purchasing provide further evidence that private purchasers were willing to pay higher prices than the Crown. It was widely acknowledged to be the case. Brissenden, for example, told the Native Land Purchase committee in May 1875 that 'I think the blocks which I have negotiated are worth double the amounts which I have given for them, in the hands of speculators.'[578] Similarly, Brissenden had relied on Charles Nelson to discredit private offers when the Crown had sought to purchase Pakanae, while Thomas McDonnell had acknowledged that private buyers might pay more than his offer for Omahuta. Speaking about Crown purchasing practices more generally and beyond Te Raki, Native Minister Sheehan told Parliament in 1877 that it could hardly be expected that Māori owners would sell to the Crown for 2s 6d when private purchasers would give them 10 shillings per acre.[579]

It is unsurprising that the Crown should have paid less than private buyers, given there was no firm basis for setting prices – except that, as Brissenden stated in May 1875, they were 'governed for the most part by the quality and the extent of the block and its probable usefulness'.[580] This meant that the price of each block was subject to negotiation in which the Crown's land purchase agents saw their duty as being to fix a price at the lowest level the owners would accept, rather than a price that was fair to both parties. McDonnell, in particular, took great pride in his ability to make savings for the Crown by beating down the purchase price; in the case of some Mangakāhia blocks, he had even persuaded owners to accept a 50 per cent reduction (from 2s 6d to 1s 3d per acre) on a price to which

575. 'Return of lands Passed through the Native Land Court', no date, AJHR, 1883, G-6, pp 2–3.
576. 'Report by the Trust Commissioner, Auckland', 12 July 1876, AJHR, 1876, G-8, p 2.
577. 'Return of Proceedings of the Haultain to Native Land Court from Minister, 12 July 1876 to 30 June 1877', 1877, AJHR, 1877, G-8, p 2.
578. Auckland Provincial Council, Report of the Committee on Native Land Purchase, May 1875 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 699).
579. 'Native Affairs', 15 November 1877, NZPD, vol 27, p 236.
580. Armstrong and Subasic, supporting papers (doc A12(a)), vol 8, pp 2:1066–2:1068.

the Crown had already agreed.[581] Private offers had the potential to interfere with the Crown's purchasing plans, as they could suggest to owners that their land was worth more than the Crown wanted to offer. This had happened in 1873 when some Mangakāhia landowners received a letter from Mr White, a private purchase agent, advising them 'to sell their lands at no less than 2/6d and 3/– an acre but to reserve the best, and the kauri land, as he could get them 5/– an acre for it from his Pakehas'.[582] Where the Crown's land purchase agents were unable to employ tāmana payments in time to exclude alternative offers, their usual recourse was to emphasise to owners that the Crown was purchasing both their high- and lesser-value lands. The agents would also stress that the collateral advantages that would follow sale and settlement, and that only the Crown could provide these roads, bridges, and other infrastructure.[583]

It should also be noted that the Crown did not account for the potential value of timber in its purchasing.[584] This was acknowledged in the 1907 General Report issued by the Stout–Ngata commission (formally, the Royal Commission Appointed on Native Lands and Native-Land Tenure), which observed that 'in respect of lands carrying milling-timber, the Crown has made no allowance for its value'.[585] Similarly, there does not seem to have been any accounting in the purchase price for kauri gum the land might contain, even though the Crown's land purchase agents were aware that it might immediately be capitalised upon for this purpose. In the case of Omahuta, this meant that the Crown paid only 1s 6d per acre for a block that McDonnell had first observed contained 'large quantities' of both first-rate kauri timber and gum, later noting that if Canadian settlers were placed upon it, their collection of both resources from their land would immediately 'provide them with a handsome surplus'.[586]

In the view of Stout and Ngata, the reason the Crown had not paid specifically for timber was that timber-producing forest had no value when it came to the Waste Land Board disposing of it to settlers (given that the settlers would have to clear the forest before they could farm their land). Stout and Ngata concluded that Māori landowners should not be penalised by the failure of the Waste Lands Board to exploit the timber before on-selling it.[587] Judge Acheson's 1925 inquiry into whether the Crown had offered to leave the timber on Te Kauaeoruruwahine in Māori ownership reached a different conclusion, reasoning that the inaccessibility of the timber had given it no market value at the time of purchase. But

581. McDonnell to Clarke, 22 October 1874, AJHR, 1875, G-7, pp 22–23; McDonnell to St John, February 1875, AJHR, 1875, G-7, p 29; McDonnell to McLean, undated, AJHR, 1875, G-7, p 30; McDonnell to Clarke, 9 June 1875, AJHR, 1875, G-7, p 31.

582. McDonnell to Pollen, 2 June 1873 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 758).

583. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 758.

584. This was also observed to be the case in the Te Rohe Pōtae district: Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims – Pre-publication Version*, Wai 898 (Wellington: Legislation Direct, 2018), pts 1–2, p 1408.

585. 'General Report on Native Lands and Native Land Tenure', 11 July 1907, AJHR, 1907, G-1C, p 8.

586. McDonnell to Pollen, 7 April 1873, AJHR, 1875, G-7, p 2.

587. 'General Report on Native Lands and Native Land Tenure', 11 July 1907, AJHR, 1907, G-1C, p 8.

Acheson accepted that the former owners had reason to feel aggrieved that all of the subsequent £50,000 rise in the timber's value had accrued to the Crown.[588] The same issue arises with the purchase of Puhipuhi 1, 2, and 3 in 1883: the Crown bought 19,490 acres for just £11,374, even though the surveyor S Percy Smith had reckoned that the standing kauri timber on the block was worth £30,000, based on existing royalty rates.[589] Three years later, the Crown forester T W Kirk estimated that all Puhipuhi's standing timber was worth £45,000, which he suggested could be accessed with easily constructed tramways or by driving it down creeks.[590] However, later efforts to extract the timber along creeks proved unsuccessful, and most of the forest was ultimately lost to fire.[591] Even so, by 1891 the Crown had already capitalised on Puhipuhi's timber: it offered 5,000 acres of forest containing kauri and tōtara timber as part payment to the builder of the Whāngārei-Kamo railway extension.[592] In short, the Crown was aware that the timber of such blocks would rise in value once infrastructure was in place enabling its exploitation. But rather than letting that increase in value be shared with Māori, by paying a fairer price at the time, the Crown – through its purchasing – sought to secure as much as possible of the gain for itself.

Market timing worked in favour of McLean's purchasing programme by allowing the Government to exploit the downturn in land prices at the start of the 1870s – a downturn created by Crown policy because a significant acreage of Māori land that had passed through the Native Land Court now became available for purchase. In March 1871, Theophilus Heale noted that some 4,000,000 acres of Māori-owned land in Auckland Province had passed through the Native Land Court since 1865, while a further 2,000,000 acres had been acquired by confiscation. As a result, in a land market that he described as 'overstocked', Heale noted, prices had declined sharply so that

> lands equal in quality to what in 1860 were readily sold at £1 per acre and which could only be obtained in small areas, are now hawked about in large blocks for sale at 2s per acre, and even less. . . . the costs, too, which would have been an insignificant proportion to the value at 20s or even 10s per acre, look enormous when the land is sold at 1s.[593]

In November 1872, Chief Judge Fenton confirmed Heale's report, advising former Premier William Fox that prices were low and that

588. 'Report and Recommendation on Petition of Tamaho Maika and Others', AJHR, 1926, G-6A, pp 2–3.
589. Derby, 'Fallen Plumage' (doc A61), pp 184–185, 200.
590. Kirk to Minister of Lands, 'Report on Native Forests and the State of the Timber-Trade', 16 November 1885, AJHR, 1886, C-3, pp 21–22.
591. Edwin Mitchelson, evidence to Commission on Timber and Timber-building Industries, 12 May 1909, AJHR, 1909, H-24, pp 583, 585.
592. 'Papers relative to Extension of Whangarei-Kamo Railway', AJHR, 1891, II, D-13, pp 1–2.
593. See Heale to Chief Judge Fenton, 7 March 1871, AJHR, 1871, A-2A, p 18.

> there are great quantities that have passed the Court that the natives are wishing to sell. All you have to do is offer a price, in most cases less than in the old days of land purchase. 45,000 acres in the North was sold [privately] the other day . . . for 6d an acre.[594]

Mantell subsequently referred to the proposal to purchase land from Māori at a maximum of two shillings per acre and to sell at a minimum of 10 shillings per acre as 'a strange piece of liberality at the expense of others – not an unusual form of liberality, yet not a praiseworthy form of liberality'.[595]

The depressed land market perfectly suited the Government's capital-borrowing programme of the 1870s: it could acquire a great deal more land at low prices which, with the pending influx of immigrants and corresponding rising demand for land, would allow it to maximise its returns. It had no incentive to manage the market to assist Māori to realise fair prices so that they could develop their remaining land and resources. As noted above, the Crown already held more land than it could readily make available for settlement. It now set about drawing yet more Te Raki land into the title adjudication and purchase process, forcing down prices. Between 1 July 1874 and 30 June 1875 alone, the Crown acquired a further 28,527 acres in Mangonui, for an average of just over sevenpence per acre; 131,097 acres at Hokianga, for just over 1s 9d per acre; and 61,941 acres in Whāngārei, for an average of slightly more than 1s 11d per acre. These were, as Armstrong and Subasic put it, 'bargain-basement prices'.[596]

The Crown was clearly aware that it had disadvantaged Māori vendors by imposing measures intended to protect its own interests as purchaser. That was apparent in McLean's Native Land Sales and Leases Bill 1876. The objective of the Bill, its preamble recorded, was 'to enable the aboriginal natives of the colony to obtain a larger value for their interests in . . . [Native] lands, and to discourage speculation, and restrain dealings therein'.[597] Where owners wished to alienate, they would set prices and any reservations, terms, and conditions. The measure was to apply to customary lands and lands held under memorials of ownership, but not to lands for which people had received or were entitled to receive Crown grants. However, the Bill did not pass.

By 1880, many Te Raki Māori clearly felt that they had effectively subsidised the Fox–Vogel ministry's large-scale capital borrowing as a result of the Crown's policy of 'buying cheap and selling dear'.[598] Having once viewed the Government's economic development plan as an opportunity to secure long-promised collateral benefits for themselves, Māori now more fully recognised that it had been based

594. Chief Judge Fenton to Fox, 16 November 1872 (cited in doc Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 767–768).

595. 'Immigration and Public Works Loan Bill', 29 September 1873, NZPD, vol 15, p 1458.

596. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 663.

597. Preamble to 'A Bill Intituled — An Act to Regulate the Sale, Letting, and Disposal of Native Lands, https://nzetc.victoria.ac.nz/tm/scholarly/tei-BIM878Nati-t1-g1-t2-body1-d1.html, p 2.

598. See, for example, Hōne Mohi Tāwhai's comments in 'Address in Reply', 1 June 1880, 'Want of Confidence', 25 June 1880, NZPD, 1880, vol 35, pp 22, 546.

on the purchase and re-sale (at enhanced prices) of their lands. Hōne Mohi Tāwhai (MHR Northern Maori) insisted in the House, that 'laws are made to obtain the Native lands in order to assist in defraying the interest on the loans'.[599] Adding to the injury, 'not one copper' of the £27,000,000 borrowed since 1861 had been spent on public works in Northland.[600] Again, in 1880, when engaged in a debate over Native Minister Bryce's proposed Native Land Sales Bill, Tāwhai said that Māori held a widely shared perception that they had subsidised the development of the colony and were continuing to do so.[601]

The same drive to buy up land as cheaply as possible is also evident in the second surge of Crown purchasing in Te Raki during the 1890s. Most of these purchases were made after the restoration of Crown pre-emption in 1894, and so there was no competition from private buyers. This situation allowed the Crown to unilaterally fix prices offered and adopt a 'take it or leave it' approach in its dealings with individual owners of shares.[602] As in the 1870s, there was no use of formal land valuations to determine what a fair price might be, let alone arbitration to determine it – something that had been provided to Crown lessees since 1882.[603] Although the Native Land Purchase and Acquisition Act 1893 contained a provision for the independent valuation of Māori land, it was rarely (if ever) used.

Auctions were another method that could potentially have secured a fairer, market-driven price for Māori land. They were periodically mooted as a way for Māori to get a fairer price.[604] Sir George Grey had earlier attacked FitzRoy's pre-emption waiver scheme for (among other things) failing to gazette individual waivers, arguing that Māori would have received better prices if the land had been put up for auction. Both Edward Shortland and Sir William Martin also recommended sales by auction to improve the early Native Lands Acts in 1865 and between 1870 and 1871, respectivey. In Professor Alan Ward's opinion, if this safeguard had been adopted there would have been publicity about alienations and a 'better chance of securing the full market value'. Instead, 'the piecemeal acquisition of signatures from individuals, indebted and under pressure, could continue until a buyer had a majority necessary for a partition.'[605] Later, Robert Stout was another strong proponent, stating in 1893 that, through auctions, Māori 'could . . . get the best price, and were not bound to put their land under this stupid eternal lease'.[606] Stout's

599. 'Address in Reply', 1 June 1880, NZPD, vol 35, p 22; see also 'Native Land Sales Bill', 20 July 1880, NZPD, vol 36, pp 379–380.

600. 'Want of Confidence', 25 June 1880, NZPD, vol 35, p 546.

601. 'Want of Confidence', 25 June 1880, NZPD, vol 35, p 546; 'Native Land Sales Bill', 20 July 1880, NZPD, vol 36, pp 379–380; see also Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 981–983.

602. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1150.

603. See ss 41–43 of the Land Act 1877 Amendment Act 1882.

604. See, for example, 'Governor's Speech', 16 June 1876, NZPD, vol 20, p 6; 'Governor's Speech', 15 July 1879, NZPD, vol 31, pp 5–6; Bryce, 17 October 1879, AJHR, 1879, G-1, pp 14–15.

605. Alan Ward, *National Overview*, 3 vols, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997), vol 2, pp 115, 235 & 240.

606. Stout was referring to one of the new leasehold tenures introduced by the Liberals in the Land Act of 1892, that is the lease in perpetuity (a 999-year leasehold grant) which became available to set-

argument was based on the grounds of equity: '[t]hey [Māori] have equal rights with us, and I say it is utterly unfair that we should seize their land at a less price than they can get for it from other people.'[607] Sections 26 and 27 of the Native Land Purchase and Acquisition Act 1893 did provide for Māori land to be auctioned if two-thirds of the owners applied for the removal of a Crown proclamation on the land, and this was approved by Governor-in-Council. But as previously noted, this provision was never put into effect. The Native Land Court Act 1894 retained provisions for sale by auction, but only if the Māori owners, or a majority of them (or newly incorporated owners through their committee), applied to the land board for their land district, which would then auction the land. The proceeds of the sale would then be lodged with the Public Trustee for distribution to the owners in proportion to their relative shares or interests.[608]

Purchase agents kept the prices they paid as low as possible. However, CJ Maxwell, in reports to his superiors, detailed his frustration that his share-buying progress was being hampered by the quantum of the offers he was able to make. In mid-1894, Maxwell received a memorandum from Mueller, Auckland's Commissioner of Crown Lands and Chief Surveyor, setting out the prices that various Te Raki blocks might reach if put on the market, and the prices that the Crown could safely offer without risk of making a loss. Mueller's recommendations took into account possible survey costs (for which he set aside 2s 6d per acre) and 'thirds' (one-third of the sale price) for local roading.[609] In response, Maxwell wrote to Patrick Sheridan, the Chief Native Land Purchase Officer, that 'the system of loading the land to be purchased with thirds is a great hindrance to acquiring land in the North as it prevents a fair price being given, that is, a price at which the natives would sell readily'.[610] Indeed, in one of the final private sales in Te Raki in 1894, Kaingapipiwai 1 had sold for 13s 10d per acre, while at the same time Maxwell had been offering its Māori owners three shillings per acre (itself an increase on the previous offer of 2s 6d per acre).[611]

It is worth noting the very different expectations applying at this time to Māori landowners, as opposed to owners of pastoral estates. The Crown expected Māori owners to meet the costs of the 'thirds' (as defined in section 126 of the Lands Act 1892) by having this amount deducted from the price they received. This did not apply to other owners; section 20 of the Lands for Settlement Act 1892 included

tlers: 'Native Land Purchase and Acquisition Bill', 31 August 1893, NZPD, vol 81, p 523.

607. 'Native Land Court Bill', 28 September 1894, NZPD, vol 86, p 388.

608. Section 132 of the Native Land Court Act 1894 provided that when Māori owners or Māori incorporated owners (through their committee) applied to the land board in their district to sell land, and the land board, having secured the consent of the Governor, proceeded to sell the land by auction, the colonial treasurer might survey any such lands or construct or maintain roads or other works which would help render the land available for settlement; the repayment of such moneys being a first charge on moneys so spent (section 133(a)) before repayment of the sale proceeds to the Maori owners. These provisions were not for 'thirds' payments, and applied specifically to Māori land sold under the provisions of the Native Land Court Act 1894.

609. Mueller to Sheridan, 20 June 1894 (Berghan, supporting papers (doc A43), vol 3, pp 1467–1470).

610. Maxwell to Sheridan, 27 October 1894 (Berghan, supporting papers (doc A43), vol 3, p 1605).

611. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1150–1151.

Block	Area (acres)	Estimated on-sale (per acre)	Property tax valuation in 1891 (per acre)	Proposed offer in 1894	Actual payment
Opouteke 2	2,735	12s 6d to £1	£2	5s	4s
Punakitere 2	4,767	5s to 12s 6d	10s	2s 6d	4s
Omahuta	678	15s to £1	10s	7s	no data
Kahikatea	797	15s	no data	4s 6d.	5s
Tautehere	693	at least 12s 6d	10s	3s 6d.	Same
Tapuwae 3	1,040	at least 12s 6d	no data	3s 6d	no data
Motukaraka	c 2,450	at least 12s 6d	no data	3s 6d	8s
Tapuwae 1	3,147	12s 6d to £1 10s	no data	5s	no data
Otarihau	1,170	at least £1	no data	7s	5s
Papua	576	10s to £1	15s	5s	no data
Waiwhatawhata 2	2,114	10s to 15s	19s approx	4s 6d	no data
Mangawhero	1,402	15s	£1 3s approx	5s	3s
Mangapupu	890	15s	£1 2s approx	5s	no data
Horotiu	826	10s to 15s	18s approx	4s	Same
Pukehuia 2	1,412	12s 6d	15s	4s	3s
Manawakaiaia	11,828	10s 6d	£1 1s approx	3s 6d	no data
Whawharu 1	1,722	10s to £1	15s	5s	Same
Waima 2	7,456	15s to £1 5s	£1 1s approx	7s	no data

Table 10.2: Estimated on-sale prices, property-tax valuations, and proposed Crown offers for various Hokianga and Mangakāhia blocks 1894.

Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1148–1149; 'Native Lands in the Colony', AJHR, 1891, sess II, G-10; 'Return of Lands Purchased and Leased in North Island', AJHR, 1894, G-3; AJHR, 1895, G-2; AJHR, 1896–1900, G-3.

an exemption from paying 'thirds' to local authorities under the Land Acts when lands were purchased or disposed of under the 1892 Act. This was an unreasonable discrimination, especially given that Te Raki Māori land was also being purchased with the objective, at least in principle, of promoting land settlement.

Table 10.2 is based on a list Maxwell prepared in 1894, detailing the expected on-sale prices of several Hokianga and Mangakāhia blocks, along with his proposed per-acre offer. The table also shows the 1891 property-tax valuations of these blocks – which, while potentially inflated, were also meant to reflect market prices. It details the subsequent adjustments the Crown made in the per-acre rate that owners received for their shares as well; where the Crown had acquired no shares in a block by 1900, this is indicated by 'no data' instead of the actual price paid.

As the table demonstrates, the Crown stood to gain from buying shares at the proposed offer rates in every block – assuming the projected on-sale prices and anticipated costs (the deductions from the on-sale prices to be used for local roading and survey expenses) are reliable. Thus, officials had the leeway to raise their offer substantially whenever they saw an opportunity to purchase. This appears to have happened in the purchase of the Motukaraka East block (1,437 acre), where the proposed rate of 3s 6d per acre was increased to 8s after John Lundon offered to broker a deal that also included the 1,327 acre Mangamaru block (which it purchased for 5 s per acre).[612] However, this case appears to have been something of an exception. As table 10.2 indicates, in the case of four blocks the eventual price received by owners for their shares was even more miserly than what Maxwell had proposed.

The Crown drove a similarly hard bargain across the inquiry district as a whole during the 1890s. Outside the 15 shillings per acre paid for several small Whatitiri partitions in the late 1890s, the most common Crown purchase price over the course of the decade was four shillings per acre. The only owners to receive 10 shillings or more per acre for their shares outside Whatitiri were the owners in the Omaunu 2, Porangi, and Whakapae 2 blocks.[613]

In short, the use of tāmana, down payments (payment of the purchase price in instalments, after title determination), and monopoly powers to keep out private competition worked together as complementary elements in the Crown's strategy to minimise prices for Māori land.[614] As Fox and Vogel had hoped and intended, New Zealand enjoyed a major boom during the 1870s on the back of imported capital and extensive public works construction, private investment in land settlement and housing, a rising influx of migrants, and rapidly rising land prices. But this economic transformation was grounded in the acquisition of extensive areas of Te Raki Māori land at minimal prices which had been created in large part by the Crown's policy. There is little evidence that Māori benefited as a result, fuelling their criticism of a colonial Government that actively hindered their participation in the economy other than as providers of cheap land, cheap itinerant labour, cheap forests, and other resources.

In the complete absence of any independent valuation, and the practical absence of a free market in land, how were prices for Māori-owned land set in Te Raki and elsewhere? As noted, the Crown suggested that 'there was no clear policy'.[615] What can be said, however, is that Crown purchasing did follow a consistent approach

612. The purchase also included the 5,200 acre Kaitaia block (outside our inquiry district): Berghan, 'Northland Block Research Narratives' (doc A39(j)), vol 11, pp 159–160.

613. 'Lands Purchased and Leased from Natives in North Island', AJHR, 1894, G-3, p 2; 'Lands Purchased and Leased from Natives in North Island', AJHR, 1895, G-2, p 2; 'Lands Purchased and Leased from Natives in North Island', AJHR, 1896, G-3, p 2; 'Lands Purchased and Leased from Natives in North Island', AJHR, 1897, G-3, p 2; 'Lands Purchased and Leased from Natives in North Island', AJHR, 1898, G-3, p 2; 'Lands Purchased and Leased from Natives in North Island', AJHR, 1899, G-3, p 2; 'Lands Purchased and Leased from Natives in North Island', AJHR, 1900, G-3, pp 2, 4.

614. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 674.

615. Crown closing submissions (#3.3.407), p 31.

in which profitability was safeguarded, competition was excluded where possible, no minimum prices were set or valuations employed, and there was little room for landowners to negotiate (including over reserves). In our view, by taking what was essentially an uncompromising and self-serving approach to price-setting, the Crown did not meet its treaty duty of dealing with Māori fairly and in good faith. It was open to the Crown to secure independent valuations (as it did for other purposes) and employ them as a guide to setting minimum purchase prices. This would have constituted at least a basic protective mechanism, but the Crown failed to adopt it until after most Te Raki lands had transferred out of Māori hands. Instead, the Crown's pricing regime was based upon a steadfast refusal even to countenance the valuation of lands owned by Māori, except for the purpose of levying rates or taxes.

We consider the evidence that the Crown did not pay fair prices is compelling. It thus failed to give effect to its guarantees in articles 2 and 3 of the treaty, and failed to ensure that hapū were in a position to invest in the development of the lands that they retained. Indeed, as Crown historian Donald Loveridge has argued, the money the Crown spent on purchasing extra Māori land would have been better spent on assisting Māori to develop the land they had left.[616]

10.4.3 Conclusions and treaty findings

The Crown designed the legislative regime governing Māori land with the aim of imposing a system of individualised title, in large part to make land easier to purchase. Māori communities were disempowered by the Crown's failure to provide for a legal collective title, and the deliberate undermining of their capacity to hold on to and manage their lands as they wished (and as they had in the past). As the Tribunal commented in the Tūranga inquiry, it was a system whose designers 'refused to provide for Maori communities to manage their assets *as communities*' (emphasis in original).[617]

The Crown's purchasing policies and practices were designed to take advantage of the title system that it had created enabling the acquisition of large amounts of Māori land at low cost throughout the period reviewed in this chapter. It did so using tactics that were at best of questionable integrity and, at worst, destructive to Te Raki hapū. Certainly, they were not treaty-compliant.

In particular, the payment of tāmana was a widely deployed and effective tool by which Crown purchasing agents acquired interests in large, undefined blocks, even before title had been determined. The use of tāmana, and the legislation enabling it, hobbled Māori efforts to exercise tino rangatiratanga, undermining collective decision-making. It also constrained individuals from freely choosing whether and to whom to sell their interests. Further, the lack of transparency surrounding tāmana payments and their incremental nature made it impossible for landowners to know what parts of their land might later be carved out by the

616. Donald Loveridge, summary of 'The Development of Crown Policy on the Purchase of Maori Lands, 1865–1910', November 2004 (doc A77(b)), pp 17–18.

617. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, p 526.

Court for the Crown, or the extent of the loss. Nor could they easily determine if the price per acre the Crown was offering was at all reasonable – and, as the evidence has shown, very often it was not.

The widespread use of tāmana payments in Te Raki continued for decades, despite it being frowned upon by those running the Native Land Purchase Department (although the evidence shows their objections were motivated more by the worrying prospect of tribal dispute and unsecured Crown investment than by the effect of tāmana payments on hapū rangatiratanga). Even when the Crown took steps to investigate particular transactions it knew had involved tāmana payments or other questionable tactics (such as those identified in multiple inquiries into Brissenden's purchases in the mid-1870s), there is no evidence suggesting matters materially improved for the landowners affected.

The legislative regime and the tactics of Crown purchase agents created anxiety, competition, and division as Te Raki Māori owners found themselves – often unwillingly – drawn into expensive title adjudication and partition proceedings, and compelled to sell. Tāmana and the collection of individual signatures undermined the community control that hapū had long exercised over their lands and resources. We find accordingly that:

- By employing tāmana, or advance payments, the Crown deliberately undermined the capacity of Te Raki Māori to retain their lands and resources in breach of te mātāpono o te tino rangatiratanga.
- By conducting its purchasing in a manner calculated to undermine the capacity of hapū to reach and maintain decisions about land, the Crown also undermined established Te Raki Māori authority structures and social cohesion, breaching te mātāpono o te tino rangatiratanga.
- In addition, despite the objections of Te Raki Māori and the conclusions reached by several official investigations into this practice, the Crown failed to respond in a timely and effective manner with appropriate remedies. This failure was in breach of te mātāpono o te whakatika/the principle of redress.

The Crown engaged, on commission, agents whose tactics had already come under scrutiny and a good deal of criticism. They became part of a system calculated to encourage unrestrained and unethical purchasing. The Crown then failed to monitor their actvities, exercising little control over them until it was too late with extensive territory having transferred out of the hands of Māori who had been exposed to their tactics.

We thus find that:

- By failing to monitor and exercise effective control over the practices and activities of its purchasing agents the capacity of Te Raki Māori to retain and develop their lands was undermined, in breach of te mātāpono o te tino rangatiratanga, te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development, and te mātāpono o te matapore moroki/the principle of active protection.

The Crown acknowledged in closing submissions that there was 'no clear policy for how the price for Northland Māori land was set';[618] however, in practice, the government followed some largely consistent approaches to setting land prices at Māori expense. As Mantell observed the proposed purchase of land from Māori at a maximum per acre well price below that of the re-sale was 'a strange piece of liberality', not unusual 'yet not a praiseworthy form of liberality'.[619]

Although the Native Land Purchase and Acquisition Act 1893 contained provision for the independent valuation of Māori land, it was rarely used and, in any case, came too late to have much beneficial effect. In the absence of valuations before 1905, the Native Minister would instead approve prices in accordance with recommendations prepared by the Surveyor-General. In our view, a contestable system for valuing land would have given Te Raki hapū and iwi a key protective mechanism, particularly important at a time when the Crown was attempting to strengthen its purchasing powers by excluding private competition to Māori disadvantage,

Other practices the Crown regularly adopted included determining maximum prices before purchase negotiations, promising collateral benefits to induce Māori to accept lower prices and failing to take account of the value of timber and kauri gum in the price offered. The Crown also deployed tactics to restrict private competition, thereby keeping prices low. On the basis of the evidence, we conclude that the Crown did not pay fair prices for land in Te Raki which was an essential obligation long acknowledged by Crown officials. An effective valuation system would have been a significant protective mechanism for hapū and iwi, better enabling them to invest in developing their remaining lands; and another potential safeguard that came far too late was the option of sale by auction. Not only were the prices paid kept deliberately and artificially low but also much of the money Māori received went towards title conversion costs – along with needs for daily sustenance, as demonstrated by storekeeper debt – rather than to develop the lands they retained.

As such, we find that:

- By deliberately designing purchasing processes and using tactics intended to lower the prices of Te Raki Māori land for its own benefit, the Crown acted inconsistently with its duty of good-faith conduct, and in breach of te mātāpono o te houruatanga/the principle of partnership. In this respect, the Crown was also in breach of te mātāpono o te mana taurite/the principle of equity.
- By intentionally acquiring vast tracts of Te Raki Māori land at much lower prices than it was worth, the Crown was in breach of te mātāpono o te mana taurite me te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principles of equity and of mutual benefit and the right to development.

618. Crown closing submissions (#3.3.407), p 31.
619. 'Immigration and Public Works Loan Bill', 29 September 1873, NZPD, vol 15, p 1458.

Lastly, following the implementation of the Native Land Act 1873 the Crown relied on the purchase of individual interests to continue acquiring vast tracts of hapū land. The Crown ignored its obligation to respect tikanga by dealing with whānau and hapū on a collective basis. Instead, the Crown acquired land by attrition – without the knowledge of all the rightful owners, without allowing them to reach decisions as a community on the matter, or in the face of their opposition.

In our inquiry, the Crown conceded that the individualisation of title made lands more susceptible to partition, fragmentation, and alienation, and that this process worked to undermine tribal structures.[620] But we further consider, as other Tribunal inquiries have done, that the Crown exploited the system of title individualisation created by Native Land legislation to benefit its own purchasing programmes, prioritising the interests of Pākehā colonists over those of Māori.

We accordingly find that:

- The Crown purchased land by acquiring individual interests, bypassing and thereby undermining community decision-making processes which had traditionally protected whānau and hapū lands. In doing so, the Crown acted inconsistently with its duty of good-faith conduct, in breach of te mātāpono o te houruatanga/the principle of partnership. It also breached te mātāpono o te tino rangatiratanga.

10.5 Did the Crown Take Adequate Steps to Protect the Interests of Te Raki Hapū when Purchasing Land?

10.5.1 Introduction

The question of 'sufficiency' of land and resources is prominent among purchasing-related matters raised by claimants. Jane Hotere and other Ngāpuhi claimants argued that it should have been Te Raki hapū, not the Crown, that had the right and opportunity to define the lands they wished to retain. Echoing Armstrong and Subasic – who said the protective mechanisms the Crown put in place to avert Māori landlessness, including the 1873 legislative requirement to set aside at least 50 acres per person, were either not applied or ineffective – these claimants contended that 'the extent of land necessary for present and future Māori needs should [have been] based on Māori expectations and Crown promises, not on a Eurocentric "acre per head" calculation.'[621] More generally, counsel representing Ngāti Kawa and Ngāti Rāhiri claimants told us that the Crown failed to abide by the instructions of Lord Normanby, that Māori be left with sufficient lands to sustain themselves, thus depriving hapū of the opportunity to participate on an equal footing in the economy.[622] Claimants submitted that the Crown was aware that Māori land legislation, beginning with the Native Lands Act 1865, would lead to the widespread alienation of Te Raki hapū land and resources. Despite this

620. Crown closing submissions (#3.3.407), p 4.
621. Closing submissions for Wai 2425 (#3.3.367), pp 43–45.
622. Closing submissions for Wai 1665 (#3.3.380), pp 42–43.

knowledge, the Crown remained focused on facilitating the transfer of land out of Māori ownership, failing in its duty of active protection in so doing.[623]

Similarly, claimants argued that while the Native Land Act 1873 empowered the Native Land Court to scrutinise any sale of land held under a memorial of ownership, in practice the Act was used to facilitate sale to and purchase by settlers. This was despite the fact that all owners were now supposed to be entered into the title, and a prospective purchaser needed to acquire the interests of them all.[624] Further, Ngāti Taimanawaiti claimants pointed out that the Native Land Frauds Prevention Act 1870 and its successor, the Native Land Frauds Prevention Act 1881, empowered trust commissioners to inquire into the validity of all alienations – including whether Māori retained sufficient land for their 'support'. However, the claimants alleged that there is no evidence of the commissioners ever rejecting 'inequitable transactions' and (in respect of their land at Okura No 2, Ohakiri, and Opuhiiti), there is no evidence that transactions were even investigated.[625]

Claimants argued that between 1865 and 1900, the Crown did not meet its duty to ensure Te Raki hapū retained sufficient land even though it had long been aware that it would need to limit and monitor its land purchasing activities. The extent of the lands it had acquired was such that McLean, in a report to Parliament in 1876, suggested that purchasing in the region should be brought to a halt – not only due to 'the wants of the Natives' but also because much of the land remaining in their ownership had passed through the Native Land Court and was now held in individual tradeable title.[626] The claimants considered this a concession by the Crown at the time that if the Government did not stop purchasing land in the north, Te Raki hapū would suffer severe prejudice. The Crown nonetheless continued its purchasing programme, breaching its treaty duty.[627]

The claimants submitted that, in addition to McLean's 1876 report, the Crown continued to be made aware of growing Te Raki landlessness throughout the 1880s by complaints from Māori themselves.[628] There was no real change in policy, however. Counsel argued that, in the 1890s, the Crown remained interested only in acquiring whatever papatupu land was left, rather than utilising the vast tracts of lands they had already acquired.[629] The Crown's failure to ensure hapū retained 'sufficient' land 'applied both in specific cases and regionally, as well as broadly to the inquiry district as a whole'.[630]

Virtually no reserves were set aside. This omission was despite the Native Land Act 1873 requiring district officers to select, in consultation with Māori,

623. Closing submissions (#3.3.213), pp 68–69; reply submissions for Wai 2063 (#3.3.544), pp 78–79.
624. Claimant submissions in reply (#3.3.429), p 11.
625. Reply submissions for Wai 2063 (#3.3.544), pp 92–93.
626. Closing submissions (#3.3.213), pp 42–43; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 667.
627. Claimant closing submissions (#3.3.213(a)), p 19.
628. Claimant closing submissions (#3.3.213), p 52; see Thomas, 'The Native Land Court' (doc A68), pp 60, 121.
629. Claimant closing submissions (#3.3.213), p 54.
630. Claimant submissions in reply (#3.3.429), p 3.

a minimum of 50 acres of inalienable reserve land for every man, woman, and child.[631] Claimants said that this failure to set aside reserves was another effect of tāmana. Much of the land had already been secured by Crown and private purchasers through payments to individual owners, so was not available to be reserved even if the district officers had attempted to fulfil their duties.[632] The claimants noted that the Crown created just 27 reserves from 1865 to 1900, amounting to only 5,578 acres. Counsel pointed out that this was significantly less than the reserves (some 14,000 acres) created in the pre-1865 period.[633]

Claimants argued that the reserve provisions in the Native Land Act 1873 were evidence of the Crown's recognition that it needed to ensure Māori retained sufficient land, including the kāinga, mahinga kai, and wāhi tapu essential for their well-being.[634] However, as counsel for the Te Ihutai hapū noted, the Crown failed to implement those legislative provisions.[635] In generic closing submissions, counsel also argued that Te Raki hapū were low on the Crown's priority list, and that the Crown failed to actively protect their interests by neglecting to ensure sufficient lands were retained.[636] Counsel for the Te Kapotai and Ngāti Pare hapū and the Waikare Inlet claims submitted that the Crown failed to specify how it had arrived at a minimum of 50 acres per person as a definition of sufficiency, and whether it had taken into account such matters as location and accessibility.[637]

The Crown conceded that no system was in place 'to ensure that it did not purchase land that was needed to ensure the iwi and hapu of Northland could continue to maintain themselves'.[638] Counsel acknowledged that under the Native Land Act 1873, the Crown was obliged to select and set apart reserves for Māori, to ensure that the lands were surveyed, and to have the title investigated by the Native Land Court, but that it failed 'to fully implement' those provisions.[639] The Crown also suggested, however, that whether or not the reserve provisions of the 1873 Native Land Act had been implemented, 'the core issue is that the Crown did not have a system to monitor the sufficiency of Northern Māori landholdings, and to discontinue purchasing when it threatened to leave particular Northland Māori landless'.[640] The Crown additionally pointed to its concession regarding iwi living in Mahurangi, the Gulf Islands, Whangaroa, and Whāngārei, which linked the landlessness of these groups to the Crown's failure to ensure they retained sufficient land; this was a breach of the treaty and its principles, the Crown conceded.[641]

631. Claimant closing submissions (#3.3.213), p 43.
632. Claimant closing submissions (#3.3.213(a)), pp 19–20.
633. Claimant closing submissions (#3.3.213(a)), p 20.
634. Claimant closing submissions (#3.3.213), pp 7, 10.
635. Claimant submissions in reply (#3.3.462), pp 3–4, 10–12.
636. Claimant closing submissions (#3.3.213(a)), p 25.
637. Claimant submissions in reply (#3.3.533), p 10.
638. Crown closing submissions (#3.3.407), pp 3–4.
639. Crown closing submissions (#3.3.407), p 35.
640. Crown closing submissions (#3.3.407), pp 6–7.
641. Crown closing submissions (#3.3.407), pp 4, 7.

The Crown argued that the primary purpose of the Native Lands Frauds Prevention Act 1870 was to prevent fraudulent transactions (by requiring scrutiny by the trust commissioners), and that it contained a provision relating to sufficiency. Counsel suggested that, before 1881, it was unclear if the Crown was actually bound by the trust commissioner regime; nonetheless, counsel said, the Crown did place land transactions before commissioners for investigation. Any uncertainty was resolved by section 8 of the Native Lands Frauds Prevention Act, which 'removed the Crown from the ambit of the Trust Commissioners' jurisdiction'.

Crown counsel said that an examination of the Auckland District Trust Commissioner's letter book indicated that he was 'quite conscientious' in discharging his duties, while respecting the right of Māori to deal with their lands as they saw fit.[642] Counsel also pointed out that section 59 of the Native Land Act 1873 allowed the Court to investigate the 'justice and fairness' of any transaction.[643] Finally, counsel noted that the Maori Real Estate Management Act 1888 offered protection, through the Native Land Court, to any minor or person suffering from a disability who held interests in land.[644]

The Crown also insisted that there was insufficient evidence to support any claim that Crown action, or inaction, was responsible for any unscrupulous tactics private purchasers may have employed when trying to acquire land from Māori. Private transactions were subject, however, to the scrutiny of the trust commissioner for Auckland Province appointed under the Native Lands Frauds Prevention Act 1870, and by the Native Land Court under sections 59 and 60 of the Native Land Act 1873. The Crown offered no comment on how, or to what effect, either the trust commissioners or the Native Land Court employed their powers, other than asserting that the former would have rejected any 'manifestly unfair transaction'.[645]

10.5.2 The Tribunal's analysis

In this section, we review the effectiveness of the various protective measures the Crown put in place with the general aim of fulfilling Normanby's earlier instruction that it should not purchase from Māori 'any territory the retention of which by them would be essential, or highly conducive, to their own comfort, safety or subsistence'.[646] We start by considering how the Crown developed a 'sufficiency' standard for assessing how much land could be alienated from Māori without doing undue harm. We then examine whether the Crown adequately monitored the extent to which Māori were retaining land within the inquiry district. Finally, we consider whether three different measures intended to prevent harm arising from land sales – alienation restrictions, the creation of reserves, and vetting

642. Crown closing submissions (#3.3.406), pp 56–58.
643. Section 59 specified that the court 'shall make inquiry'.
644. Crown closing submissions (#3.3.406), pp 58–59.
645. Crown closing submissions (#3.3.407), p 17.
646. Normanby to Hobson, 14 August 1839, BPP, vol 3, pp 85–90.

of purchase transactions – provided an effective level of protection for Te Raki landowners.

10.5.2.1 *The Crown's standard of 'sufficiency'*

The question of how much land Māori needed to retain generated considerable debate among settlers and Crown officials during the latter part of the nineteenth century. Crucial to answering this question was deciding whether the Crown should continue with the approach it took before 1865, when reserves were confined largely to cultivations and kāinga, or whether it should seek to ensure Māori had enough land to participate in the modern settler economy. The latter concept was not one foreign to the Crown, since there was an implicit standard of sufficiency built into the minimum landholding sizes when Crown land was subdivided and offered for sale to settlers. However, applying that concept to Māori landowners was a different matter, and the question of equity was not considered.

When Colonel Haultain prepared a report on the workings of the Native Land Court for Donald McLean in July 1871, he included the views of Te Raki rangatira on the question of what was 'the least quantity of land' that should be reserved for Māori. Eru Nehua of Ngāti Hau had remarked that 'Sufficient land has not been hitherto reserved for the use of the Natives.'[647] Wiremu Te Wheoro of Waikato and Pāora Tūhaere of Ngāti Whātua noted that the Native Land Court had not reserved sufficient land as inalienable – 'that in some cases the wishes of the owners have not been carried out in this respect' – and they proposed that 'from 50 to 500 acres should be reserved for each Maori man, woman, and child, according to the land they hold. They might be allowed to lease some of it, but not to sell it on any account.'[648] In contrast, Hemi Tautari considered that five acres of good-quality land might be sufficient, but more would be needed if the land was of lesser quality.[649] As an assessor in the Native Land Court, his view may have been influenced by those of Chief Judge Fenton and Judge Maning, who both believed that Māori required no more than five acres per head.[650]

In November 1871, McLean advised purchase agents that they were to provide 'a clear idea as to what reserves it will be necessary to make for the Natives – in the case of these, discriminating most carefully their acreage'.[651] He expressed his view on reserves clearly during parliamentary debates on the Native Land Act 1873, intimating in August 1873 that

> the chief object of the Government should be to settle on the Natives themselves, *in the first instance*, a certain sufficient quantity of land which would be a permanent home for them, on which they would feel safe and secure against subsequent changes or removal; and, in fact, to be held as an ancestral patrimony, accessible for occupation

647. Eru Nehua, statement, undated, AJHR, 1871, A-2A, p 34.
648. Te Wheoro and Pāora Tūhaere, joint evidence, 18 February 1871, AJHR, 1871, A-2A, p 26.
649. Hemi Tautari, response to questions, undated, AJHR, 1871, A-2A, p 30.
650. Haultain to McLean, 18 July 1871, AJHR, 1871, A-2A, p 7.
651. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 771.

> to the different hapus of the tribe; to give them places which they could not dispose of, and upon which they would settle down and live peaceably side by side with the Europeans. The officers appointed would ascertain the requirements of the Natives, and set apart a sufficiency of land for their use. [Emphasis added.][652]

Further, McLean emphasised the importance of tribal reserves as a means of instilling confidence among Māori that their lands would not all be lost to them. Many Māori, he noted, regarded Crown titles as 'devices on the part of Europeans to get a hold of their lands.'[653] The future McLean painted was of Māori and Pākehā communities living settled and secure side by side. Section 24 of the Act was unambiguous: it provided that district officers were 'to select, with the concurrence of the Natives interested, and to set apart, a sufficient quantity of land in as many blocks as he shall deem necessary for the benefit of the Natives of the district'. Sufficiency was considered to amount, on aggregate, to 'not less than fifty acres per head for every Native man woman and child resident in the district'.[654]

Though it was the district officer's responsibility, Māori were clearly intended to play a key role in the process of creating reserves – in fact, the Native Land Act 1873 required their agreement. McLean's remarks and the wording of the Act's preamble and section 24 implied that the reservation of land was a first requirement in any land purchase, and that the land reserved would be owned collectively. This much was indicated in *Te Waka Maori a Niu Tireni*, in which the Government stated:

> No man will be able to sell the land so set apart; and henceforward it will not be in the power of any chief to sell all the land of the tribe and leave the tribe without any land; but by the new law every man, woman, and child will be counted, and a large piece of land for the whole of them, in proportion to their numbers, will be kept for them; where they can live, and where they may die, for it will not be lawful for any one to sell that land, or take it away from them, or prevent them from living on that land and cultivating it.[655]

This parcelling out of reserves would protect Māori from the operation of the widely criticised ten-owner rule and ensure that all Māori retained a 'sufficiency' of land, defined by the Act as a *minimum* of 50 acres per capita.

In other inquiries, the Tribunal has found that the 50 acre per capita requirement in the legislation was insufficient to meet the Crown's treaty obligations. In *Turanga Tangata Turanga Whenua*, the Tribunal suggested that this minimum had been arbitrarily defined and 'took no account of the size of families, location, and quality of land needed for workable farms.'[656] In *He Maunga Rongo*, the Tribunal

652. 'Native Land Bill', 25 August 1873, NZPD, vol 14, p 604.
653. 'Native Land Bill', 25 August 1873, NZPD, vol 14, p 606.
654. Native Land Act 1873, s 24.
655. '*Te Waka Maori a Niu Tireni*, 29 October 1873 (cited in Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 439).
656. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, p 457.

added: 'The "sufficiency" of land set at a level of 50 acres a head was clearly meant for bare subsistence needs only.'[657] The evidence we have on the viability of colonial farms supports this conclusion, suggesting that properties as small as 50 acres could not prosper across much of Northland. For example, in relation to Whangaroa County, in 1908, the Stout-Ngata commission contrasted the more than 80 acres per head then in Pākehā ownership with the 40 acres per head of land in Māori ownership, stating that the latter was 'really too small an area . . . to make a living off the land from ordinary farming.'[658]

Nevertheless, the 50 acres was defined as a minimum not a maximum. Thus, in principle, the reserves provisions of the Native Land Act 1873 offered, as Thomas observed, something considerably more valuable than 'a few areas excluded from land sales for the maintenance of the vendors'.[659] Moreover, as the notice in *Te Waka Maori a Niu Tireni* makes clear, those provisions were oriented towards the needs of Māori communities rather than the interests of individuals. After district officers set apart reserves, the Act provided for those areas to be surveyed before an investigation of the parent block by the Native Land Court to confirm the title to the land, with owners' names listed on a Memorial of ownership. After six months and barring any rehearing, a notice confirming the reserve would be published in the *New Zealand Gazette* and the *Kahiti*, including a note that such reserves were inalienable by sale, lease, or mortgage, except with the consent of all owners and the Governor-in-Council.[660]

The Native Reserves Act 1873 was presumably meant to be utilised alongside the Native Land Act 1873, which was passed on the same day. The Reserves Act was designed to systematise the administration of Māori land that had up to that point been 'reserved' and held in trust through one of a number of possible mechanisms.[661] However, the Act was never actually implemented. The Commissioner for Native Reserves in the South Island said it suffered from 'a host of deficiencies', and major objections to it were aired in parliamentary debates – including 'that too much authority for administration had been shifted away from the Governor's direct control' and 'the existence of Maori administrators'.[662] The failure to put the Native Reserves Act into effect left the provisions of the Native Land Act 1873 to be implemented on their own.[663]

A new round of Crown purchasing in Te Raki followed. While section 24 of the Native Land Act 1873 offered hapū and iwi a degree of protection, as discussed in chapter 9, Fenton and other Native Land Court judges disliked the prospect of district officers interfering in their work and the provisions relating to reserves were

657. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 631.
658. 'Interim Report on Native Lands and Native-land Tenure: Whangarei, Hokianga, Bay of Islands, Whangaroa, and Mangonui', 10 June 1908, AJHR, 1908, G-1J, p 5.
659. Thomas, 'The Native Land Court' (doc A68), p 116.
660. Native Land Act 1873, ss 25–30.
661. Ralph Johnson, *The Trust Administration of Maori Reserves, 1840–1913*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997), pp 77–79.
662. Johnson, *The Trust Administration of Maori Reserves*, pp 74, 83–84.
663. Johnson, *The Trust Administration of Maori Reserves*, pp 83–84.

never fully implemented. According to William Webster, Te Raki Māori were also averse to the creation of reserves over which they did not have ultimate control:

> The Natives have all objected to allow any of their lands to be reserved in the manner required by the [Native Land] Act, and, when strongly advised to secure an inalienable reserve for themselves and their families as provided by the Act, have uniformly said that the provisions of the Act are very good, but they prefer to have their land left in their own hands, to deal with as they like.[664]

With McLean's departure from the role of Native Minister in 1876, the concept of district officers reserving lands to ensure sufficiency had lost its champion. As the Tribunal noted in its report on Whanganui land claims, by this time the district officer scheme was becoming a dead letter.[665] With the Native Reserves Act 1882, however, the Crown briefly revived its wish to take a more active role in preserving sufficient landholdings. The Act empowered the commissioner of native reserves to make submissions during Court hearings as to whether Māori owners needed to retain particular lands for their own use; but any such interest proved short-lived, as the commissioner Alexander Mackay was not replaced when he resigned in 1884.[666]

The Government again addressed the definition of reserves and sufficiency in section 15 of the Native Land Purchase and Acquisition Act 1893. It provided that the Crown was required, before completing any sale, to establish whether the vendors had other land 'sufficient for their maintenance'. If not, the Crown was required to reserve such areas of the block as it deemed to be sufficient, or set aside land out of any other Crown block. Section 15 defined sufficiency as not less than 25 acres of first-class land; 50 acres of second-class land, or 100 acres of third-class land per man, woman, and child.

The insertion of quantitative definitions into the 1873 and 1893 Acts presupposed that the Crown possessed the requisite information and the administrative systems to give them effect. If it possessed neither, then there would appear to have been a lack of serious intent, if not irresponsibility on the part of law makers. The Crown could have provided for Māori to exercise their tino rangatiratanga by enabling them to define the area that they required before any purchasing negotiations commenced. Instead, purchase tactics were employed that undermined the capacity of owners to reach a collective decision as to what lands they wished to retain. The Crown took upon itself the responsibility of defining what Māori required for their maintenance and then failed to ensure that the minimum

664. Jenny E Murray, *Crown Policy on Maori Reserved Lands, 1840–65, and Lands Restricted from Alienation, 1865–1900*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997), p 49.

665. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 525.

666. Waitangi Tribunal, *Te Urewera*, 8 vols, Wai 894 (Wellington: Legislation Direct, 2017), vol 3, p 1291.

standards it had set were met. The Crown has conceded in this inquiry that, in fact, it lacked the information to enable it to do so.[667] In our view, it also lacked the will.

As for the adequacy of the sufficiency definitions set out in the 1893 Act, a comparison with the Crown's village homestead special settlement scheme in Northland is instructive. Under that scheme, which sought to entice (Pākehā) settlers, they would be allocated a maximum of 50 acres.[668] By 1889 – only three years after the scheme was set up – one-third of the Whananaki allotments, and almost half of the Hukerenui and Punakitere allotments taken up by settlers had been abandoned, suggesting 50 acres (let alone 25) was indeed insufficient for viable farming in Te Raki.[669]

10.5.2.2 *Was alienation monitored?*

A system for monitoring the alienation of land might have protected Te Raki hapū from being left with insufficient holdings for their current needs and future well-being. We have already noted the Crown's concession that it did not have a 'system' in place by which to balance its land purchases against the acknowledged need of hapū to retain 'sufficient' land. The necessity for such a system was clearly implied in Normanby's August 1839 instructions to Hobson, namely:

- that with respect to land, Māori 'must not be permitted to enter into any contracts in which they might be the ignorant and unintentional authors of injuries to themselves';
- the Crown was not to 'purchase from them any territory, the retention of which by them would be essential, or highly conducive, to their own comfort, safety or subsistence'; and,
- acquisitions by the Crown for future settlement were to be 'confined to such districts as the natives can alienate, without distress or serious inconvenience to themselves', and in all future dealings with Māori, the Crown would provide for and protect Māori interests.[670]

Those instructions imposed a serious obligation on the Crown officials to develop standards that would translate those instructions into purchase practice and to acquire a clear understanding of where purchasing might be undertaken without threatening Māori well-being.

The Native Department may have had some intention to keep track of purchasing when it re-entered the market after a brief hiatus; this was suggested by the provision under section 24 of the 1873 Act for district officers to keep a record of the extent of land held by each hapū, and how much had been reserved, in local

667. Crown closing submissions (#3.3.407), pp 3–4.

668. A system of village homestead special settlements was established on Crown lands in various regions in 1886 as a way of assisting unemployed urban families onto farms during a time of economic recession; see Evelyn Stokes, 'The Muriwhenua Land Claims Post 1865', report commissioned by the Waitangi Tribunal, 2002 (Wai 45 ROI, doc R8), pp 105–107.

669. 'General Results of Village Homestead Special-settlements', 31 March 1889, AJHR, 1889, C-5, pp 1, 3.

670. Normanby to Hobson, 14 August 1839, BPP, vol 3, pp 85–90.

reference books. However, according to John Curnin, none were ever produced.[671] Any monitoring seems to have been abandoned by the time Brissenden's purchasing was at full tilt. This is most clearly demonstrated by Brissenden's return, submitted to the department in December 1874; of the 66 Northland blocks under negotiation, in which he gave acreage estimates for only seven. Brissenden observed that surveys were completed or nearly completed for 29 of the blocks. But that still gave him time to enter into yet more purchases, and it left the department with little to go on in terms of judging the location, size, or ownership of all the other blocks. Indeed, for most of the 66 entries in the return, Brissenden identified the sellers only as a single named individual 'and others'.[672]

Nevertheless, officials were aware of the rapid pace with which land was transferring out of Māori hands in the Te Raki district. This is apparent from McLean's reference to representations from his district officer when sounding his warning about acquiring further Māori land in Northland in 1876. McLean told Parliament that

> Viewing the large extent of country that has been from time to time acquired from the Natives in the North, and the representations that have been made by the District Officer, appointed under the Native Land Act of 1873, as to the quantity of land still in the possession of the Natives, it has become a question for consideration whether, after the present negotiations are completed, it would be right, regard being had to the wants of the Natives, for the Government to acquire any more land in that district.[673]

Judge Maning made similar observations to those of McLean in July 1876. He advised Chief Judge Fenton that northern Māori were inclined 'to divest themselves of every acre of land for which they can obtain money', and claimed that they had failed to work with district officers to define and establish reserves. Predicting that many Māori would become landless, Maning estimated that at a minimum of 50 acres per capita, 293,350 acres would have to be reserved for Ngāpuhi; the implication was that purchasing would have to cease immediately if the law was to be followed.[674] In any case, as noted earlier, he considered five acres per person to be adequate. Four years later, when providing evidence at the Pakiri inquiry, Fenton (who also had advocated the five-acre figure) expressed regret on behalf of both himself and Judge Monro 'that the success of the Government . . . had been so great. We thought they had denuded the Natives of their lands to a much greater extent than they ought to have done.'[675] In essence, the responsibility was seen as entirely that of Māori for selling excessive amounts of land and failing to ensure that they retained sufficient landholdings to enable their future participation in the economy.

671. Curnin, evidence, 14 May 1891, AJHR, 1891, G-1, pp 171–173.
672. Brissenden, memorandum, 30 December 1874, AJHR, 1875, G-7, pp 26–27.
673. 'Statement relative to Land Purchases, North Island', undated, AJHR, 1876, G-10, p 1.
674. Maning to Fenton, 5 July 1876 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 772–773.).
675. Fenton, evidence, 24 August, 1880, AJHR, 1880, I-2A, pp 45–46.

The warnings given by McLean and Maning (regardless of whom they held responsible) put the Crown on notice: it had to proceed with care if Māori in the district were to be able to sustain themselves let alone develop their lands (and resources) in the future. From about this time, the Crown was also able to keep a better record of the land still held in Māori ownership. The slowdown of Crown purchasing after 1876 was one factor behind the improvement in record-keeping. So, too, was the advent of local body rating, which required local authorities to know both the location and tenurial situation of Māori land, such as whether it was being leased, within their rating districts. By the end of the 1870s, the Crown was in a position to publish maps showing land tenure across the North Island.[676] These factors led to the inclusion of a higher level of detail in returns that were presented to Parliament in 1886 and 1891. The first identified the remaining area of papatupu land by county; named and provided the area of reserves made under various enactments; and listed all the blocks and the acreages held by Māori as inalienable.[677] The second, published on the eve of the Liberal Government's renewed purchasing efforts, offered a comprehensive summary of tribal lands (by block and acreage) that had not passed through the Native Land Court and were not leased. The returns also detailed Māori land that had passed through the Native Land Court and was leased to Pākehā, including details of area and property-tax valuations; and blocks (by area and property-tax valuations) that had passed through Native Land Court and been retained by Māori. The marked variation in the rates of property-tax valuations indicated a clear appreciation of the attributes of the blocks involved.[678]

Comments made by Native Minister Ballance in 1886 attest to ongoing awareness at the highest levels of Government about the predicament that Māori, particularly those in Te Raki, might face if alienation of their lands continued. Ballance warned that, as a class, landless Māori were 'becoming a danger to the state', and therefore suggested that areas of unoccupied Crown land could be set aside for them. If actioned, he thought this measure would principally benefit Ngāpuhi.[679] However, there was no practical action to ensure that the Crown did not purchase too much land from any given hapū in any given district; neither were there any moves to set aside reserves to prevent that from happening. In 1899, Hōne Heke Ngāpua (MHR Northern Maori) informed the House of Representatives that all 'the Native lands north of Auckland are not really sufficient if divided equally amongst members of the different hapus for their maintenance and support . . . further acquisition of Native lands should be stopped altogether.'[680]

676. McKerrow to Minister of Lands, 3 September, 1878, AJHR, 1878, H-17, p 5.
677. 'Land Possessed by Maoris, North Island', 16 July 1885, AJHR, 1886, G-15.
678. 'Native Lands in the Colony', AJHR, 1891, G-10.
679. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1032.
680. 'Aid to Public Works and Land Settlement Bill', 1 September 1899, NZPD, vol 108, p 658.

10.5.2.3 *Were restrictions on alienation effective?*

Imposing restrictions on alienation was a further mechanism available to the Crown to meet its obligations of active protection. Generally, such restrictions would take the form of a Native Land Court prohibition on any alienation of the land other than by a lease lasting no more than 21 years. The intended purpose was to give Māori 'time to make management decisions free from pressures for alienation, or to protect the land so that it could only be leased and not sold'.[681] Previous Tribunal inquiries have found, however, that alienation restrictions were ineffective when it came to helping Māori retain their lands over the long term. Given that they blocked developmental opportunities (such as raising funds through mortgages, or selling timber), such restrictions in the title may even have done more harm than good.[682]

Continual tinkering with the legislation concerning alienation restrictions reflected the Crown's inability to strike a balance between its obligation to respect tino rangatiratanga, its duty to protect Māori against injurious land loss, and its own objectives of making Māori land available for settlement and ensuring that the state managed this process and private purchasers ('speculators') were kept at bay.

Prior to 1873, the Native Land Court was supposed to hear evidence on the merits of alienation restrictions before making a recommendation to the Governor. However, Chief Judge Fenton was 'ideologically opposed' to imposing restrictions,[683] while in the early 1870s Judge Maning doubted restrictions on alienability for reserves were either necessary or desirable in areas further away from Auckland. At first, Maning claimed that Hokianga Māori possessed far more land than they could 'possibly improve themselves' and hence should be encouraged to sell some of it.[684] Indeed, in 1870 he appeared to think that Native Land Court judges were already ensuring that Māori retained sufficient land, arguing that the Court 'always places restrictions on the sale of a sufficient quantity of land to ensure to the natives an ample provision for their comfortable maintenance'.[685] However, as we noted earlier, by 1876 Maning would become concerned that the Crown had acquired more land than Te Raki Māori could safely alienate; but, as we read it, his comments about pending Māori landlessness were intended as a rebuke to Māori for their profligacy and lack of forethought rather than as a criticism of the rapacious practices of government purchase officers.

Te Raki Māori responses to alienation restrictions before 1873 were mixed. Given the number of alienation restrictions applied to Te Raki blocks in the late

681. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 634.

682. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 634; Waitangi Tribunal, *He Whiritaunoka*, Wai 898, vol 1, p 522.

683. Ward, *National Overview*, vol 1, pp 77–78 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 343)).

684. Judge Maning to McLean, 7 October 1870 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 346).

685. Judge Maning to McLean, 29 September 1870 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 346).

1860s, there was clearly some acceptance of the principles underlying them. Hugh Carleton, MHR for the Bay of Islands, told Parliament in 1867 that 22,597 acres and 4,194 acres of Hokianga and Bay of Islands land respectively were subject to alienation restrictions.[686] Charles Heaphy's report as Commissioner of Native Reserves lists some 25 Hokianga blocks and 68 Bay of Islands blocks as subject to alienation restrictions in 1871, but only five blocks in Whāngārei and Mahurangi.[687] Among Te Raki Māori, it seems that the main objection to the restrictions was the manner of their implementation, which interfered with their ability to exercise rangatiratanga over their lands. As of May 1870, Judge Maning reported that northern Māori were

> deeply discontented that their land should be made inalienable by act of Parliament, and without their knowledge, and cases have occurred where the inalienability of some of those lands has been both . . . injury to the natives and a cause of discontent against the Government.[688]

The discretion of the Native Land Court to impose restrictions on alienation as it saw fit (but generally at the request of the owners) was subsequently removed by section 48 of the Native Land Act 1873, which required a standard inalienability clause to be annexed to all memorials of ownership the Court issued. However, other sections of the 1873 Act provided for exceptions to the annex requirement: if all owners agreed to sell the land (section 49); or, in the absence of unanimity, if a majority of owners partitioned the land for sale (section 65). As the Waitangi Tribunal observed in the *Turanga Tangata Turanga Whenua* report, the cumulative effect of these two sections was to negate section 48; their inclusion 'meant that the manner of alienation was restricted, but alienation itself was not.'[689] The significance for the Te Raki inquiry district was that during the mid-to-late 1870s, when the Crown's determination to purchase Māori land was at its height, alienation restrictions provided no barrier to the Crown's ambitions. According to Thomas, the years from 1875 to 1880 'more than any other period, laid the foundations for Maori landlessness and shortage of land throughout Te Raki.'[690] For the two years for which we have information, 1875 to 1877, the trust commissioner rejected only a handful of transactions because there were restrictions on the title preventing sale.

The legislation governing restrictions on alienation went through several changes during the late 1870s and 1880s. Section 3 of the Native Land Amendment Act 1878 (No 2) again empowered the court to recommend restrictions that could only be removed by the Governor. Section 36 of the Native Land Court Act 1880 then authorised the Court to impose its own restrictions (without the involvement

686. 'Native Lands Act Amendment Act', 1 August 1867, NZPD, vol 1.1, p 267.
687. 'Report of Commissioner of Native Reserves', 19 July 1871, schedule, AJHR, 1871, F-4, pp 9–13.
688. Maning to McLean, 17 May 1870 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 345).
689. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, p 459.
690. Thomas, 'The Native Land Court' (doc A68), p 120.

of the Governor). Thereafter, the trend was towards making it easier for owners to have restrictions removed and, in the 1890s, to exempt the Crown from their operation altogether. That trend can first be seen in the Native Land Division Act 1882, which empowered the Native Land Court to remove restrictions when partitioning inalienable land. In a Waitangi Tribunal overview report on Crown policy relating to reserved lands under the Native Reserves Act, J E Murray described this as 'an indirect and relatively easy way of having restrictions removed without further scrutiny'.[691] The second measure was the Native Reserves Act 1882, specifically section 22 which empowered the Native Land Court to vary or annul any restrictions on alienation. The court, however, had to first satisfy itself that a final reservation was 'amply sufficient for the future wants and maintenance of the tribe, hapu, or persons to whom the reserve wholly or partly belongs'.

The Native Land Administration Act 1886, which banned private buyers from directly purchasing Māori land, effectively introduced another restriction on alienation. But the reaction against Ballance's reforms in 1888 led not only to the Native Land Administration Act 1886 being revoked, but also to further weakening of the pre-1886 alienation restrictions by the legislation that replaced it (the Native Land Court Act 1886 Amendment Act 1888). Section 6 of the 1888 amendment Act provided, again subject to sufficiency considerations, that restrictions 'which may hereafter be ordered may be annulled or varied by order of the Court on application by a majority in number of the owners of the land'. Meanwhile, another Act passed in 1888 – the Native Land Act 1888 (repealed by the Native Land Court Act 1894) – provided that existing restrictions could be removed or declared void by the Governor-in-Council on the application of a majority of the owners (section 5). Applicants were not required to set out any grounds or information about the sufficiency of the land they were to retain.

The 1,348-acre Oue block in Hokianga provides an example of the ineffectiveness of placing restrictions on alienation in the title. When title had been awarded in 1868, the block was made subject to alienation restrictions, which stood in the way when the Crown had first considered acquisition in 1872. However, the Crown started acquiring interests in the block in 1874, and it completed the purchase of all but 19 acres (split between three reserves) in 1876.[692] As for the purchase by George Holdship of the Otangaroa 2 block (also restricted), this was achieved in 1876 by half the owners having the block subdivided into two, at which point they unanimously agreed to the sale of their 3,439 acres. The sale was confirmed by the Native Land Court on 3 November 1876 and the trust commissioner's certificate was dated 18 January 1877.[693]

691. Murray, *Crown Policy on Maori Reserved Lands*, p 77.

692. Heaphy, 'Report from the Commissioner of Native Reserves ', AJHR, 1871, F-4, p 12; Berghan, 'Block Research Narratives' (doc A39(j),)), vol 11, pp 230–231; 'Lands Purchased and Leased from Natives in North IslandIsland', AJHR, 1885, C-7, p 3.

693. The Crown had made advance payments on the Otangaroa block, but when the Courtcourt awarded the block to 34 owners, it abandoned its efforts to acquire it: Horsley, 'A History of the Otangaroa, Te Pupuke, and Waihapa Blocks' (doc A57,), pp 56, 60, 65–66, 88–90.

At the time when Crown pre-emption was briefly restored in 1886, a return presented to Parliament showed 137 inalienable blocks, totalling 73,160 acres, in the three counties of Bay of Islands, Hokianga, and Whāngārei (although as the return still included the 1,348-acre Oue block, its accuracy is open to question).[694] Only 6,591 of the 73,160 acres had been added since 1880 (that is, while the imposition of restrictions had been discretionary).[695] Considering that 38,163 acres of Te Raki land had passed through the Native Land Court between 1881 and 1885, the uptake of alienation restrictions appears to have been slow.[696] This may reflect the lack of confidence among Māori that alienation restrictions would protect their ownership, while they might interfere with their ability to manage their lands.[697]

One of the Whangarei County blocks listed in the 1886 return was Whauwhau Pounamu, a small block that is the subject of allegations in the Karaitiana whānau claim. Again, the history of its alienation illustrates just how easily alienation restrictions could be ignored or circumvented. Comprising just 49 acres, Whauwhau Pounamu was one of many small blocks for which title investigations occurred in the 1860s. At the May 1867 hearing, Hepi Monariki and Tipene Hari were both placed on the title, but not before Monariki had stated that 'the land belonged to the whole of us' and asked for restrictions to be 'placed on the sale of this land for the benefit of the children'.[698] An official report on cases that passed through the Native Land Court to June 1867 indicates an alienation restriction (as set out in the Native Land Act 1866) was placed on the title, although this was not recorded in the minute book.[699] Eighteen years later, by which time Tipene Hari had died, his son-in-law and Hepi Monariki reached agreement about partitioning the block. It seems the existence of any restriction was forgotten; no mention was made of it. In any case, the restriction came to an end with the block's partition. Sixteen of the 23 acres in Whauwhau Pounamu 1, and all of Whauwhau Pounamu 2, were sold to James Whitelaw in September 1886.[700]

Throughout the 1880s, Māori views on alienation restrictions remained mixed, reflecting the unenviable position in which they had been placed as a result of government land legislation and purchase policies. Māori calls for control over their own lands grew more emphatic. For example, in 1888 a hui at Pūtiki of rangatira from across the North Island called for the continued operation of native committees. The rangatira wanted them to have powers equivalent to those of the Native Land Court. They stipulated that – subject to conditions covering land sufficiency

694. 'Land Possessed by Maoris, North Island', AJHR, 1886, G-15, pp13–14.

695. The post-1880 blocks on the list (determined by checking against Thomas, 'The Native Land Court' (doc A68), apps E, F; 'Report of Commissioner of Native Reserves', 19 July 1871, schedule, AJHR, 1871, F-4, pp9–12) were Otetao, Te Popo, Whawharu A-B, Horotiu A-B, Ratakamaru A-I, Whataipu, Mauiui A-B, Poroti 2–4, and Puhipuhi 4.

696. Thomas, 'The Native Land Court' (doc A68), p122.

697. 'Land Possessed by Maoris, North Island', AJHR, 1886, G-15, p14.

698. Berghan, 'Northland Block Research Narratives' (doc A39(h)), vol 9, p368; *Whauwhau Pounamu* 2 (1867) 2 Whangarei MB 9–10 (doc A49).

699. Return of certificates issued by Native Land Court from 1 November 1865 to 30 June 1867, AJHR, 1867, A-10C, p5.

700. Berghan, 'Northland Block Research Narratives' (doc A39(h)), vol 9, p369.

and a 200-acre reserve (for contested alienations) being met – Māori should 'have full authority to deal with their own lands, as to sale, lease or otherwise'.[701] However, there seems to have been an acceptance among Māori that some alienation restrictions were better than nothing. This was especially so once the Liberals began moving to resume Crown purchasing on a large scale. In 1892, Eparaima Te Mutu Kapa (MHR Northern Maori) opposed the removal of restrictions on alienation, fearing that further land loss would follow.[702] It is also notable that when Wiremu Komene – whose keen questioning of Seddon during the Premier's North Island tour in 1894 was noted in section 10.3.2.5 – challenged several provisions of the Native Land Purchase and Acquisition Act 1893, the alienation restrictions section was not among them.[703] Meanwhile, Hōne Heke (MHR Northern Māori) told Parliament in 1895 that the restrictions on leasing should be removed to help Māori facing rates demands.[704]

Although alienation restrictions were changed again in the 1890s, this was done to meet the Crown's needs rather than those of Māori landowners. The changes were consistent with the advice of Native Department Under-Secretary Lewis to the Rees–Carroll commission in 1891 that there was no such thing as absolute inalienability.[705] He also claimed that the Crown, when purchasing land that was subject to restrictions on alienation, was 'practically compelled to break the law'; otherwise, it could not purchase at all, 'which is extremely unsatisfactory where the land is required for settlement'.[706] Possibly in response to Lewis' advice, section 14 of the Native Land Purchases Act 1892 and section 12 of the Native Land Purchase and Acquisition Act 1893 provided for the removal of restrictions on land under negotiation for sale to the Crown. The Native Land (Validation of Titles) Act 1893 also allowed the Native Land Court to validate any irregularities that had occurred in the removal of restrictions. Finally, section 52 of the Native Land Court Act 1894 empowered the Court to remove or vary any restrictions on alienation with the assent of the owner or one-third of the owners, 'on proof that every such owner has sufficient land left for his support'.

Thus, during the second period of intensive purchase activity in Te Raki – namely 1895 to 1899 – the Crown's programme was unhindered by both private competition and whatever alienation restrictions had been previously placed on the title of blocks. Indeed, many of the blocks of 1,000 acres or more that had featured in the 1886 return of inalienable land scrutinised by Parliament – Otarihau,

701. 'Native Views on Native Land Legislation', AJHR, 1888, G-7, p 1.

702. 'Bills', 12 July 1892, NZPD, vol 75, p 391; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1033–1034.

703. Komene had specifically queried or objected to sections 3, 11, 15–17, 24, 26, 31; alienation restrictions were addressed in section 12: 'A Narrative of the Premier's Trip through the Native Districts of the North Island', AJHR, 1895, G-1, pp 28–31.

704. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1201–1202. Heke was referring to the Native Land Court Act 1894 and its prohibition on Māori leasing or selling land to third parties. According to Armstrong and Subasic, Heke considered it 'a great inconsistency' that Māori were denied complete control over their lands but had to take full responsibility for rates.

705. Lewis, evidence, 13 May 1891, AJHR, 1891, G-1, p 156.

706. Lewis, evidence, 12 May 1891, AJHR, 1891, G-1, p 146.

Te Awaroa 1, Rotokakahi, Te Tapuwae 3, and Te Ruatahi – were subject to Crown purchases during this period.[707] Other blocks that were alienated in spite of restrictions included Parahirahi (which was discussed in section 10.4.2.4.1) and Horahora North and South.

10.5.2.4 *Horahora*

According to Te Waiariki, Ngāti Korora, and Ngāti Takapari claimants, the alienation of the Horahora block demonstrated the detrimental double impact caused by the imposition of Native Land Court processes and Crown purchase practice.[708] In 1877, at the request of Hohepa Mahanga and Kereama Te Peke, the Native Land Court investigated the title to Horahora South and Horahora North. The Court awarded the 1,986-acre Horahora North block to nine owners, and the 1,336-acre Horahora South block to 28 owners. Using sections 48 and 49 of the Native Land Act 1873, the Court put restrictions on the title of both blocks, barring sale and lease for more than 21 years.[709]

Despite these alienation restrictions, in January 1895 the Crown land purchase agent Christopher Maxwell sought authorisation to take up an offer to sell interests in the Horahora South block.[710] We note that the Crown listed this block in the *New Zealand Gazette* on 18 July 1895 as under negotiation for Crown purchase 'in pursuances to the provisions of the "Native Land Purchases Act 1892"'.[711] Historian Dr Barry Rigby argued that Crown officials may have felt empowered by section 76 of the Native Land Court Act 1894, which pertained to 'Rights of the Crown' and stated: 'Nothing in this Act shall limit the power of the Crown to acquire land from Natives, and any deed shall be given effect to notwithstanding any law in force to the contrary.'[712]

Given the surplus of land available to the Crown and its pre-emption policy, Maxwell reckoned that the land in Horahora South – although worth 10 to 15 shillings per acre – could be bought for five shillings per acre. Following the same logic, the Surveyor-General recommended a purchasing price of three to four shillings per acre, and in February the Minister of Lands approved four shillings per acre across the entire block. In July 1895, the *New Zealand Gazette* added Horahora

707. 'Land Possessed by Maoris, North Island', AJHR, 1886, G-15, pp 13–14; Rigby, 'Validation Review of the Crown's Tabulated Data' (doc A56), app A.

708. Specific closing submissions for Wai 620, 1411–1416, 2239 (#3.3.305(a)), pp 74–77; closing submissions for Wai 179, Wai 1524, Wai 1537, Wai 1541, Wai 1681, Wai 620, Wai 1673, Wai 1917, and Wai 1918 (#3.3.393(b)), pp 168–170.

709. Barry Rigby, 'Horahora Local Study', report commissioned by the Waitangi Tribunal, 2016 (doc A70), pp 23–24, 29.

710. Berghan, 'Northland Block Research Narratives' (doc A39(l)), vol 13, p 88; Rigby, 'Horahora Local Study' (doc A70), p 35.

711. 'Notice of Entry into Negotiations for Acquisition of Native Lands by Her Majesty', 16 July 1895, *New Zealand Gazette*, 1895, no 54, pp 1099–1100 (cited in Rigby, 'Horahora Local Study' (doc A70), p 36).

712. Rigby, 'Horahora Local Study' (doc A70), p 36.

South to its list of blocks under negotiation for Crown purchase.[713] By purchasing individual owners' interests, the Crown ultimately managed to acquire 10 out of 28 shares. In October 1896, the Crown then partitioned its 477-acre entitlement out of the block as Horahora 2A, leaving the 18 non-sellers with the remaining 858 acres, which became Horahora 2B.[714]

No reserves were made for the sellers, and there is no record in the court minutes of any assessment of the sufficiency of the remaining lands for Māori in Horahora. According to Armstrong and Subasic, the purchase of Horahora 2A (like all of Maxwell's endeavours) exemplifies the overriding aim of Crown purchase policy in the north at this time: to acquire any remaining areas suited for settlement at the lowest price. Little or no attention was paid to Māori economic aspirations or the retention of land in Māori ownership.[715] Speaking of the land loss that her tūpuna had suffered, Pereri Mahanga (Te Waiariki, Ngāti Korora, and Ngāti Takapari) attested to their territorial integrity being 'shattered by the Crown'.[716] For the Crown, by contrast, the Horahora purchase illustrates the practice of circumventing title restrictions and acquiring blocks for much less than their true value.

10.5.2.5 *Were ample hapū reserves created?*

In the preceding discussion of protection mechanisms, we saw how section 24 of the Native Land Act 1873 would have allowed district officers to effectively ringfence Māori land for future use, but this provision was rarely used. We also saw how applying alienation restrictions at the time of title hearings could also result in 'Native Reserves', but that such protections had limited meaning when the restrictions were so easily evaded. We now turn our attention to the reserves more closely associated with Crown purchasing between 1865 and 1900; that is, areas cut out or excluded from purchases. This was precisely how the small number of reserves generated from pre-1865 purchases and the settlement of old land claims had been created.

According to Dr Rigby, during the period from 1865 to 1900, the Crown created just 27 reserves in Te Raki with an aggregate area of 5,578 acres. This amounted to less than one per cent of the total of 588,707 acres that it acquired during that period. Moreover, those 27 reserves were all established during the 1870s.[717] The tiny number and limited area (an average of 207 acres) of reserves created out of Crown-purchased blocks in these years suggests an ad hoc and negligent approach by the Crown that was utterly inconsistent with ensuring that Māori retained the land required for immediate sustenance, the maintenance of cultural obligations, and future development. As a result of this negligence, promised reserves were

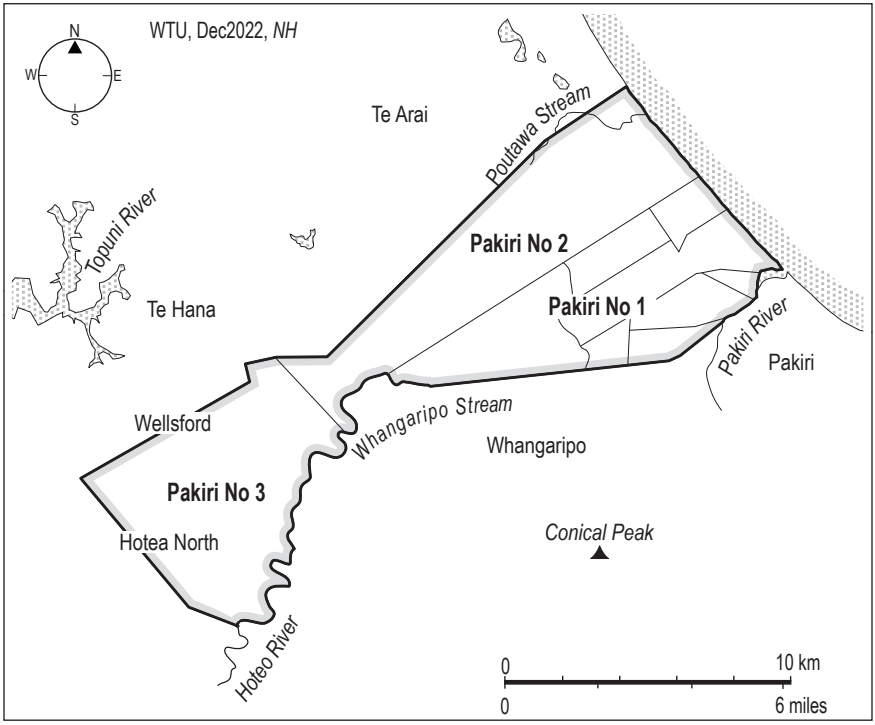
713. Berghan, 'Northland Block Research Narratives' (doc A39(l)), vol 13, pp 88–89; Rigby, 'Horahora Local Study' (doc A70), pp 35–36.

714. Rigby, 'Horahora Local Study' (doc A70), p 36.

715. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1147.

716. Pereri Mahanga (doc U21), para 68.

717. Rigby, 'Validation Review of the Crown's Tabulated Data' (doc A56), app B; Thomas, 'The Native Land Court' (doc A68), p 117.



Map 10.4: The Pakiri block.

not always granted or provided where they should have been (as demonstrated by the cases of Arawhatatotara and Tunapohepohe, described later). Additionally, reserves were not safe from future purchase. By 1880, the Crown had acquired the 882-acre Ngatahuna reserve, which was associated with the purchase of Otonga 1; the 417-acre Te Karu and the 159-acre Waimahutahuta reserves, both set aside out of the Whataipu block; and 241 out of the 250 acres in Maroparea reserve, created out of the Punakitere block.[718]

In the 1890s, just one reserve was established as part of the Crown's purchasing.[719] At the very time the Te Raki Māori land base was dwindling dangerously (and the powers of the Court and Crown over its alienation were strengthened), the provision of reserves remained utterly inadequate. In part, this was a matter of practicality; given the Crown was dealing with each owner of shares separately, it could not easily have reached agreement with every owner as to where a reserve might be located (unless it did so at the start of the process at a hui with all owners

718. Thomas, 'The Native Land Court' (doc A68), app A.

719. Rigby, 'Validation Review of the Crown's Tabulated Data' (doc A56), app B; see also Thomas, 'The Native Land Court' (doc A68), p 117.

in attendance).[720] Patrick Sheridan, the chief native land purchase officer, said in 1895 that if part of a block was to be excluded from sale, then the remaining owners would have to absorb it into their interests when the block was eventually partitioned. He reminded Gill of this policy when writing to him about provisions for reserves in a Te Urewera transaction: '[I]f they [the Māori sellers] imagine we are going to pay them in full for the land and then give it back to them you had better let them understand that that is not the way we do things nowadays.'[721] In fact, as McLean's 'repurchase' policy had demonstrated, this had never been the way things were done ; essentially, Māori were expected to pay for their own reserves. The Crown's approach was to transfer its protective responsibilities to the remaining owners – a practice that was especially unfair when the owners who had decided, or were in a position to retain their interests, were in the minority.

Several of the flaws in the Crown's approach to creating reserves were apparent in the 1875 Arawhatatotara purchase in Hokianga. The purchase took around five years to finalise, with a significant amount of confusion between Māori and the Crown over what had been agreed. David Armstrong observes that the Crown's purchase of Te Arawhatatotara commenced in August 1874, when Brissenden paid £30 tāmana in relation to the adjacent Punakitere and Arawhatatotara blocks to Pehikura of Ngāti Moerewa and three others. Charles Nelson, who was involved in the payment, later asserted that he had agreed to set aside two reserves within the two blocks totalling around 490 acres. He noted that Matenga Taiwhanga had forgone payment, with the expectation that he would instead retain ownership of the reserves.[722]

In April 1875, the 4,116-acre Te Arawhatatotara block came before the Native Land Court, where ownership was disputed by several parties, including Hare Rewiti Puataata of Ngāti Wake, Hone Moka of Ngāti Pākau, Hōne Mohi Tāwhai of Māhurehure and Ngāti Pākau, and Pehikuru of Ngāti Moerewa. Armstrong noted that several reserves were indicated on the plan before the Court, including a 250-acre reserve at Maroparea on the eastern boundary of the block. Hare Puataata claimed that the block was owned by Te Matenga Taiwhanga, Hirini Taiwhanga, and nine others. Pehikura's claims centred on the western side of the block and did not oppose that of Puataata. Tāwhai claimed a part of the block with Hone Moka, which included the reserves claimed by Pehikura.[723] To resolve these conflicting claims, the Court partitioned the block into two, creating a boundary to separate the lands belonging to the Tāwhai and Hone Moka party from those belonging to Pehikura and Puataata. The eastern section, Arawhatatotara 1, was awarded to Pehikura and Puataata, of whom Armstrong observed, '[I]t is clear that these two chiefs were representatives of a wider community of owners, and had

720. Waitangi Tribunal, *Te Urewera*, Wai 894, vol 3, p 1293.
721. Waitangi Tribunal, *Te Urewera*, Wai 894, vol 3, p 1293. It should be noted that Taniora Arapata argued that James Clendon had promised a 100-acre reserve from the Omaunu sale: Berghan, 'Northland Block Research Narratives' (doc A39(i)), vol 10, p 147.
722. Armstrong, 'The Native Land Court and Crown Purchasing' (doc AA52), p 53.
723. Armstrong, 'The Native Land Court and Crown Purchasing' (doc AA52), p 55.

effectively been nominated to conduct a pending sale of the land to the Crown.'[724] The Arawhatatotara No 1 block was sold to the Crown for £353 the following day (which included the £30 tāmana Brissenden had paid the previous year).[725] Notably, the purchase deed did not mention any reserves.[726] Armstrong records that survey costs totalled £95, or a further 27 per cent of the purchase moneys.[727]

Te Arawhatatotara no.2 consisting of the western portion of the parent block, had its title hearing on 11 November 1876 to ascertain 'who of Ngatipakau are entitled to claim.'[728] Armstrong states that after extensive evidence was provided to the Court, a memorial of ownership was issued to 40 owners including Hone Moka, on 15 November 1876.[729] The Crown purchased Te Arawhatatotara 2 the next day for £368.[730]

The same day as the Crown's purchase of Te Arawhatatotara 2 was confirmed (16 November 1876), Te Matenga Taiwhanga and others wrote to the Native Minister stating that government officer Nelson had agreed reserves should be made in Te Arawhatatotara 1 (which the Crown had purchased the year before). He apparently received no response, as he again wrote in February 1877, asking that 400 to 500 acres be set aside as had been agreed and as they had been promised. It appears that around this time, Native Under-Secretary Clarke directed Preece to carry out any arrangements regarding reserves that had been made. When Preece wrote back on 28 March 1877, however, he said he was unaware of any reserves on the Te Arawhatatotara 1 block, pointing instead to reserves on the Punakitere block, which the Crown had also purchased in 1876. By May 1877, Clarke had taken steps to have the reserve at Te Arawhatatotara set aside by the Auckland Waste Lands Board.[731]

District Officer Webster visited Kaikohe in September 1877 to meet with Hirini and Te Matenga Taiwhanga and arrange for a survey of the reserves. At this meeting, Webster argueed that the owners had failed to mention reserves during the Native Land Court hearings in 1876. As a result, they had received payment for the whole block, and would therefore have to bear the survey expenses for the land to be now reserved.[732] These comments were not correct. Taiwhanga had not received any of the tāmana payment from Brissenden and would have reasonably expected the Crown to carry out its promise to set land aside. Furthermore, the Māori owners had in fact indicated their wish for a number of reserves to be established during the Native Land Court hearings. The Maroparea reserve, which was

724. Armstrong, 'The Native Land Court and Crown Purchasing' (doc AA52), p 55.
725. Berghan, 'Northland Block Research Narratives' (doc A39(c)), vol 4, p 28.
726. 'Deeds No 67 – Arawhata-Totara No 1, Hokianga District', Turton, *Maori Deeds of Land Purchases in the North Islands*, vol 1, p 93.
727. Armstrong, 'The Native Land Court and Crown Purchasing' (doc AA52), p 55.
728. *Te Arawhatatotara* (1876), 3 Northern MB, 269 (cited in Armstrong, 'The Native Land Court and Crown Purchasing' (doc AA52), p 55).
729. Armstrong, 'The Native Land Court and Crown Purchasing' (doc AA52), pp 55–56.
730. Berghan, 'Northland Block Research Narratives' (doc A39(c)), vol 4, p 36.
731. Berghan, 'Northland Block Research Narratives' (doc A39(c)), vol 4, pp 28–29.
732. Webster to Preece, 1 October 1877 (cited in Berghan, 'Northland Block Research Narratives' (doc A39(c)), vol 4, pp 30–31).

identified for the court in 1876, was the same as the area Te Matenga had sought to be kept aside.[733] In purchasing the whole block, the Crown had both failed to recognise the reserves identified in court and to deliver on its earlier promises.

The Crown's belated provision proved short-lived. By 1878, Matenga had informed the Crown that he wished to sell the reserve land to the Government for £100, as it had taken too long for it to be set aside; in the interim, Matenga explained, he had grown old, his daughter had died, and he had gone to live in Maketu.[734] In 1880, following further letters from Matenga, Nelson finally confirmed to Land Purchase Under-Secretary Gill that a 250-acre reserve called Maroparea had been created from the Arawhatatotara No 1 block, and a 240-acre reserve named Pukututu from the adjacent Punakitere block. The following month, Gill instructed Nelson to purchase both reserves.[735] In October of 1880, 241 acres of the Maroparea reserve were purchased by the Crown, with nine acres held back as a Native reserve.[736]

Similarly, a key grievance in the Ngāti Torehina ki Matakā hapū claim is the Crown's lack of reserve provision – in this instance, its purchase of the entire Tunapohepohe block, without any land being reserved at all. In submissions, the claimants argued that the Crown must have employed underhand methods to obtain the owners' agreement to part with a block containing cultivations and the sacred maunga Matakā in return for £244 2s 6d (or 2s 3d per acre for the 2,170-acre block). In the Native Land Court title investigation held in April 1875, Haroe Morunga put forward Ngāti Torehina ki Mataka's case, testifying that they did not reside on the block but had cultivations there. According to the claimants, the presence of such cultivations was 'viewed by the Native Land Court as [a] key poin[t] when establishing mana and resolving disputes'.[737] Haroe Morunga's evidence was then countered by Matenga Taiwhanga, who asserted an ancestral claim on behalf of Ngāti Kura.[738] No survey of the block had been carried out, so the court made do with a certified tracing.[739] After the cross-examination of witnesses, Judge Monro awarded the block to the four Ngāti Torehina ki Mataka owners named by Haroe Morunga. No protections were requested, and none were put in place.[740]

Few details are on record of the subsequent Crown purchase of the Tunapohepohe block, although published correspondence reveals that Brissenden

733. Armstrong, 'The Native Land Court and Crown Purchasing' (doc A A52), ppp 55–56; Berghan, 'Northland Block Research Narratives' (doc A39(c)), vol 4, pp 28–30; Webster explained that Hirini Taiwhanga and the other owners pointed out the end of the Arawhatatotara block closest to Kaikohe as the land Te Matenga Taiwhanga wanted reserved: Berghan, 'Northland Block Research Narratives' (doc A39(c)), vol 4, p 30.

734. Berghan, 'Northland Block Research Narratives' (doc A39(c)), vol 4, pp 19–26; Armstrong, 'The Native Land Court and Crown Purchasing' (doc A A52), p 59.

735. Berghan, 'Northland Block Research Narratives' (doc A39(c)), vol 4, pp 20–25.

736. Rigby, 'Validation Review of the Crown's Tabulated Data' (doc A56), app A, p 2.

737. Closing submissions for Wai 1508 and Wai 1757 (#3.3.330), p 63.

738. Herbert Rihari (doc R14), p 61; *Tunapohepohe* (1875), 2 Northern MB 96–103 (doc A49).

739. *Tunapohepohe* (1875), 2 Northern MB 96 (doc A49).

740. Herbert Rihari (doc R14), p 61; *Tunapohepohe* (1875), 2 Northern MB 98, 103 (doc A49).

had made a £50 advance on the block by mid-1875. At the time, Brissenden reported that he had negotiated the rate of 1s 6d per acre for the whole block.[741] In September 1876, H T Kemp had completed purchasing it for the Crown, and the purchase was gazetted in April 1878.[742] Despite the presence of the maunga Matakā and Ngāti Torehina ki Mataka cultivations on the block, no reserves were created.

10.5.2.6 *Was fraud prevented?*

For much of the period from 1865 to 1900, two agencies were responsible for vetting Māori land transactions for fraud: the Native Land Court, and the trust commissioners appointed under the Native Lands Frauds Prevention Acts. Here, our main focus is the latter, as fraud prevention was their primary function (unlike the court, for whom it was just one of many tasks). Nevertheless, it is appropriate to briefly review the court's responsibilities, since it was in effect the first line of defence.

In cases where Māori wished to sell land, section 59 of the Native Land Act 1873 required the Native Land Court to 'make inquiry into the particulars of the transaction'. Subsequently, 'on being satisfied of the justice and fairness thereof, [and] of the assent of all owners to such sale', the court could endorse the memorial of ownership 'to the effect that the transaction appears to be bona fide, and that no difficulty exists in respect of the alienation of the land comprised in such Memorial'. The provision did not specify how to assess whether a transaction had been conducted in 'justice and fairness'or any remedies if it proved not to have been. Although the Act was not repealed until 1886, Paul Thomas could find only 'sporadic references' to the court acting under section 59 in Te Raki, and nothing to suggest it carried out any thorough inquiries.[743] From 1886 onwards, the court's duty to establish that a transaction was bona fide was reiterated several times: in section 24 of the Native Land Administration Act 1886, section 4 of the Native Land Court Act 1886 Amendment Act 1888, and section 4 of the Native Land Laws Amendment Act 1890. Again, no remedies were provided.

The Native Land Court Act 1894 contained an apparent revision of the Court's role in inquiring into and confirming alienation particulars when land was sold. Its inclusion probably reflected the abolition of the position of trust commissionere by the same Act. Section 53(1) specified that the Court had to be satisfied that a transaction was not:

- prohibited by law;
- contrary to equity and good conscience;
- a breach or in contravention of any trust to which the land was subject;
- in contravention of any restriction on alienation;

741. The block name was mistranscribed as Tunapahepahe: Brissenden to McLean, 24 June 1875, AJHR, 1875, G-7, p 33.

742. Berghan, 'Northland Block Research Narratives' (doc A39(g)), vol 8, pp 415–416.

743. Thomas, 'The Native Land Court' (doc A68), p 120.

- made 'in consideration wholly or partly, directly or indirectly, of the supply, or promise of supply, of any intoxicating liquor, or weapons or munitions of war'; or
- subject to a notice under the Native Land Purchases Act 1892 or the Native Land and Purchase and Acquisition Act 1893.

Section 53(2) set out five further requirements, namely that:

- the title had been ascertained;
- the consideration had been paid or given;
- the vendor ('other than a half-caste') had 'sufficient land left for his support,' while any half-caste had 'sufficient means of support derivable from land or otherwise';
- the deed carried a plan of the land, a certified statement in the Māori language setting out the effect of the deed, and confirmation that effect had been explained by a licensed interpreter to each vendor before signing; and
- the signature of each vendor had been attested by a named official.

No evidence was presented to us about how these 'Confirmation of Alienations' provisions in the Native Land Court Act 1894 were administered. How the Court interpreted and applied the requirements – particularly those relating to 'equity and good conscience' and 'sufficiency' – is not known. As a result, whether these provisions offered effective protection cannot be established, although their inclusion indicates that the Crown recognised its responsibility to ensure land purchases were fair and legitimate.

We now turn our attention to the trust commissioners, a role that was created by the Native Lands Frauds Prevention Act 1870. This Act emerged from an 1870 parliamentary select committee consideration of the Native Reserves Bill. Supporters of the proposed legislation had called for an independent check of the Native Land Court to guard against sales breaching intended trusts, fraudulent dealings, and improper payments for the purchase of lands from Māori.[744] Two concerns predominated: first, that settlers were endeavouring to acquire land through foreclosing on mortgage debts incurred by Māori; and secondly, that those named as grantees under the Native Lands Act 1865 were placed in the legal position of absolute owners, enabling settlers to acquire Māori land through 'inequitable bargains'. Minister of Justice Sewell, when moving the Bill's second reading, remarked that '[h]e could conceive no greater danger to the Colony than for large masses of Natives to be denuded of their lands and pauperized. The next step to pauperization would be brigandage, and that would be fatal to colonization.' The object of the Bill was therefore 'to prevent, as far as possible, the maladministration of lands vested in trustees for the Natives, in cases where trusts had been created in the names of individual proprietors, but really for the benefit of Native communities'.[745] Sewell went on to comment:

744. Murray, *Crown Policy on Maori Reserved Lands*, p 34.

745. 'Native Lands Frauds Prevention Bill', 29 August 1870, NZPD, vol 9, p 361; 'Instructions to Trust Commissioners under the Native Lands Frauds Prevention Act 1870', AJLC, 1871, no 23, p 162.

> We must not attempt to take the Native under our protection, controlling their free agency in dealings with their own lands. That would be equally resisted by Europeans and Natives. On the other hand, it was necessary to extend to the Natives the same protection which we provide for ourselves in our own tribunals. What was meant by this Bill was to declare that transactions which were plainly against law and equity should be invalidated; to provide means by which the circumstances attending those transactions should be investigated; and to provide an easy, cheap, and speedy process to which parties, whether Natives or Europeans, might resort to determining questions springing out of these transactions.[746]

The preamble to the Native Lands Frauds Prevention Act 1870 referred to 'frauds and abuses in connection with the alienation of land by Native proprietors', and noted 'that lands held by them on trusts have been improperly disposed of and dealt with'; however, the Act had a wider application. Section 4 – which applied to all land in Māori ownership, whether subject to an underlying form of trust or not – provided that no alienation would be certified as valid if 'contrary to equity and good conscience'; or if the alienation contravened any trusts affecting the land in question; or if the supply of alcohol, arms, or stores had formed part of the payment. Section 5 required the trust commissioner to investigate: the circumstances of every alienation; whether the parties to the transaction understood its nature; the nature of the consideration and whether it had been paid; and 'that sufficient land is left for the support of the Natives interested in such alienation'. While the Act appeared to provide Māori with a measure of protection, it did not define sufficiency (which was to remain undefined until the Native Land Act of 1873).

Previous Tribunal reports have criticised the Native Lands Frauds Prevention Act 1870 and its implementation. *The Hauraki Report*, for example, concluded that the reports produced by trust commissioners were merely a 'formality . . . especially after the amendment Act of 1881 had introduced pro forma statutory declarations as the way of ascertaining relevant facts'.[747] In *Turanga Tangata Turanga Whenua*, the Tribunal concluded that the Act, had it been rigorously applied, would have largely enabled the Crown to meet its obligation of active protection, but that the commissioners charged with its implementation were insufficiently resourced and lacked the necessary powers.[748] In *He Whiritaunoka*, the Tribunal concluded: 'With just five part-time trust commissioners covering the whole of the country, they could not undertake detailed investigations, and some were notoriously lax in fulfilling their duties.'[749]

In his instructions to trust commissioners in 1871, Sewell noted the Act was intended to ensure 'a system of fair dealing' in land transactions with Māori. But he also advised them that their 'inquiries need not, in ordinary cases, be

746. 'Native Lands Frauds Prevention Bill', 29 August 1870, NZPD, vol 9, p 361.
747. Waitangi Tribunal, *The Hauraki Report*, Wai 686, vol 2, p 847.
748. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, vol 2, pp 456–457.
749. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 388.

too minute'.[750] In March 1871, Sewell again advised commissioners that while the Government was

> most anxious that the equitable rights of all parties should be preserved by means of the provisions of this Act, care should be taken not to permit an over scrupulous anxiety to prevent inequitable bargains from interfering with the legitimate transfer of property.[751]

Of particular moment was Sewell's direction to the effect that if the title granted by the Court did not disclose a trust, then none was to be implied, meaning that where the ten-owner rule had been applied, all other rightful owners who had been left off the title were denied such protection as the commissioners might have offered.[752] His astonishing advice that trust commissioners should avoid inquiring too closely into the equity of the transactions they were supposed to be monitoring casts serious doubt on the integrity of the Crown's intentions and the likely effectiveness of this measure.

Only two of the reports prepared by Trust Commissioner T M Haultain of Auckland, covering just that province, were published. During the year ending 30 June 1876, Haultain's office received 210 deeds. Certificates were refused in five cases: three because the land was inalienable except by lease for 21 years, and two because the land was held by grantees in trust for a tribe. Haultain's report made no reference to the matter of 'sufficiency'.[753] In his second report, for the year ending 30 June 1877, Haultain recorded that he had received 225 deeds and again, only five had been refused certificates.[754] Haultain did not elaborate on how his office managed to deal with 435 deeds in two years while complying with the exacting requirements of section 5 of the Native Lands Frauds Prevention Act 1870. The reasons given for refusing these 10 certificates suggest that he focused on the legal status of the lands involved, particularly whether restrictions against sale were entered on the title. All other matters, including whether transactions had been conducted with 'sincerity, justice, and good faith' as Normanby had directed in 1839, or in 'equity and good conscience' as stated in Native Lands Fraud Prevention Act 1870,[755] were evidently beyond the capacity of trust commissioners to assess.[756]

750. 'Instructions to Trust Commissioners under the Native Lands Frauds Prevention Act 1870', AJLC, 1871, no 23, p 162.

751. Sewell, circular to Trust Commissioners, 18 March 1871, AJHR, 1871, G-7A.

752. Murray, *Crown Policy on Maori Reserved Lands*, p 35.

753. 'Report relating to Alienation of Lands by Natives in Auckland Province', 14 July 1876, AJHR, 1876, G-8.

754. 'Report of Lands Alienated by Natives in Auckland Provincial District', 12 July 1877, AJHR, 1877, G-6.

755. 'Report relating to Alienation of Lands by Natives in Auckland Province', 14 July 1876, AJHR, 1876, G-8; 'Report of Lands Alienated by Natives in Auckland Provincial District', 12 July 1877, AJHR, 1877, G-6.

756. 'Report relating to Alienation of Lands by Natives in Auckland Province', 14 July 1876, AJHR, 1876, G-8; 'Report of Lands Alienated by Natives in Auckland Provincial District', 12 July 1877, AJHR, 1877, G-6.

In 1886, G E Barton, appointed by the Government to investigate some particular instances where restrictions on alienation had been removed, concluded 'that the system of inquiry before the frauds prevention commissioners [was] useless for the prevention of fraud'.[757] That same year, Native Minister Ballance claimed that it was

> notorious that the Frauds Commissioners in the past have performed their duties in the most perfunctory manner, and passed transactions when the consideration was a mere bagatelle – 'an iron pot' . . . In this way large tracts of land are passed into the hands of private owners.[758]

In his evidence before the 1891 Native Lands Laws Commission, the Native Department's Under-Secretary, T W Lewis, also suggested that while the Native Lands Frauds Prevention Acts had been intended to protect Māori, in fact they had 'inflicted serious loss upon them'. Purchasers, he suggested, adjusted the price they were prepared to pay to take into account the costs of commissioners' investigations. Given that 'lands are purchased from the Natives at very much below what would be the value of similar land in the hands of Europeans', the outcome was that 'the Frauds Prevention Acts have certainly the effect of reducing the price of the land of the Maoris and so depriving the Natives of at least 25 per cent of the monetary value of their land.'[759] Insofar as trust commission investigations were concerned, Lewis aptly noted that Māori secured 'a pennyworth of protection at a cost . . . of a pound'.[760]

An additional peril of informal trust relationships, and one which should have justified trust commissioner protection, was that the sense of obligation of named owners to those who had failed to find their way into the title could diminish with the passage of time and (more especially) generations. In the case of Kauaeranga and Ngaturipukunui, the two successors to the original owner, Te Tirarau, had been persuaded that selling the blocks to the Crown would alleviate their poverty. As we noted in chapter 9 (see section 9.6), the sale went ahead in late 1893 despite complaints. These included a petition to Parliament from Hira Te Taka and 65 others, stating that Te Tirarau had held the blocks in a trust relationship and had only become sole owner to facilitate a lease with a timber-milling company 16 years earlier.[761] Rather than trying to rescind the sale, Parliament instead made provision in sections 2 and 3 of the Ngaere and other Blocks Native Claims Adjustment Act 1894 for half of the purchase money to be paid to those whom the Native Land Court could identify as having interests in the blocks. This investigation was undertaken by Judge Edward Gudgeon, who determined that it should be

757. 'Report on Removal of Restrictions on Sale of Native Lands', 14 May 1886, AJHR, 1886, G-11, p 3.

758. 'Native Land Administration Bill', 11 June 1886, NZPD, vol 54, p 463.

759. Lewis, evidence to Commission on Native Land Laws, 12 May 1891, AJHR, 1891, G-1, p 156.

760. Lewis, evidence to Commission on Native Land Laws, 12 May 1891, AJHR, 1891, G-1, p 157.

761. Thomas, 'The Native Land Court' (doc A68), pp 214–217; Hira Te Taka and 65 others, petition, 3 October 1893, AJHR, 1893, I-3, p 23.

divided among 32 people. A subsequent request from Hori Rewi for a reserve to be created for the non-owners was unsuccessful.[762]

Historian J E Murray concluded that '[i]t is difficult not to read a certain ambivalence, indeed, a half-heartedness, in the general instructions to trust commissioners. The Crown's intention was to protect but not to protect with much rigour.'[763] Moreover, the Crown's own purchases (such as Kauaeranga and Ngaturipukunui) were specifically exempted from the commissioners' scrutiny by section 13 of the Native Land Laws Amendment Act 1883 and section 8 of the Native Lands Frauds Prevention Act 1881 Amendment Act 1888. In *He Maunga Rongo*, the Tribunal concluded that it was 'not consistent with the Crown's honour that its purchase officials should be held to a lesser standard than private buyers', a conclusion repeated in *He Whiritaunoka*.[764] We share that view, especially in light of the widespread criticism of the system by the Crown's own officials. The following sections comprise two further case studies to help address the question of interventions to prevent fraud.

10.5.2.6.1 Pakiri

The acquisition of the Pakiri block was one Crown purchase in which a trust commissioner intervened to doubtful effect. In 1872, the storekeeper John McLeod had approached the Crown about purchasing in the Pakiri block. He hoped that the proceeds of a sale could be used to clear the debt of more than £290 that he was owed by Hori Te More, the father of one of Pakiri's three owners.[765] The following year, John Sheehan, acting as lawyer for both Te More and McLeod, arranged for the land purchase agent Thomas McDonnell to initiate the purchase. McDonnell did so by paying £10 to Arama Karaka on behalf of another Pakiri owner, Wi Te Apo, who was a minor. Sheehan was also a trustee for Wī Te Apo, compounding Sheehan's conflict of interest. A further £20 payment was made to Hori Te More in the expectation that he would succeed to the interest of his son, who had died in the interim.[766] Brissenden then took over in 1874, buying out a timber lease over the block for £450, and signing a deed for the purchase of two-thirds of the block with Hori Te More and Arama Karaka, whom he paid £800, half of what had been agreed. Under this arrangement, the remaining share of the block was to be retained by the non-selling owner, Rāhui Te Kiri.[767]

Trust Commissioner Haultain held an inquiry into the transaction in May 1876, hearing evidence from Charles Nelson, Edward Brissenden, Arama Karaka, Hori Te More, and Te Hemara Tauhia. By this time, Native Minister McLean had

762. Thomas, 'The Native Land Court' (doc A68), p 218.
763. Murray, *Crown Policy on Maori Reserved Lands*, p 34.
764. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 436; Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 495.
765. Berghan, 'Northland Block Research Narratives' (doc A39(f)), vol 7, pp 73–74; Thomas, 'The Native Land Court' (doc A68), p 61.
766. Thomas, 'The Native Land Court' (doc A68), p 61; Berghan, 'Northland Block Research Narratives' (doc A39(f)), vol 7, pp 77–79.
767. Berghan, 'Northland Block Research Narratives' (doc A39(f)), vol 7, pp 79–83, 88–89.

already decided not to complete the purchase. The department's Under-Secretary H T Clarke had alerted him that it was illegal, given that the Maori Real Estate Management Act 1867 did not accord trustees the power to sell the interests of minors.[768] Unsurprisingly, Haultain withheld his certificate, finding that neither Hori Te More (who had not in fact been named as his son's successor) nor Arama Karaka had the right to sell interests in Pakiri.[769] But in March 1877, Haultain produced a second report, this time for John Sheehan, who was now Native Minister. Haultain suggested a twofold way to circumvent the obstacle to purchase of the Pakiri block: Parliament could pass legislation validating the sale of minors' shares by trustees; and Rāhui Te Kiri could be persuaded to agree to the sale.[770] The Maori Real Estate Management Act Amendment Act 1877 fulfilled the first part of this suggestion, while the need for Rāhui Te Kiri's assent to the sale was removed by the partitioning of the block into three parts in 1880. After that, the Crown completed the purchase of Pakiri 2 and 3, paying the remaining £800 in 1881.[771]

10.5.2.6.2 Opuawhanga

The transactions involving Opuawhanga (especially Opuawhanga 2) are a key grievance raised in Marie Tautari's claim on behalf of Te Whakapiko hapū.[772] The Native Land Court heard the title application for the block in May 1867, and divided it into four partitions: Opuawhanga 1 through 4, which were awarded to three, two, one, and three owners respectively.[773] The Whangaruru Rūnanga had previously recognised that Pita Tunua should represent his hapū's interests in Opuawhanga 2, and this was reflected in a case put to the Native Land Court. Parore, however, objected that his interests had been omitted and that he, too, had an ancestral claim to Opuawhanga. Pita Tunua accepted Parore's claim, and they were both named as owners in Opuawhanga 2.[774] Only Opuawhanga 4 had been surveyed, and therefore the court made temporary orders for the other three blocks, which would stand until they were surveyed. The subsequent surveyed areas for Opuawhanga 1 to 4 were determined as 9,450 acres, 6,784 acres, 1,782 acres, and 15,157 acres respectively.[775]

According to Thomas, the inquiry into ownership of these blocks was 'quick and perfunctory', and he noted the difficulty in ascertaining the extent to which hapū

768. Berghan, 'Northland Block Research Narratives' (doc A39(f)), vol 7, p 84; Barry Rigby, 'The Crown, Maori, and Mahurangi: 1840–1881', report commissioned by the Waitangi Tribunal, 1998 (doc E18), p 116.

769. Berghan, 'Northland Block Research Narratives' (doc A39(f)), vol 7, p 84.

770. Berghan, 'Northland Block Research Narratives' (doc A39(f)), vol 7, pp 85–86.

771. Maori Real Estate Management Act Amendment Act 1877, Sectionsss 2, 8; Berghan, 'Northland Block Research Narratives' (doc A39(f)), vol 7, pp 87–88.

772. Closing submissions for Wai 156 (#3.3.401(c)), pp 37–48.

773. Berghan, 'Northland Block Research Narratives' (doc A39(l)), vol 13, pp 396–397.

774. Closing submissions for Wai 156 (#3.3.401(c)), pp 37–38; *Opuawhanga 2* (1867) 1 Whangarei MB 140–141 (doc A49).

775. Berghan, 'Northland Block Research Narratives' (doc A39(l)), vol 13, pp 396–397, 402; Thomas, 'The Native Land Court' (doc A68), p 65; Armstrong, 'Ngati Hau "Gap Filling" Research' (doc P1), p 17.

and iwi agreed with or were even aware of the land transactions that followed.[776] Armstrong and Subasic stated that tāmana had been paid for the Opuawhanga blocks in 1866 by John White.[777] The surveyor F T Newberry testified during the Opuawhanga 2 hearing that Pita Tunua had not received any of that payment, and as a result had initially obstructed its survey.[778]

A final Opuawhanga payment of £1,533 was arranged in Auckland in May 1870,[779] The Auckland Provincial Government which had become responsible for purchasing land in Te Raki after the dismantling of the Native Land Purchase Department now considered the blocks 'to be fully and finally acquired'.[780] However, Auckland Province's Opuawhanga purchase file contains receipts for only Opuawhanga 1, 2, and 4. Similarly, Marie Tautari found payments only for Opuawhanga 1, 3, and 4 in the provincial government ledger books covering 1867 to 1875.[781] A few years later allegations were made that the signatures of some owners (including Ngahuia and Mokau) had been forged on the deeds, but who the alleged perpetrator was remains unclear.[782] The final payments and the associated forgery had all occurred prior to the passage of the Native Lands Frauds Prevention Act 1870, before which time, as Haultain observed in 1871, the only avenue for seeking redress would have been through the Supreme Court.[783]

After the original Opuawhanga purchase deeds were lost in a fire in 1872, Crown purchase agent Nelson was tasked, in 1878, with encouraging the original owners to sign replacements. It is at this point, it seems, that Pita Tunua and Parore were brought to accede to the Crown's purchase. They did so at a Whāngārei hotel, with the former receiving a £6 payment to cover his costs.[784] However, some of the other owners (including Ngahuia and Mokau) refused to sign the new deeds. Their opposition included concerns about whether the right people had been paid for the blocks and the forgery of signatures on the original deeds.[785]

776. Thomas, 'The Native Land Court' (doc A68), pp 65–66; see also Armstrong, 'Ngati Hau "Gap Filling" Research' (doc P1), pp 18–22.

777. Thomas, 'The Native Land Court' (doc A68), pp 64–65.

778. Marie Tautari (doc AA157), p 4 n; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 410.

779. Armstrong, 'Ngati Hau "Gap Filling" Research' (doc P1), p 18.

780. Thomas, 'The Native Land Court' (doc A68), pp 64–65; ; see also Armstrong, 'Ngati Hau "Gap Filling" Research' (doc P1), pp 18–22.

781. Armstrong, 'Ngati Hau "Gap Filling" Research' (doc P1), p 18n18 n; Marie Tautari (doc AA157), pp 21–22.

782. Berghan, 'Northland Block Research Narratives' (doc A39(l)), p 4vol 13, pp 400–401; S Woon to Auckland Superintendent., 9 December 1873420. (cited in Armstrong, 'Ngati Hau "Gap Filling" Research' (doc P1), p 18).

783. Haultain to McLean, 18 July 1871, AJHR, 1871, A-2A, p 5.

784. Marie Tautari (doc I37(a)), p 28; Berghan, 'Northland Block Research Narratives' (doc A39(l)), vol 13, pp 403, 405.

785. Thomas, 'The Native Land Court' (doc A68), pp 65–66; Armstrong, 'Ngati Hau "Gap Filling" Research' (doc P1), pp 18–22.

Petitions continued to be received in the following decades from owners who had not received payment.[786] In 1881, Pita Tunua and three others petitioned Parliament seeking the return of half of the Opuawhango No 3 block. They asserted that Nelson had misled Tunua in encouraging him to sign the deeds when he had not been paid for the block. However, Parliament considered that no payment was due, and that the signed deed was the end of the matter. This remained the Crown's position when another petition raised the question of non-payment in 1903.[787]

10.5.3 Conclusions and treaty analysis

10.5.3.1 *'Sufficiency'*

Through the treaty partnership, the Crown accepted an obligation to ensure that Te Raki Māori retained land sufficient for their existing and future well-being. This obligation clearly required the Crown to go beyond simply providing for minimum subsistence when transacting land. To meet a treaty-consistent standard, the Crown needed to ensure that hapū retained enough land for their communities to continue to flourish as polities strong in their cultural and social identity for generations to come. And they must retain enough productive land for present and subsequent generations to be able to engage with and benefit from the colonial economy on their own terms (and as they had been led to expect).

Several nineteenth-century statutes used the term 'sufficiency' to characterise the amount of land Māori needed to retain, and both the Native Land Act 1873 and the Native Land Purchase and Acquisition Act 1893 included quantitative definitions of what 'sufficiency' was considered to comprise.[788] The term itself reveals a miserly approach quite out of keeping with the importance of land to the economic future of Māori. The Tribunal has repeatedly found that the statutory definitions (even though expressed as minimum requirements) were patently inadequate for anything other than bare subsistence – a finding borne out in Te Raki not only by the experiences of Māori but also by the dismal outcome of the Crown's attempts to encourage Pākehā settlement by allocating 50-acre holdings in the 1880s.

Ultimately though, the statutory definitions and standards meant little because the Crown demonstrated no sustained commitment to ensuring its own officers and agents gave effect to them. Nor did it show any serious intent to ensure that Māori were always part of decisions about the creation of reserves which, under section 24 of the Native Land Act 1873, were to be made 'with the concurrence of the Natives interested' for their support and maintenance. The making of hapu reserves never became a standard part of land purchases, with its own established protocols.

786. Thomas, 'The Native Land Court' (doc A68), pp 65–66; see also Armstrong, 'Ngati Hau "Gap Filling" Research' (doc P1), pp 18–22.

787. Berghan, 'Northland Block Research Narratives' (doc A39(l)), vol 13, pp 404–407.

788. 'Sufficiency' was defined as land 'equal to an aggregate amount of not less than fifty acres per head for every Native man woman and child resident in the district' in the 1873 Act (section 24), and not less than 25 acres of first-class land, 50 acres of second-class land, and 100 acres of third-class land per man, woman, and child in the 1893 Act (section 15).

Consequently, the Crown failed to monitor or regulate where land could be purchased in the inquiry district without endangering or damaging the interests of hapū. Through this omission, the Crown flouted the obligations imposed on it by Normanby's instructions, its responsibilities under the treaty, and its own legislation. It was guided instead by an overweening determination to prioritise colonisation over the protection of Māori interests, and it did not shrink, when required, from bending or ignoring its statutory obligations to achieve this. Accordingly, we find:

- In failing to develop and implement a system to ensure Te Raki whānau and hapū retained land of appropriate quality and quantity for the well-being of present and future generations and their economic development, the Crown fell short of the protective duties inherent in the treaty partnership, breaching te mātāpono o te matapopore moroki/the principle of active protection, and te o te houruatanga/the principle of partnership.

10.5.3.2 *Restrictions on land alienation*

It is clear that the Crown was aware – from an early stage – of the need to monitor and limit its land purchasing in Te Raki. Nonetheless, it re-entered the land market in the early 1870s at full throttle. Its purchase planning was detailed, but little thought was given as to how to prevent Māori from being rendered landless or how to monitor the impact of its policy. During this period, the Crown amassed information about the extent, location, and quality of lands remaining in Māori ownership in Te Raki, but this knowledge did not in any way curtail its land purchasing.

It is also clear from the evidence available to us that the Crown's failure to enforce provisions that could have restricted land alienation assisted Crown purchasing in Te Raki. The Native Land Act 1873 strengthened requirements relating to restrictions on land alienation, but these were not fully implemented. Further, amendments enacted from 1881 onwards that modified or lifted such restrictions made it progressively easier for the Crown to pursue its land purchasing objectives. Thus the long-term economic, cultural, and commercial interests of Te Raki hapū were, as a matter of policy, sacrificed to the interests of Pākehā settlement and economic progress.

Accordingly, we find that:

- The Crown failed to implement or enforce an effective policy for restricting the alienation of Māori land, and instead prioritised the needs of settlers, taking steps to reduce the effectiveness of existing restrictions, in breach of te mātāpono o te tino rangatiratanga, te mātāpono o te mana taurite/the principle of equity, mātāpono o te matapopore moroki/the principle of active protection, and te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development.

10.5.3.3 *Reserves*

We cited earlier the statement of Native Minister Donald McLean, describing the Government's 'chief object' as:

> To settle upon the Natives themselves, in the first instance, a certain sufficient quantity of land which would be a permanent home for them, on which they would feel safe and secure against subsequent changes or removal; land in fact to be held as an ancestral patrimony accessible for occupation to the different hapus of the tribe: to give them places which they could not dispose of, and upon which they would settle down and live peacably side by side with Europeans.[789]

The Tribunal commented in the *He Maunga Rongo* report that 'had this stated intention been carried out, many of the claims before us may have been unnecessary'. In this speech, the Tribunal observed, McLean clearly recognised 'the Crown's obligation to ensure that ancestral lands were made inalienable, and that the hapu would maintain rights of occupation'.[790] The evidence in this inquiry on the creation of reserves reveals a profound chasm between the lofty vision for hapū articulated by McLean, and the Crown's near-total failure to make any lasting provision for hapū lands.

The scant number of reserves created (27 only) and their limited average size (207 acres) speak volumes. The Crown's approach was inconsistent with ensuring Te Raki hapū communities retained sufficient land to either maintain a traditional lifestyle or engage in the colonial economy on an equitable footing, and thus failed to actively protect their tino rangatiratanga rights. Nor were these reserves safe from further Crown purchasing: it had acquired some, or all, of the land from four reserves by the end of the 1890s.

Accordingly, we find that the Crown:

- failed to develop and institute a clear policy for creating reserves on a basis agreed with Te Raki hapū leaders, in breach of te mātāpono o te houruatanga/the principle of partnership. The policies the Crown did introduce failed to balance its purchase goals with the creation of hapū reserves and to legally protect and respect such reserves as were established, in breach of te mātāpono o te matapopore moroki/the principle of active protection.
- failed to ensure that Te Raki whānau and hapū retained enough land and resources to meet their obligations under tikanga, to develop their lands, and to contribute to the colonial economy in successive generations, which breached te mātāpono o te tino rangatiratanga and te mātāpono o te matatika mana whakahaere/right of development.

10.5.3.4 *Fraud prevention*

The Government failed to ensure that measures intended to protect Māori against fraudulent transactions were effective or applied with the necessary vigour and rigour. It weakened or simply exempted itself from the application of protective mechanisms that impeded its purchasing ambitions – as demonstrated by the legislative steps taken to remove obstacles hindering the Crown's (inconveniently illegal) purchase of the Pakiri block. The Crown also neutralised the potential

789. 'Native Land Bill', 25 August 1873, NZPD, vol 14, p 604.
790. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 439.

effectiveness of available protective mechanisms when it progressively diluted the role of the trust commissioners, eventually doing away with them altogether. Its cavalier and expedient approach to fraud prevention reflected the Crown's general unwillingness throughout this period to engage with Māori over reforms to Native Land laws, including those ostensibly designed to benefit them.

We find that the Crown:

- failed to ensure the implementation of effective protective legislation including legislation specifically addressing fraud prevention, and then circumscribed the exercise of those legislative protections that did exist or simply ignored them. This breached te mātāpono o te houruatanga/the principle of partnership and te mātāpono o te matapopore moroki/the principle of active protection.

10.6 Whakarāpopototanga o ngā Whakataunga / Summary of Findings

In respect of the political and economic objectives of Crown purchasing policy, we find that:

- By returning to land purchasing in the 1870s for the purpose of expediting Pākehā settlement, and doing so at the expense of Te Raki Māori rights to retain and develop large parts of their land within a mutually beneficial relationship, the Crown breached te mātāpono o te houruatanga/the principle of partnership, and te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development, as well as te mātāpono o te tino rangatiratanga.
- By assuming and imposing land purchase monopoly powers under the Government Native Land Purchase Act 1877 without the consent of Te Raki Māori and in the face of opposition, the Crown acted inconsistently with its duty to engage with Māori in good faith, in breach of te mātāpono o te houruatanga/the principle of partnership.
- By unilaterally reimposing Crown pre-emption through the Native Land Court Act 1894 in the face of express Te Raki Māori opposition and without adequate engagement with Te Raki hapū, the Crown breached te mātāpono o te houruatanga/the principle of partnership.
- By reimposing Crown pre-emption, the Crown denied Te Raki Māori potential benefits associated with a market in land. Its reimposition restricted the ability of Māori to develop and transfer their land in a way that other landowners were not subject to. This breached te mātāpono o te mana taurite/the principle of equity. Moreover, re-asserting its right to pre-emption actually heightened the Crown's obligations to protect the rights and interests of Māori landowners. Its failure to do so was thus a breach of te mātāpono o te matapopore moroki/the principle of active protection and te mātāpono o te kāwanatanga.
- By failing, through its legislation and policy, to promote land settlement opportunities and collateral benefits for Te Raki Māori equivalent to those

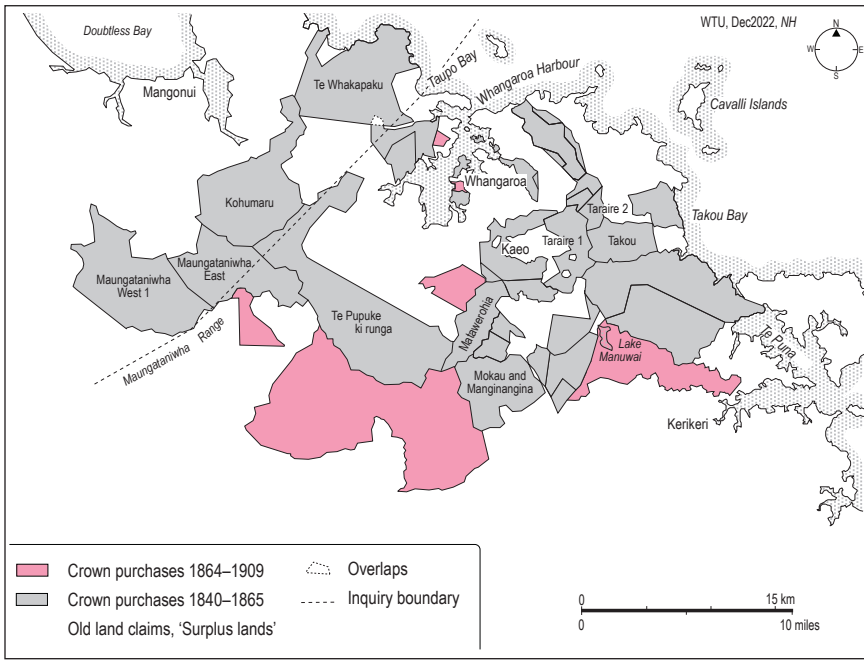
afforded to Pākehā settlers, as promised, the Crown breached te mātāpono o te mana taurite me te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of equity and the principle of mutual benefit and the right to development.

In respect of the Crown's on the ground purchasing practices, we find that:

- By employing tāmana, or advance payments, the Crown deliberately undermined the capacity of Te Raki Māori to retain their lands and resources in breach of te mātāpono o te tino rangatiratanga.
- By conducting its purchasing in a manner calculated to undermine the capacity of hapū to reach and maintain decisions about land, the Crown also undermined established Te Raki Māori authority structures and social cohesion, breaching te mātāpono o te tino rangatiratanga.
- In addition, despite the objections of Te Raki Māori and the conclusions reached by several official investigations into this practice, the Crown failed to respond in a timely and effective manner with appropriate remedies. This failure was in breach of te mātāpono o te whakatika/the principle of redress.
- By failing to monitor and exercise effective control over the practices and activities of its purchasing agents the capacity of Te Raki Māori to retain and develop their lands was undermined, in breach of te mātāpono o te tino rangatiratanga, te mātāpono o te whai hua kotahi me te matatika mana whakahaere/ the principle of mutual benefit and the right to development, and te mātāpono o te matapore moroki/the principle of active protection.
- By deliberately designing purchasing processes and using tactics intended to lower the prices of Te Raki Māori land for its own benefit, the Crown acted inconsistently with its duty of good-faith conduct, and in breach of te mātāpono o te houruatanga/the principle of partnership. In this respect, the Crown was also in breach of te mātāpono o te mana taurite/the principle of equity.
- By intentionally acquiring vast tracts of Te Raki Māori land at much lower prices than it was worth, the Crown was in breach of te mātāpono o te mana taurite me te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principles of equity and of mutual benefit and the right to development.
- The Crown purchased land by acquiring individual interests, bypassing and thereby undermining community decision-making processes which had traditionally protected whānau and hapū lands. In doing so, the Crown acted inconsistently with its duty of good-faith conduct, in breach of te mātāpono o te houruatanga/the principle of partnership. It also breached te mātāpono o te tino rangatiratanga.

In respect of the steps the Crown took to protect Te Raki Māori land, we find that:

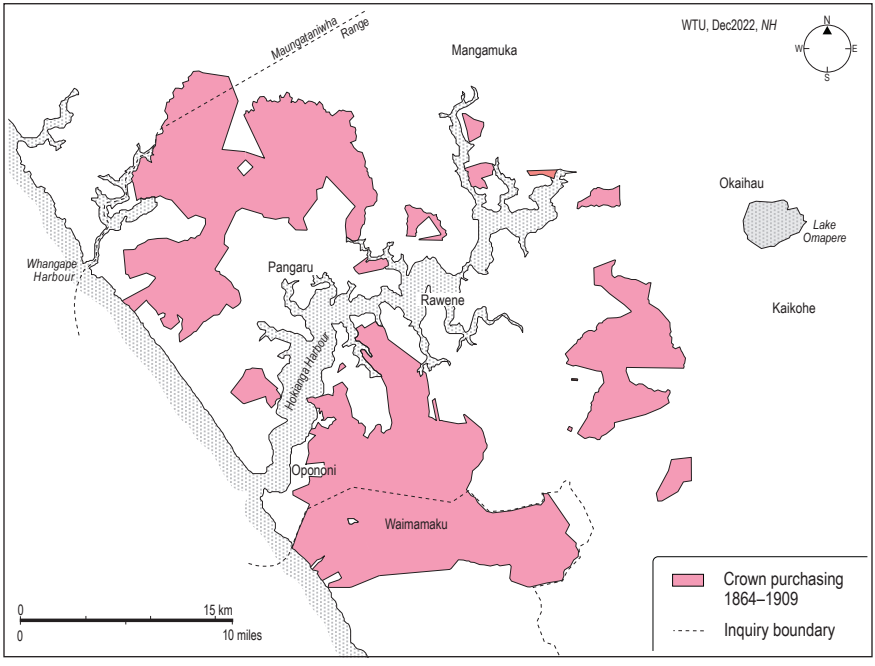
- In failing to develop and implement a system to ensure Te Raki whānau and hapū retained land of appropriate quality and quantity for the well-being of present and future generations and their economic development, the Crown fell short of the protective duties inherent in the treaty partnership,



Map 10.5: Crown purchasing in Whangaroa, 1864–1909.

breaching te mātāpono o te matapopore moroki/the principle of active protection, and te o te houruatanga/the principle of partnership.

- The Crown failed to implement or enforce an effective policy for restricting the alienation of Māori land, and instead prioritised the needs of settlers, taking steps to reduce the effectiveness of existing restrictions, in breach of te mātāpono o te tino rangatiratanga, te mātāpono o te mana taurite/the principle of equity, mātāpono o te matapopore moroki/the principle of active protection, and te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development.
- The Crown failed to develop and institute a clear policy for creating reserves on a basis agreed with Te Raki hapū leaders, in breach of te mātāpono o te houruatanga/the principle of partnership. The policies the Crown did introduce failed to balance its purchase goals with the creation of hapū reserves and to legally protect and respect such reserves as were established, in breach of te mātāpono o te matapopore moroki/the principle of active protection.
- The Crown failed to ensure that Te Raki whānau and hapū retained enough land and resources to meet their obligations under tikanga, to develop their lands, and to contribute to the colonial economy in successive generations,



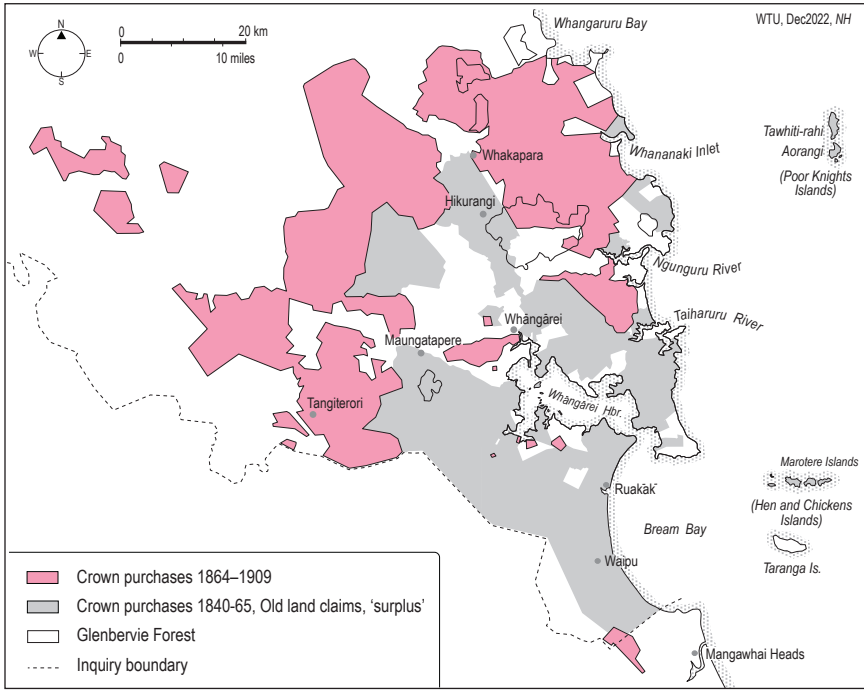
Map 10.6: Crown purchasing in Hokianga, 1864–1909.

which breached te mātāpono o te tino rangatiratanga and te mātāpono o te matatika mana whakahaere/right of development.

- The Crown failed to ensure the implementation of effective protective legislation, including legislation specifically addressing fraud prevention, and then circumscribed the exercise of those legislative protections that did exist or simply ignored them. This breached te mātāpono o te houruatanga/the principle of partnership and te mātāpono o te matapopore moroki/the principle of active protection.

10.7 Ngā Whakahāweatanga / Prejudice

The claimants argued that the Crown's legislation, policies, actions, and omissions relating to the alienation of Māori land between 1865 and 1900 prejudicially affected Te Raki Māori. The Crown's actions and omissions include its policy of aggressive purchasing, its failure to set up legislative protections to ensure Te Raki Māori had sufficient land resources for present and future needs, and its failure to ensure they could participate as treaty partners in the new colonial economy. The scope of the resulting prejudice for Māori, discussed in the following sections, ranges across the economic, social, and political spheres, and its impact continues today.



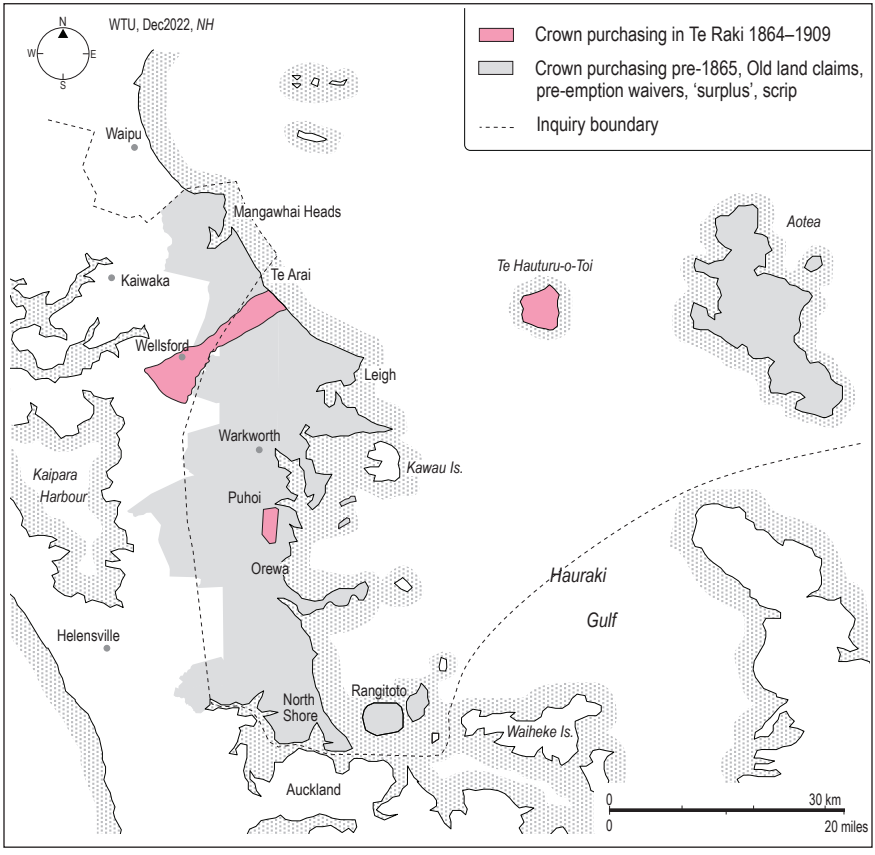
Map 10.7: Crown purchasing in Whângārei, 1864–1909.

10.7.1 Extensive loss of tribal estate

Over this period, the Crown purchased 231 blocks of Māori land in the inquiry district, comprising 588,708 acres.[791] While it had withdrawn from purchasing for a short time, the Crown resumed its efforts to acquire Te Raki land after 1872. Half of the total acreage was acquired during the mid-1870s, when purchasing was spear-headed by the land purchase agent Edward Brissenden. As outlined in this chapter, during the 1870s the Crown's preferred method of initiating purchase was the payment of tāmana, before shifting to the incremental purchase of blocks by acquiring individual interests in the late 1880s and the 1890s. By these means, the Crown succeeded in largely extinguishing customary ownership and then utilised the power imbalance inherent in the Native Land legislation to purchase the vast majority of the district from Māori. Just 27 reserves were created in the inquiry district over this period, amounting to a mere 5,578 acres – less than one per cent of Crown-purchased land.[792] And even so, reserves were subject to further Crown purchase activity.

The aggressive Crown purchase policy, and the methods its agents employed, hampered the ability of hapū and iwi to exercise their tino rangatiratanga.

791. Rigby, 'Validation Review of the Crown's Tabulated Data' (doc A56), p 3.
792. Claimant closing submissions (#3.3.213), p 44.



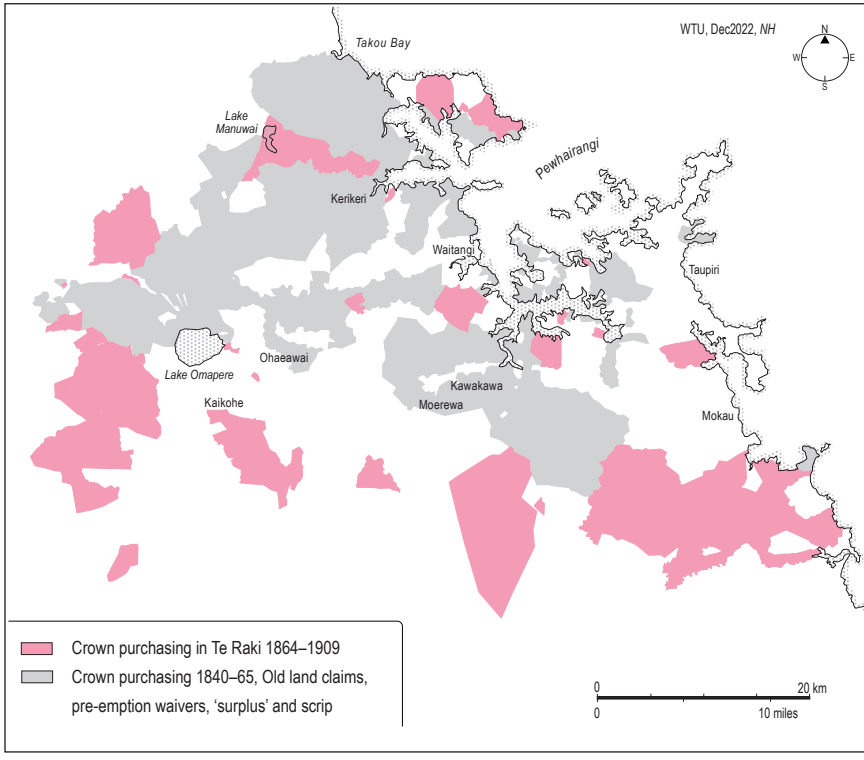
Map 10.8: Crown purchasing in Mahurangi, 1864–1909.

Traditional relationships and structures were destabilised, depriving some whānau and hapū even of a tūrangawaewae and resulting in fundamental changes to the organisation of Te Raki Māori society.

10.7.2 Damage to chiefly authority and social cohesion

Between 1865 and 1900, the Crown (and to a lesser extent, the Auckland provincial government and private purchasers) were able to take advantage of the title and purchasing mechanisms that had been enshrined in Māori land legislation. Those mechanisms had been introduced with a view to limiting the control that hapū had over the management of their own lands. Te Raki Māori social structures were fractured and the role of successive rangatira undermined as a result.

Both the methods that the Crown relied on to initiate purchasing – the payment of advances or tāmana, and later, the buying of shares – involved Crown agents dealing with individual owners without necessarily, any prior community discussion. By avoiding negotiations with hapū, the Crown undermined collective



Map 10.9: Crown purchasing in in the Bay of Islands, 1864–1909.

decision-making over land alienation and development, the setting aside of reserves, and resource use. McDonnell's purchase of the Otangaroa and Patoa blocks exemplified the Crown's approach: he commenced negotiations with the individuals whom he could most easily persuade to 'sell', rather than with hapū led by rangatira Hāre Hongi Hika and Paora Ururoa.[793] In other instances, rangatira were persuaded to accept tāmana payments without the prior knowledge and consent of their communities. The motives of rangatira in accepting such offers varied; some did so as a means to alleviate debt, and some in the hopes of progressing their relationship with the Crown and thereby protecting their hapū. In either case, these Crown-initiated transactions had the effect of undermining relationships both within and between Māori communities. The involvement of Te Raki rangatira in such sales sometimes generated suspicion and tension within the hapū, and with other hapū who shared rights in the transacted land.

Both the payment of advances and the purchase of individual interests damaged the social cohesion of hapū whose lands were sought by the Crown or private buyers. Under tikanga, matters affecting the whole community would have been

793. Claimant closing submissions (#3.3.213), pp 39–40.

discussed and consensus reached, in the open, before any action was taken. But when advances were paid, all owners were drawn into the sale at whatever price and terms had been agreed to by the first recipients. Hapū were divided into sellers and non-sellers, the latter suffering the further injustice of having to meet their proportion of title hearing and survey costs. As for share purchasing, once the Crown had acquired some interests in a given block, it was entitled to have these 'cut out' at will, while those who wished to retain ownership had to pay an equivalent proportion of the partition costs of the land they wanted to keep.

Inter-hapū relationships were also damaged. During the 1870s, it was routine for purchasing to begin before blocks had been surveyed or their ownership determined. Given that more than one hapū often had interests in blocks, fear of the Crown favouring owners from one over those of another could generate inter-hapū tensions, as was seen in the case of the Puhipuhi purchase. The same dangers also arose when private buyers imitated the Crown's purchasing approach. The most striking example was the armed conflict at Matarāua, in 1879, where the payment of large advances to Ngai Tū led directly to the death of four people (two from Ngai Tū and two from Ngāi Tāwake).[794]

We heard from claimants in our inquiry that the prejudice from land loss was both manifold and intergenerational. Marie Tautari (Te Whakapiko), for example, told us of the lasting impact on her hapū caused by the Opuawhanga land transactions (discussed in section 10.5.2.6.2):

> These losses combined with the failure of the Crown to make good on its promise to pay for Opuawhanga No 2 after the Crown Grant was registered, and the failure of the Crown to ensure that the Fishing Reserve would be protected all contributed to perplex and destabilise a strong community of people who had been well resourced, independent and committed to full expression of their centuries old identity, up to and following the time of the Treaty.[795]

Today, the divisive legacy has continued, with ongoing argument over the roles that particular individuals or groups may have played in selling land. For instance, Waitangi Annette Wood (Ngāti Rua ki Whangaroa) told us of Wiremu Naihi, the mātāmua of Te Pahi. As a rangatira, he was influential in the Ngāpuhi and Ngāti Kahu area and is frequently mentioned in the Native Land Court records as having brought land through it. However, the voices of rangatira like Wiremu Naihi were, and continue to be, misinterpreted. As Ms Wood explained:

> The history captured in the documentation associated with that time has marginalized our tupuna's role as a rangatira, and has been presented in such a way as to state that he supported the sale of the whenua to Pakeha. This has resulted in our own internal discussions, having to defend his role as rangatira. Because our people believe

794. See 'Papers relating to Native Disturbance at Otaua, Hokianga', AJHR, 1879, G-9, pp 2–3.
795. Marie Tautari (doc 137(a)), p 12.

our tupuna endorsed the sale of the land, it has caused division amongst us – intergenerational division in particular.[796]

10.7.3 Lost economic opportunities

A defining feature of Crown purchasing in the inquiry district throughout this period was the determination to buy up Māori land as cheaply as possible to make way for Pākehā settlement and to fund the colony's development and governance.

We note the difficulty of drawing neat connections between nineteenth-century land alienation and later socio-economic disadvantage experienced by Māori communities in Northland. Although the Crown did not comment on the nexus between nineteenth-century land policy and longer-term deprivation in the inquiry district, its submissions did emphasise at various points what it saw as the necessity to substantiate specific prejudicial outcomes of particular actions and policies alleged to have breached the treaty.[797] Providing this kind of cause-and-effect substantiation in individual cases is an impossible demand to meet. When a longer-term and wider lens is applied, however, it is clear that the dispossession of Māori of their land was systemic and had a range of damaging outcomes, some discernible in the immediate term, but many cumulative, compounding, and deeply entwined.

As we have seen, in the early and mid-1870s the Crown's land purchase agents paid tāmana as a way to exclude private purchasers (who were not legally allowed to make advance payments) and to lock in its own acquisitions at a low price.[798] To make these offers more appealing, the 'collateral benefits' of Crown settlement were also promoted. From the late 1870s, the exclusion of private competition began to be enshrined in law, first with the use of proclamations to declare blocks 'under negotiation' by the Crown, and then with the restoration of Crown pre-emption from 1886 to 1888, and from 1894 onwards.

Inevitably, the Crown's exploitation of its privileged legal position deprived Māori landowners of the opportunity to receive a market price for their land. Māori landowners were also denied the benefit of even a Government valuation of their land until 1905. Since there were few comparable land purchases by private parties during the 1870s, it is impossible to gauge precisely how much more income Te Raki Māori would have received had there been a free market in land. But assuming an average difference between market value and purchase price of 1s 6d per acre – which does not seem unreasonable, given Brissenden's boast that land was worth twice as much in the hands of speculators, and McDonnell's audacious reduction of a previously agreed price by 1s 3d per acre – then the combined loss across all of Te Raki might be estimated at more than £30,000. Looking at it another way, this would mean that if the landowners of Te Raki had received

796. Waitangi Annette Wood (doc s12), p 5.
797. Crown closing submissions (#3.3.407), pp 7, 28.
798. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, vol 2, p 397; Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, p 403.

market prices, they might have retained an extra 150,000 acres or more, over the 1870s purchasing period, and still received as much payment.

We are on firmer ground when it comes to prices for many of the individual blocks purchased in the 1890s, as official estimates were made of their on-sale value. Generally, it was around three times the amount offered to Māori. The Crown could have doubled the offers it made for many of these blocks. That would have meant the owners receiving 10 shillings rather than five shillings per acre. If, across all the purchases during the 1890s, the per-acre price that Te Raki Māori were paid had been four to five shillings higher, altogether they would have received another £20,000 from selling their lands.

Meanwhile the Crown practice of acquiring land well in advance of settlement and holding on to it for many decades meant that a large amount of capital remained locked up, while Māori received few of the benefits they had been promised.

10.7.4 Loss of resources and economic capability

As tribal structures were progressively eroded during this period, the economic opportunities open to Te Raki Māori were simultaneously breaking down. The result was increasing Māori material poverty. The Crown's purchasing programme and the divisive and unfair purchasing tactics employed by its agents were central to this decline. The programme itself, and its implementation, deprived hapū of both customary resources and the opportunity to accumulate capital for the purposes of investment and development. By 1900, hapū and whānau were left with insufficient land to engage in land-based economic opportunities. At the same time, a disproportionate amount of the 'profits' from sale were swallowed by the costs of putting lands into a tradeable state in the first place and, increasingly, by the basic requirements for daily sustenance rather than investment in the future.

Land alienation had resulted in a major regional economic shift toward a cash economy that had cumulative consequences for Te Raki hapū and iwi. The sale of the kauri-covered areas of Puhipuhi signified the beginning of this transition. As Mark Derby's evidence demonstrated, Puhipuhi Māori could no longer remain largely self-sufficient on their own land and took to gum-digging to make ends meet.[799] Typically, they then accrued debts as a result of overdrawn accounts for the provisions they then had to buy at inflated prices set by company stores. As historian Bruce Stirling commented, many Māori were

> being held in a state of peonage by storekeepers – the diggers were their 'working bullocks.' When a digger was fortunate enough to earn more from the sale of his gum than showed on his store account the storekeeper would insist on retaining this as a credit in the books, rather than paying over the cash. As the commissioners observed,

799. Derby, 'Fallen Plumage' (doc A61), p 202.

> it proved, 'almost impossible to obtain any cash whatever, without taking legal proceedings, that in remote country districts would entail great trouble and expense.[800]

The ever-declining area of land remaining in Māori ownership also became steadily harder to utilise. In blocks where the purchasing process was underway, owners could not risk improving their land as, following partition, this investment might end up in the Crown award. Nor, as we saw in the case of Mangakāhia in the 1890s, could owners profit from their land in other ways, such as selling its timber, if they wanted to avoid a damaging injunction. The same restraints applied more generally to land under Crown pre-emption, since entering into new leases of land to private parties (such as local farmers) was prohibited. To make matters worse, with no settlement allowed in the vicinity of lands the Crown was considering purchasing, the Crown robbed Māori communities of economic opportunities and new markets.

The Crown also showed a distinct lack of interest in developing potentially valuable resources while they remained on Māori land, such as when it declined the Omaunu owners' request to invest in mining opportunities on the block. It was assumed that such assets needed to be in Pākehā hands to be developed. This was exemplified when coal-bearing land was identified on the Ruapekapeka block in the early 1860s, while it was still in Māori ownership. It was only once the Crown had acquired the land that its potential was realised; in short order, a coal mine was opened and infrastructure established. By 1880, the Kawakawa mine was producing the most coal of any in the country, and the town was flourishing. But Māori, including those who until recently had owned the land from which Kawakawa's new prosperity derived, were not: as Alexander comments, mining 'was strictly a European activity, and Kawakawa was strictly a European town.'[801] Here and elsewhere, Te Raki Māori could only stand by and watch while Pākehā profited from the exploitation of the region's natural resources. As was the case with coal mining, it was Pākehā who prospered from the trade in timber that stood on land its Māori owners may have chosen to lease or utilise for themselves. And also like coal mining, the effects of the timber trade and the gum-digging activities that followed degraded the quality of that land. Even those areas remaining in Māori ownership were often of poor quality and all but incapable of further economic development – an issue we will return to in the context of the twentieth century.

By the turn of the century, so much land had been lost that the Māori communities of Te Raki did not have enough to support their present needs, let alone future requirements. Describing their predicament to Parliament in 1899, Hōne Heke Ngāpua observed:

800. Bruce Stirling, 'Ngati Whatua and the Crown' (commissioned research report, Wellington: Crown Forestry Rental Trust and the Ngati Whatua o Kaipara ki te Tonga Claims Committee, 1998) (doc E20), pp 426–427.

801. Alexander, 'Land-Based Resources, Waterways and Environmental Impacts' (doc A7), p 118.

> I can speak so far as the Native lands in the north of Auckland are concerned. The number of natives there has been increasing for a number of years. All the native lands north of Auckland are not really sufficient if divided equally amongst members of the different hapus for their maintenance and support . . . further acquisition of Native lands should be stopped altogether.[802]

While significant areas of papatupu land could be found in some parts of Te Raki (which would create its own challenges in terms of attracting investment in the future), the remaining land was mostly highly fragmented and often resource poor. For three decades, the Crown had aggressively purchased both land and the resources it contained. It thereby sought to capture for itself as much as possible of the future gains in value, while leaving large tracts of land unoccupied and unused or damaged in the process.

This pattern of voracious land purchase and exploitation was disastrous for Te Raki Māori in all taiwhenua, leaving them marginalised, and often unable to access traditional food sources or participate on equal terms in the wider economic, social, and political life of the nation.

802. Claimant closing submissions (#3.3.213), p 60.

CHAPTER 11

TINO RANGATIRATANGA ME TE KĀWANATANGA, 1865–1900: NGĀ WHAKAMĀTAUTANGA O TE RAKI MĀORI TE WHAKAPUAKI TE TINO RANGATIRATANGA / TINO RANGATIRATANGA AND KĀWANATANGA, 1865–1900: TE RAKI MĀORI ATTEMPTS TO ASSERT TINO RANGATIRATANGA

Huihui tatou ka tu, wehewehe tatou ka hinga.

—Kotahitanga Paremata, Waitangi, 14 April 1892[1]

11.1 Hei Tīmatanga Kōrero / Introduction

By 1865, the Crown had proclaimed its sovereignty over the whole of New Zealand; asserted its authority in this district and in the central North Island through warfare; established colonial governance institutions for settlers in which Māori had little or no voice; broken promises to establish and sustain a national Māori assembly and a system of local self-government through rūnanga; and established a land titling and transfer system that aimed to support the rapid alienation of Māori land.

All of these policies had been damaging both to Te Raki Māori interests and to the Crown–Māori partnership. But none had fully broken down Te Raki Māori independence. On the contrary, in 1865 Māori in this district retained a very significant degree of day-to-day autonomy. The Crown, for example, could mediate in disputes but not fully enforce its laws. The period from 1865 to 1900 was one of major change and challenge for Māori in this district and throughout New Zealand. Governing power was now fully in the hands of settlers, who were growing in numbers and confidence, and who were increasingly determined to bring Māori lands and people into the colonial system. During this period, the Crown, through successive colonial Governments, pursued policies aimed at accelerating immigration; transferring Māori land to settlers; breaking down tribal 'communism'; hastening Māori submission to the colony's laws; establishing local government for settlers; asserting control over land, fisheries and other resources; and ensuring that Māori made significant financial and land contributions to local and national development.

1. 'United We Stand, Divided We Fall': 'The Native Meeting at Waitangi', *New Zealand Herald*, 21 April 1892, p 6; David Armstrong and Evald Subasic, 'Northern Land and Politics: 1860–1910', overview report prepared for the Crown Forestry Rental Trust, 2007 (doc A12), p 1282.

These policies constrained Māori economic development, undermined Māori health and well-being, and challenged the mana of Māori communities. The Native Land Court, after a positive beginning under the Native Lands Act 1862, began to operate very differently under the Native Lands Act 1865; it imposed significant costs on Māori communities, undermined community authority, and paved the way for further alienation of Māori land (see chapter 9). During the 1870s alone, under the Crown's new title system, the Native Land Court provided several hundred thousand acres of this district's land with a modified customary title which conferred on the owners nothing more than the right to alienate their individual interests; the Crown offered no collective legal title (see chapter 9).[2] The Government purchased more than a fourth of the district's land (see chapter 10).[3]

During the same decade, successive colonial Governments also asserted control over shellfish and fishing grounds;[4] county councils – most of them dominated by settlers – began to operate in the Te Raki inquiry district;[5] and resident magistrates were increasingly able to assert authority over Māori, albeit with some exceptions.[6] In addition, the settler population grew rapidly from the late 1870s, especially in the southern part of the district (see appendix 11.11).

Up until the mid-1860s, Te Raki Māori had sought to engage with the colonial Government and to some extent experiment with colonial laws and institutions, as a means of advancing development. During the period covered by this chapter, as Māori progressively felt the destructive effects of government policies on their lands, economic well-being, and sphere of authority, they increasingly asserted their rights to autonomy and self-government, in accordance with the treaty.

Over two decades, Te Raki Māori leaders embarked on a range of sustained political initiatives. They established committees to mediate internal disputes and manage relationships with settlers and the colonial Government; they engaged with other northern tribes to establish regular regional parliaments at Waitangi, Ōrākei, and elsewhere; they sought accommodation with the Kīngitanga; and during the 1890s, they took lead roles in the attempts of the Kotahitanga movement to establish a national Māori parliament and self-government recognised by the Crown. At the same time, they sought freedom from the Crown's laws and institutions that unfairly impacted on them, especially the Native Land Court and land

2. Paul Thomas, 'The Native Land Court in Te Paparahi o Te Raki: 1865–1900' (commissioned research report, Wellington: Waitangi Tribunal for the Te Paparahi o Te Raki inquiry, 2016) (doc A68), p 21.

3. Barry Rigby, 'Validation Review of the Crown's Tabulated Data on Land Titling and Alienation for the Te Paparahi o Te Raki Inquiry Region: Crown Purchases 1866–1900' (commissioned research report, Wellington: Waitangi Tribunal, 2016) (doc A56), p 3; Crown closing submissions (#3.3.407), p 13; claimant closing submissions (#3.3.213), p 35.

4. For example, Fish Protection Act 1877. See Anne-Marie Jackson, 'Erosion of Māori Fishing Rights in Customary Fisheries Management', *Waikato Law Review*, vol 21 (2013), p 65.

5. Bruce Stirling, 'Eating Away at the Land, Eating Away at the People: Local Government, Rates and Maori in Northland' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2008) (doc A15), pp 40–43, 100–103; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 83.

6. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 65–66, 905–910.

laws. In pursuit of these objectives, they petitioned the colonial Parliament and the Queen, met with and wrote to Ministers, and proposed legislation. Some communities sought to withdraw entirely from engagement with colonial authorities.

Consistently, Māori leaders argued that they had rights under he Whakaputanga and te Tiriti to make their own laws and manage their own affairs. Rangatira explained that they were not rejecting the Queen or the treaty relationship under which she had offered her protection for their lands and guaranteed their rangatiratanga. Nor were they rejecting the right of the colonial Parliament and Government in New Zealand to pass laws. They sought arrangements in which Māori and settler institutions could coexist under the Queen's protection; indeed, they asked the colonial Parliament to provide legal recognition and protection for their institutions.

Ultimately, the colonial authorities rejected most of their proposals, and in particular were unwilling to recognise any significant transfer of authority away from colonial institutions. By the end of the century, most of this district's land had been titled by the Native Land Court, and the last remaining territories would soon follow; the Government and local authorities were able to enforce colonial laws and gather taxes from Māori communities; and Māori remained on the economic and social margins of emerging settler communities. By 1900, the vision of Te Raki leaders for an autonomous Māori system of government had given way to a much more limited system established under government authority. In sum, the transfer of authority from Māori to the Crown was complete throughout most of the district, and very close elsewhere.

Claimants told us that the Crown failed to protect the tino rangatiratanga of Te Raki Māori during this critical period and instead deliberately undermined Māori autonomy and self-government, marginalising Māori from national decision-making and variously dismissing, rejecting, and seeking to co-opt and control Māori in their attempts to develop institutions for self-government.[7] Claimants said that, throughout the period covered by this chapter (and beyond), the Crown continued to gradually extend its de facto sovereignty in a manner inconsistent with te Tiriti.[8]

In the Crown's assessment, it had a right to assert its laws and system of government over the whole of New Zealand, it provided adequate mechanisms for Māori to exercise tino rangatiratanga during the period covered by this chapter, and it also provided for adequate Māori representation in the colonial Parliament.[9]

11.1.1 Purpose of this chapter

Chapters 4 and 7 considered the treaty compliance of the Crown's exercise of kāwanatanga in the inquiry district from 1840 until 1867 and its impact on Te Raki Māori tino rangatiratanga. This chapter continues the analysis of this tension into

7. Claimant closing submissions (#3.3.228), pp 17–19, 172–176; amended closing submissions for Wai 49 and Wai 682 (#3.3.382(b)), pp 18–22.
8. Claimant closing submissions (#3.3.228), pp 18–19.
9. Crown closing submissions (#3.3.402), pp 6–7, 25–27, 29–32, 166.

the period from 1868. We examine, from a treaty perspective, how the Crown sought to assert what it considered to be its own paramount sovereignty in the inquiry district, and the implications this had for Māori initiatives to maintain their rangatiratanga over their lands and communities.

The purpose of this chapter is to investigate claims that Crown actions, omissions, legislation, and policy undermined Māori autonomy and the institutions of self-government in the latter part of the nineteenth century. As with the preceding chapters on the relationship between rangatiratanga and kāwanatanga, from 1840 to 1867, the issues in this chapter centre on the Crown's treaty duty to recognise and respect, the Māori right to exercise tino rangatiratanga over their lands, resources and other taonga, including their right to exercise tino rangatiratanga in respect of issues concerning their communities. The overarching aim in exploring these issues is to assess the extent to which the Crown's efforts to assert its legal and political authority in the inquiry district complied with its treaty obligations.

11.1.2 How this chapter is structured

We begin this chapter by considering claimant and Crown submissions, and previous Tribunal guidance on relevant issues, in order to identify the issues for determination (section 11.2).

We then consider the central issues over three distinct periods: from 1865 to 1878 (section 11.3), from 1878 to 1887 (section 11.4), and from 1888 to 1900 (section 11.5). Within each of these sections, we set out our analysis of the issues, then our findings in terms of treaty principles. In the final sections of the chapter, we summarise our findings (section 11.7) and we describe the prejudice experienced by Te Raki Māori as a result of treaty breaches (section 11.6).

11.2 Ngā Kaupapa / Issues

This chapter concerns claims that, during the years from 1866 to 1900, the Crown acted in ways that were inconsistent with the treaty agreement – by failing to provide Te Raki Māori with sufficient representation in the colonial Parliament; by failing to recognise and provide for Te Raki Māori institutions of self-government at hapū, tribal, and national levels; by failing to respond adequately to petitions and protests from Te Raki Māori; and also by using force to assert its practical authority over Te Raki Māori.

In this section, we consider claimant and Crown submissions on these matters, and also consider guidance from previous Tribunal reports, before identifying issues that remain for determination.

11.2.1 What previous Tribunal reports have said

As discussed in chapter 4, our findings about the Crown–Māori relationship will necessarily reflect this district's unique circumstances, including the conclusion from stage one of our inquiry that rangatira 'consented to the treaty on the basis

that they and the Governor were to be equals', each with distinct spheres of influence, in an arrangement that would require further negotiation over time.[10]

Nonetheless, previous Tribunal reports can provide valuable guidance on the issues that we are considering. In this chapter, these concern the political relationship between Te Raki Māori and the Crown, including their relative authority and spheres of influence. As we noted in chapter 4, the Tribunal has consistently found that the treaty guaranteed Māori rights to autonomy, self-determination, and self-government over the full range of their affairs and through institutions of their choosing, at local, tribal, and national levels; that these rights constrained or fettered the Crown's power of kāwanatanga; and that the relationship between Crown and Māori spheres of influence was subject to ongoing negotiation and adjustment in which neither side could impose its will.[11]

In the *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (1988), that inquiry panel noted that, from the 1860s, the Crown increasingly sought to assert its authority over Māori populations and over their lands and resources. A growing settler population, the transfer of political responsibility to colonial institutions of government, Crown warfare against Māori, and hardening settler attitudes towards Māori all influenced a growing Crown determination to break Māori control of land and resources.[12]

With respect to Māori political representation, several Tribunal reports have found that Māori were entitled to fair, meaningful, and effective representation in the colonial Legislature.[13] Yet, the Tribunal has found, the four seats granted to Māori in 1867 were neither proportionate on a population basis nor adequate to provide for effective representation of Māori rights and interests. In the *Maori Electoral Option Report* (1994), the Tribunal found that Māori members 'could have little influence' and were easily outvoted on matters of importance to themselves. As a result, Māori increasingly sought political influence through their own autonomous institutions; for example, by aligning with the Kīngitanga or by appealing for rights under section 71 of the New Zealand Constitution Act 1852.[14]

In *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims* (2010), the Tribunal found that, through representation in Parliament, Māori 'did have some voice', but 'it cannot be said that their representation allowed them anywhere near

10. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 529.

11. Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims – Pre-publication Version*, Wai 898 (Wellington: Legislation Direct, 2018), pts 1–2, pp 150–151; Waitangi Tribunal, *He Maunga Rongo: Report on the Central North Island Claims*, Wai 1200, 4 vols (Wellington: Legislation Direct, 2008), vol 1, pp 166, 173–174.

12. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, Wai 22 (Wellington: GP Publications, 1988), pp xvi.

13. Waitangi Tribunal, *Maori Electoral Option Report*, Wai 413 (Wellington, Brooker's, 1994), ch 2.1, 3.3, 5.1; Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, pp 208, 242–243, 305–306, 338–339; Waitangi Tribunal, *Tauranga Moana 1886–2006: Report on the Post-Raupatu Claims*, Wai 215, 2 vols (Wellington: Legislation Direct, 2010), vol 1, pp 381, 385; Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report*, Wai 903, 3 vols (Wellington: Legislation Direct, 2015), vol 1, p 401.

14. Waitangi Tribunal, *Maori Electoral Option*, Wai 413, p 6.

the same degree of expression and power that Pākehā had'.[15] Māori representation, for much of New Zealand's history, 'never . . . came anywhere near a level to proportionately match that of Pākehā'. This 'seems to us to be a direct undermining of the Treaty's article 2 promise of tino rangatiratanga', since 'how were Māori leaders meant to lead and represent their people within the framework of the State, if they were not given reasonable opportunity to do so?'[16] As a result of this imbalance, the Māori members had 'only nominal power' and were unable to redress wrongs done to Māori through the legislative process.[17] Similarly, in *He Whiritaunoka: The Whanganui Land Report* (2015), the Tribunal found that Māori members 'were powerless to block legislation that harmed Māori', and therefore lost faith in the parliamentary system.[18]

This, then, was the context in which Māori in this district and elsewhere increasingly attempted to assert their rights to self-government in accordance with he Whakaputanga and the treaty. In *He Maunga Rongo: Report on Central North Island Claims, Stage One* (2008), the Tribunal considered in detail options for Māori self-government during the period covered by this chapter, and also considered the relationship between parliamentary representation and autonomous institutions. It found that Māori were entitled under article 2 of the treaty to meaningful power at a national level, either through their own institutions of government or through representation in colonial institutions, or a combination of both. That power must be sufficient to ensure that Māori rights and interests were not 'swamped' by those of settlers, especially as the settler population grew.[19] This, in its view, required the Crown to ensure that institutions of government were established in a manner that actively protected tino rangatiratanga. The Tribunal also found that article 3 of the treaty guaranteed Māori rights of representative self-government at a national level, on the same basis as settlers.[20]

The Tribunal found in *He Maunga Rongo* that several models were available for Māori self-government during this period, including (among others) recognition of district rūnanga and komiti with meaningful powers, and recognition of a national Māori parliament.[21] Yet the Crown either ignored or missed these opportunities.[22] In particular, the Tribunal found that the Crown had missed a critical opportunity by failing to recognise the Kotahitanga Paremata when it was established during the 1890s: 'When Maori set up their own elected body – self-funded and with an elaborate electoral system, rules, and a very large degree of popular support – the Crown should have worked with it, encouraged it, and empowered

15. Waitangi Tribunal, *Tauranga Moana*, Wai 215, pp 382–383.
16. Waitangi Tribunal, *Tauranga Moana*, Wai 215, p 385.
17. Waitangi Tribunal, *Tauranga Moana*, Wai 215, vol 1, p 383.
18. Waitangi Tribunal, *He Whiritaunoka*, Wai 903, vol 1, pp 400–401. Also see Waitangi Tribunal, *The Te Roroa Report*, Wai 38 (Wellington: Brooker and Friend, 1992)), p 184.
19. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, pp 242–243, 305–306.
20. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, p 177, see also pp 383–384; Waitangi Tribunal, *Te Urewera*, Wai 894, 8 vols (Wellington: Legislation Direct, 2017), vol 2, p 871.
21. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, pp 367–368.
22. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, pp 371–372, 384–385.

it.' The Paremata was entirely consistent with the Crown's kāwanatanga and the treaty guarantee of tino rangatiratanga. The Crown's failure to 'to incorporate Kotahitanga into the machinery of the State, and share power with Maori in a meaningful way at the central level' was a 'serious breach of the principles of the Treaty'.[23]

11.2.2 The claimants' submissions

In the claimants' view, from the mid-1860s – once the military crisis in Waikato had passed – 'the Crown quickly moved to reduce or disestablish any manifestation of Māori political autonomy'.[24] The Crown, claimants alleged, pursued policies that individualised land interests, destroyed tribal structures, and encouraged both land loss and swamping of the Māori population.[25]

Although Te Raki Māori attempted to work with and within colonial institutions, the 'token and ineffective' representation in the colonial Parliament meant they had no effective means of protecting tino rangatiratanga from the decisions of the settler majority.[26] The Maori Representation Act 1867 established four Māori electorates at a time when Māori were entitled to many more on a population basis. Parliamentary under-representation allowed settlers to make law for Māori and contributed to a breakdown in the treaty relationship from the 1870s onwards.[27] Claimants submitted that the Crown ignored or rejected Māori protests and recommendations for improving representation.[28]

Claimants told us that, from the 1870s, Te Raki Māori sought to persuade the Crown to recognise autonomous political institutions. In particular, they sought Crown recognition of a Māori parliament, and of self-governing Māori districts under section 71 of the Constitution Act. Māori regarded themselves as having a right to manage their own affairs; this arose from their pre-treaty relationships with British kings, from he Whakaputanga in 1835, from the treaty in 1840, and from the agreements reached and commitments made at Kohimarama in the 1860s.[29]

Claimants described Te Raki leaders as seeking Crown recognition for Māori autonomy and institutions of self-government through a succession of major hui at Waitangi, Ōrākei, and elsewhere; through petitions to the colonial Parliament and the Queen; through Bills in Parliament; by taking a leading role in the national Kotahitanga movement in the late 1880s and 1890s; by declaring their authority within tribal boundaries; and by other means. In the claimants' assessment, the

23. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, pp 384–385.
24. Claimant closing submissions (#3.3.228), p 171, see also pp 17, 29.
25. Claimant closing submissions (#3.3.228), pp 172–173, 175.
26. Claimant closing submissions (#3.3.228), pp 259–261; amended closing submissions for Wai 49 and Wai 682 (#3.3.382(b)), pp 23–24; Te Waimate Taiamai and Kaikohe Taiwhenua opening statement (doc E58), pp 43–45; closing submissions for Wai 2005 (#3.3.264), pp 31–32; Waihoroi Shortland (doc AA81), pp 19–21.
27. Claimant closing submissions (#3.3.228), pp 259, 278–279.
28. Claimant closing submissions (#3.3.228), pp 260–261.
29. Claimant closing submissions (#3.3.228), pp 172–177.

Crown alternately dismissed, rejected, and sought to control these initiatives, while pressing ahead with policies aimed at asserting its authority and opening Māori land for settlement.[30]

Claimants told us that te Tiriti guaranteed tino rangatiratanga over Māori peoples, lands, and other taonga; provided for the Crown to exercise kāwanatanga over settlers on lands that had been legitimately acquired from Māori; and provided for a partnership or shared authority, to be negotiated between Māori and the Crown, wherever the populations intermingled.[31] Claimant counsel submitted that, in breach of these provisions, the Crown instead imposed its government and legal regime on Māori, and obstructed, marginalised, or ignored Te Raki Māori attempts to create institutions through which they could exercise their tino rangatiratanga.[32]

11.2.3 The Crown's submissions

The Crown asserted that, notwithstanding our conclusion in stage 1 of this inquiry, and notwithstanding the ongoing right of Māori to exercise local 'chieftainship' over their people and lands, it acquired sovereignty over the whole of New Zealand in 1840, and therefore had a right to assert its own laws and authority over Māori.[33] The Crown submitted that, at the Kohimarama Conference in 1860 (which we refer to in this report as the Kohimarama Rūnanga; see chapter 7), Te Raki Māori unambiguously accepted the Queen's authority and laws, and from that time sought self-government only under the Crown's authority.[34]

In counsel's submission, the Crown provided adequately for the ongoing exercise of tino rangatiratanga from that time. The Crown made no concessions on the historical issues in this chapter. After initially making little attempt to impose British law on Te Raki Māori, 'from the 1860s onwards, the Crown provided mechanisms for Northland Māori to exercise tino rangatiratanga in respect of their lands and taonga' through rūnanga (in the 1860s) and Maori Councils (from 1900).[35] The Crown said it was under no obligation to recognise or establish self-governing Māori districts, and caused no prejudice to Te Raki Māori by choosing not to do so.[36] The Crown also submitted that, from 1867, Te Raki Māori had been fairly and adequately represented in Parliament,[37] and that there was no evidence of Māori complaints about the number of Māori electorates during the period covered by this chapter.[38] It noted that during the 1890s, 'there were various calls

30. Claimant closing submissions (#3.3.228), pp 17–19, 172–177; amended closing submissions for Wai 49 and Wai 682 (#3.3.382(b)), pp 18–22.
31. Claimant closing submissions (#3.3.228), pp 7–8.
32. Claimant closing submissions (#3.3.228), pp 8–9.
33. Crown closing submissions (#3.3.402), pp 25–27, 29–32.
34. Crown closing submissions (#3.3.402), pp 89–90, 128–129, 165–166.
35. Crown closing submissions (#3.3.402), pp 6–7.
36. Crown closing submissions (#3.3.402), pp 111–116.
37. Crown closing submissions (#3.3.402), pp 116–118, 166; Crown memorandum filing answers to post-hearing questions (#3.2.2681(a)), para 38.
38. Crown closing submissions (#3.3.402), p 118; see also memorandum 3.2.2681(a), para 38.

by Māori for greater autonomy and self-determination over their own affairs'. In particular, it noted the Kotahitanga movement sought 'to persuade the Crown to accept the proposal for a separate Māori Parliament'. The Maori Councils Act 1900 was a compromise solution, the Crown submitted, 'granting the power of local self-government to Māori communities'.[39]

11.2.4 Issues for determination

The claimants contend that during the period under consideration in this chapter the Crown did not recognise and respect Māori rights of tino rangatiratanga, autonomy, and self-government, and instead continued to assert its authority over Te Raki Māori without their consent. The Crown's view is that it made sufficient provision for tino rangatiratanga through institutional arrangements such as rūnanga and the much later Maori Councils. The overarching issue for this chapter to determine is therefore a simple one:

- Did the Crown recognise and support institutions and initiatives through which Te Raki Māori could exercise their rights of tino rangatiratanga?

This issue question is considered by examining three key strategies Te Raki Māori employed in the time period under review; namely, by attempting to engage with the Crown's institutions (broadly speaking, during 1865 to 1878); by developing new institutions for local and regional self-government (1879 to 1887); and finally, by working through te Kotahitanga to establish a system of national self-government, then finally reaching accommodation with the Crown over new institutional arrangements (1888 to 1900).

11.3 Did the Crown Recognise and Support Institutions and Initiatives through which Te Raki Māori Could Exercise Tino Rangatiratanga during the Period 1865–78?

11.3.1 Introduction

By 1865, notwithstanding the collapse of Grey's rūnanga (the 'new instutions'), Te Raki Māori communities continued to exercise a significant degree of autonomy over their day-to-day affairs. Māori still outnumbered settlers by some margin in the north of the district;[40] the Native Land Court, had only just begun the process of converting customary title to legally cognisable titles;[41] for the most part, Māori also continued to resolve internal disputes among themselves, with government officials exercising authority only when rangatira consented;[42] and relationships between Māori and settlers in out inquiry district were typically harmonious, par-

39. Crown closing submissions (#3.3.402), pp 126–129.

40. Vincent O'Malley, 'Northland Crown Purchases – 1840–1865' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2006) (doc A6), pp 62–63. Census results show Māori outnumbering non-Māori in Mangonui and Hokianga until the 1890s: New Zealand Census 1891, ch 16, tbl 15, app C, tbl 4.

41. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 341.

42. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 422–423, 436, 451–454, 910–911.

tially because settlers still relied on Māori goodwill for their security and livelihoods.[43] Indeed, one member of the House of Representatives in 1871 commented that Ngāpuhi were 'so powerful' that the Government did not dare to establish settler militia, and that northern settlers live 'on the sufferance of the Natives'.[44]

Nonetheless, for this district's leaders, the treaty relationship was a source of frustration. In particular, the work of the Native Land Court, from 1866, became a growing burden on Māori communities (see chapter 9).[45] Nor were Te Raki Māori experiencing the political partnership or economic benefits they expected as part of the treaty relationship. At the Kohimarama Rūnanga, the Governor had promised Māori a national assembly and local self-government, as well as an economic partnership under which Māori would contribute land, and the Government would build roads, bridges, and schools, thereby developing the conditions necessary for mutual prosperity. Aside from its brief experiment with rūnanga, the colonial Government had by the end of the decade delivered on none of these promises.[46] Very few roads had been built north of Auckland,[47] and the first native schools appear to have been established in 1872 on lands gifted by Māori.[48]

From the late 1860s onwards, the colonial Government intensified its efforts to break down tribal 'communism' and hasten Māori submission to the colony's systems of law and authority. The Maori Representation Act provided for the establishment of four Māori electorates in the House of Representatives, as a temporary measure to encourage Māori engagement with colonial law-making. The Native Land Act 1873 aimed to accelerate purchases of Māori land by converting collective customary landholdings into individually held, tradeable shares (see chapter 9, section 9.5.3). This, in turn, opened the way for Crown land purchasing on a large scale: between 1875 and 1880, Government agents acquired over 400,000 acres of Māori land (from a district total of 2.13 million acres).[49] During the 1870s, the colonial Parliament enacted legislation asserting control over Māori

43. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 892–893.
44. Robert Creighton, 4 October 1871, NZPD, vol 11, p 106.
45. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p, p 65.
46. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 952–953; see also p 548.
47. By October 1871, members of the House of Representatives debated funding for Waitematā-Whāngārei, Whāngārei-Kaipara, Kaipara-Bay of Islands, Bay of Islands-Hokianga, and Mangonui-Ahipara roads: 'Public Works North of Auckland', 4 October 1871, NZPD, vol 11, p 96.
48. Mary Gillingham and Suzanne Woodley provided evidence that by 1879 there were 17 Native Schools operating in Northland, and 14 were situated on land gifted by Māori. However, none of the sites gifted by 1879 had been conveyed to trustees as required under the legislation, and in most cases the amount of land initially gifted by Māori for the school sites is not known: Mary Gillingham and Suzanne Woodley, 'Northland: Gifting of Lands' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2007) (doc A8), pp 37–39; Merata Kawharu (doc W10(a)), p 14; Dr John Barrington, 'Northland Language, Culture and Education – Part One: Education' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2005) (doc A2), p 78.
49. Specifically, the Crown purchased approximately 439,768 acres between 1 January 1875 and 31 December 1880. However, a portion of this area extended outside of the inquiry district: Rigby, 'Validation review: Crown purchases 1866–1900' (doc A56), p 4, app A.

fisheries,[50] and in the wake of the abolition of the provinces, established a system of local government that quickly fell under settler control.[51] As we noted earlier, at a local level, the settler population grew rapidly, especially in the south of this inquiry district, and government authorities sought – albeit with mixed success – to enforce colonial law over Māori.[52]

The Government saw its approach to Māori assimilation as important for the colony's economic objectives and as reducing the risks of further Crown–Māori warfare, which it held responsible for slowing the North Island's development. As discussed in chapter 10, the Government's development objectives were underpinned by heavy investment in public works and assisted immigration, funded through borrowing which was to be repaid through the profits made from the purchase and on-sale of Māori land. Settler politicians sometimes differed over the speed with which Māori should be pressed to submit to this new economic and political order, but few disagreed with its ultimate assimilative purpose.[53] Historian Dr Vincent O'Malley has argued that as the Crown sought to assimilate Māori into its own system of law and authority, it could attempt to ignore or suppress Māori institutions, or it could attempt to co-opt Māori to enforce colonial law. He observed that as Native Minister from 1869 to 1876, Donald McLean typically pursued this co-option strategy.[54]

These policies, by their very nature, challenged Te Raki Māori authority and Māori expectations of the treaty relationship. In their dealings with the colonial Government during the late 1860s and early 1870s, Te Raki leaders continued to pursue a treaty partnership based on peace and mutual prosperity, and to this end they generally continued to accommodate and cooperate with the colony's laws and institutions. They might be protective of their own authority within their sphere, but they were also committed to the treaty relationship. As the latter decade wore on and Māori communities increasingly felt the impacts of the Court's titling operation, land alienation, and other policies, the district's leaders pursued a different course. They continued to engage with colonial authorities but increasingly sought recognition of their rights to govern themselves, in accordance with the treaty guarantee of tino rangatiratanga. They sought Crown recognition of committees to provide Māori self-government at a local level, and at times also suggested that Māori should have their own legislature.

50. For example, Fish Protection Act 1877. See Anne-Marie Jackson, 'Erosion of Māori Fishing Rights in Customary Fisheries Management', p 65. Fisheries legislation and the establishment of a local government system is discussed further in part 2 of this stage 2 report.

51. Bruce Stirling, 'Eating Away at the Land, Eating Away at the People' (doc A15), pp 40–43, 100–103; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 83.

52. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p, pp 65–66, 905–919.

53. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 14, 20, 40, 46, 647, 902, 910; see also Vincent O'Malley, 'Runanga and Komiti: Maori Institutions of Self-government in the Nineteenth Century' (doctoral thesis, Victoria University of Wellington, 2004) (doc E31), pp 91–92; Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pts 1–2, pp 695–696, 728–729, 769, 962, 1316–1317; Giselle Byrnes (ed), *The New Oxford History of New Zealand* (Wellington: Oxford University Press, 2009), pp 120–121, 180–181, 209.: O'Malley, 'Runanga and Komiti' (doc E31), pp 91–92.

54. O'Malley, 'Runanga and Komiti' (doc E31), pp 91–92.

In this and other sections, we are seeking to address one central issue: Did the Crown recognise and support institutions and initiatives through which Te Raki Māori could exercise their rights of tino rangatiratanga? For the period from 1865 to 1878, we will consider:

- To what extent was the Government able to enforce colonial law on the ground in this district during the period from 1865 to 1878?
- Was Māori representation in Parliament sufficient to protect the tino rangatiratanga of Te Raki Māori?
- What was the Crown's response to Te Raki Māori proposals for local self-government?
- What was the overall state of the treaty relationship between Te Raki and the Crown by 1878?

11.3.2 Tribunal analysis

11.3.2.1 *To what extent was the Government able to enforce colonial law on the ground in this district during the period 1865–78?*

A critical test of government authority is its ability to enforce law. As we have seen in preceding chapters, from 1840 the colonial Government sought to enforce law in this district but with limited impacts; to a very significant degree, Te Raki Māori continued to live according to their own laws and to adjust disputes among themselves, and local officials were able to enforce the colony's laws only when Māori consented. While this continued to be the case in the late 1860s, a combination of factors – conflict among Māori, an increasingly assertive Government, and a desire among Māori to encourage peaceful Pākehā settlement of their district – all combined to lead Te Raki Māori towards increased engagement with the colony's legal system.

11.3.2.1.1 Had these changes resulted in a greater ability on the part of the Government to enforce its authority during the years 1865–68 immediately after the retrenchment of the rūnanga?

After withdrawing support from the Bay of Islands and Mangonui Rūnanga, the Government sought to encourage Te Raki Māori to comply with the colony's laws. Within this district, it relied on four resident magistrates assisted by Māori assessors and karere (constables). The magistrates in 1868 were Edward Williams (Waimate and Hokianga), Robert Barstow (Bay of Islands), William B White (Mangonui), and Harcourt Aubrey (Whāngārei and Kaipara). At that time, the Government also employed 28 rangatira as assessors across the whole of the north, along with 17 karere.[55]

As noted earlier, Māori continued to outnumber settlers by a significant margin north of Whāngārei – a consequence of the Crown's failure up to that point to

55. 'Nominal Roll of the Civil Establishment of New Zealand on the 1st July, 1868', AJHR, 1868, D-13, pp 3, 13–16, 18–24, 26, 28. White remained as a resident magistrate until 1878 while also serving as a Native Land Court judge: see 'Mangonui: Farewell to Mr White R M', *New Zealand Herald*, 5 April 1878, p 3 and Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 305–306.

Māori Assessors in the North in 1868

An 1868 return listed the following rangatira as assessors in the north: Mangonui – Wiremu Kingi, Paraone, Puhipi Te Ripi, Penetito te Huhu, H R Hukatere, P Wharekauri; Hokianga – Tamahote Anga, Moetara, Hoterene Wi Pou, T Tai, Aperahama Taonui, Mohi Tawhai; Waimate – Hira te Awa, Riwhi Hongi, Wi Kaire, Hemi Marupo, Wi Pepene; Russell – Tamati Waka Nene, Hori Maka te Ngere, H Tawatawa, Wi Te Tete; Kaipara: Te Hemara, Arama Karaka, Te Keene, W Kereti, Wiremu Rewiti, Wi Tomairangi, H Kingi Tuhua. The return also listed three wardens: Kingi Hori Wira (Waimate), P Papahia (Hokianga), and Rangaunu (Mangonui). Four karere were employed in each of Waimate, Hokianga, and Russell, and five at Kaipara.[1]

1. 'Nominal Roll of the Civil Establishment of New Zealand on the 1st July, 1868', AJHR, D-13.

open the district with roads and bridges, its retention of large areas of land that had been purchased from Māori but not yet opened for settlement, and its failure to deliver the townships that Governors Thomas Gore Browne and George Grey had promised.[56]

When the Native Land Court had begun its hearings in Te Raki in Whāngārei in March 1865, about two-thirds of the district remained in Māori ownership, the rest having passed to the Crown and settlers through a combination of purchasing and the settlement of old land claims.[57] With limited access to trading opportunities, the Māori economy continued to rely on land sales and subsistence agriculture, and (for cash, which was increasingly needed because of the costs of attending Court sittings) on extractive industries such as kauri trading and gum digging.[58]

The experiment with government rūnanga had provided means by which rangatira and Crown officials could meet – either formally at annual meetings or informally on other occasions – to negotiate over the intersection (at a local level) between the rangatiratanga and kāwanatanga spheres. From a Te Raki Māori perspective, this was an important step towards attracting settlers and development to the district, in accordance with the promises made by Gore Browne and Grey.[59] The rūnanga had also provided a mechanism for bringing the district's leaders

56. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 40–42; see also p 453.

57. From 1840 to 1865, the Crown purchased some 482,115 acres of land in this district (or 482,525 acres according to Dr Barry Rigby). Old land claims and pre-emption waiver purchases accounted for another 258,350 acres, bringing the total of 740,465 acres in a district totalling 2,132,148 acres: Rigby, 'Validation review: Old land claims, surplus land and scrip' (doc A48(e)), p 2.

58. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 41–42, 52–56.

59. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 171–177, 449; O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), pp 161–164.

together to adjust significant inter-hapū disputes, including questions of land title, though there were occasions on which Māori communities did not accept rūnanga decisions.[60]

Although the rūnanga only operated for a few years, they were clearly valued in this district by rangatira and local officials alike (we discuss the operation of the rūnanga in chapter 7, see section 7.5). When the Government withdrew its support and reduced the number of assessors, a gap was created which both Māori and the Government sought to fill.[61] To a significant degree, Te Raki Māori managed their sphere of authority as they had before 1861, adjusting disputes among themselves and involving Crown officials only when they saw some purpose; for example, when a magistrate was needed to mediate, or when Pākehā were involved and matters therefore needed to be managed in ways that would not discourage settlement and trade.[62]

The Crown, meanwhile, became increasingly determined to exercise authority over hapū and to ensure that Māori complied with the colony's laws (see chapter 7, section 7.3, and chapter 9, section 9.3). The Native Land Court was a significant step towards this objective, as we discuss in chapter 9. From the late 1860s onwards, local officials also became increasingly determined to enforce the colony's laws with respect to inter-personal and inter-group disputes, many of which were caused by Crown and settler land purchasing activities. In practice, however, the small number of Crown officials was far from adequate to enforce the colony's laws, and local officials continued to rely on Māori involvement and consent. Te Raki Māori compliance with the colony's laws was not so much enforced as negotiated.[63]

In one significant example, in 1866 local officials were unable to arrest the assessor Hare Poti after he shot and killed another rangatira, Te Ripi, for adultery. After this incident, Poti and 70 of his people fortified themselves in a pā at Kirioke (near Kaikohe) and declared they would resist any attempted arrest. Ngāpuhi called a large hui, attended by some 400 people, where the matter was discussed. Some rangatira were willing to hand Poti over for trial, but many believed the matter should be resolved in a more traditional manner through Poti making some recompense to Te Ripi's kin. The resident magistrate (Williams) sought advice from the Native Minister. Fearing that any use of force would cause an outbreak of war when the colony was already in a volatile state, the Government instructed Williams to let the matter lie. While Poti was never arrested, the situation was ultimately resolved within Ngāpuhi when Poti made a gift of land to Te Ripi's people.[64]

60. Armstrong and Subasic discuss the operation of the rūnanga in detail: see Armstrong and Subasic, 'Northern Land and Politics' (doc A12), section 1.3.2. For examples of Te Raki Māori resisting, rejecting, or bypassing rūnanga decisions, see pp 208–209, 227–228, 265.

61. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 449.

62. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 449–450, 454.

63. Armstrong and Subasic discuss these matters in detail: 'Northern Land and Politics' (doc A12), pp 448–498 (for the period 1864 to 1870) and pp 905–919 (for the period 1871 to 1881).

64. Armstrong and Subasic describe this incident in detail: see Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 463–467.

During 1867, there were two major inter-hapū conflicts in the district. Both arose from disputed land transactions, both involved fatalities, and both were resolved not by the Government – whose encouragement of land transactions was the underlying cause – but by the intervention of neutral rangatira. One of these conflicts concerned a 3000-acre block of land at Ahuahu, near Waimate. Two closely related hapū, Ngāti Hineira and Te Uri Taniwha, reached agreement that they would divide the block of land between them and retain it permanently in Māori ownership. Another hapū, Ngāre Hauata, asserted rights to a portion of the land and threatened to place it before the Court and then sell it. The leaders met but could not reach agreement. Shots were fired after Te Uri Taniwha disrupted a survey, and both sides then built pā and began fighting, resulting in the deaths of at least three Te Uri Taniwha and two Ngāre Hauata. At its peak, some 500 armed men were involved.[65]

There was a brief ceasefire at the end of July when the combatants heard that the missionary Henry Williams had died. Hostilities then resumed in early August, before Āperahama Taonui, Tāmati Waka Nene, and several other leading Hokianga rangatira arrived – with an armed party of more than 100 – to mediate. Under their influence, the combatants agreed to make peace so long as the land remained unoccupied and was not placed before the Court. The Government formally thanked the Hokianga rangatira for ending the conflict, which local officials feared would otherwise become a general war encompassing all of Ngāpuhi. Four years later, the leaders of Te Uri Taniwha and Ngāre Hauata agreed to divide the land.[66]

Although Edward Williams went to considerable lengths to mediate in this conflict, including riding between the fighting lines (as his father had done), it is notable that the Government was unable to intervene effectively and does not appear to have considered any attempt to bring about peace through armed intervention; rather, it was neutral rangatira, with much greater force at their disposal than the Government could command, who brought the conflict to an end.[67] Soon afterwards, another conflict broke out at Mangonui under similar circumstances when a land dispute erupted after an attempted purchase. On that occasion, the Resident Magistrate and Native Land Court Judge, William B White, was able to negotiate a resolution.[68]

Historians David Armstrong and Evald Subasic gave several other examples of Māori communities living according to their own laws during the late 1860s, and sometimes enforcing those laws against settlers – even in Kaipara and Mahurangi where settlers outnumbered Māori.[69] In another conflict at Kaikohe in November 1867, two men were killed and the rangatira Renata Te Pure was severely injured.

65. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 414–416.
66. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 416–419.
67. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 418.
68. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 422–423.
69. For examples, see Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 467–470, 472, 477, 482–483.

Again, neither Williams nor the Native Minister felt able to intervene.[70] Williams also reported in 1868 that Māori communities insisted on settling internal disputes among themselves, and he had considerable difficulty committing Māori for trial or imposing sentences.[71] White reported similar difficulties, writing that he was heavily reliant on assessors and other rangatira, and that any attempt to imprison a Māori of rank would endanger peace in the district.[72]

11.3.2.1.2 What was the significance of the Hokianga War in 1868?

The so-called 'Hokianga War' of April 1868 provided a clear example of the limits of the Crown's authority at this time, and in particular the extent to which law 'enforcement' was then a matter of negotiation between the Government and rangatira on competing sides. The 'war' arose from another land dispute, this time between Ngāti Kurī and Te Rarawa over a small parcel of coastal land at Whirinaki. After Te Rarawa resisted Ngāti Kurī attempts to survey the land and place it before the Court, both parties built pā on the block. Te Rarawa marked a boundary on the road beside their pā and said they would shoot any man who crossed it (women and children were allowed to pass). Several Ngāpuhi rangatira, including Hōne Mohi Tāwhai of Te Hikutū, then arrived to mediate. While the mediation was occurring, a Ngāpuhi and Ngāti Kurī rangatira named Nuku attempted to pass the Te Rarawa line and was shot and killed.[73]

Tāwhai then wrote to the Acting Native Minister, J C Richmond, asking the Government to endorse a Ngāpuhi response against Te Rarawa. In an official translation of this letter, Tāwhai said the Government had been 'powerless to act' on previous occasions when rangatira had been killed in the north, and so Ngāpuhi would 'take the matter in our own hands . . . we should act as soldiers and policemen and go and ask that the murderer be given up, if his people refuse to do so, then fight'. If the Government approved this action, Tāwhai would hand the killer over to the resident magistrate so he could be placed on trial; if the Government did not approve, Ngāpuhi would return to the 'manners and customs . . . practised by our forefathers'.[74]

By approaching the Minister, in our view, Tāwhai sought to ensure that any Ngāpuhi enforcement action would not cause conflict with the Government and settlers; and also to achieve utu for Nuku's death without initiating a potentially dangerous and costly conflict with Te Rarawa. Yet this was also a clear assertion

70. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 469–470.
71. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 469.
72. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 472.
73. These events are described in newspaper coverage of Te Wake's trial: 'Supreme Court – Criminal Sittings', *New Zealand Herald*, 8 September 1868, p 6; 'Supreme Court – Criminal Sittings', *New Zealand Herald*, 9 September 1868, p 4; 'Supreme Court – Criminal Sittings', *New Zealand Herald*, 10 September 1868, p 4. Also see Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 423–424; 'Report by Mr Commissioner MacKay Relative to the Surrender of Te Wake, Etc', AJHR, 1869, A16, pp 3–4.; and 'Native Disturbance at Hokianga', 29 July 1868, NZPD, 1868, pp 146–153.
74. Hone Mohi Tawhai to Native Minister, 3 April 1868 (Armstrong and Subasic document bank, doc A12(a), vol 5, pp 1880–1896. Also see Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 424–425.

of mana from a rangatira who had only recently been involved in brokering the peace at Ahuahu. As Tāwhai's letter clearly indicated, Ngāpuhi could do as they wished – but they wished for an outcome that would not undermine their broader goal of securing peace and prosperity in the north.[75]

Richmond arrived in the district later that month on a previously scheduled trip.[76] With several neutral rangatira, he visited Hokianga to mediate in the dispute. Faced with Ngāpuhi's threat of war, Te Rarawa agreed to give up the alleged killer, Heremia Te Wake of Ngāti Manawa, so he could face trial under the colony's laws. Richmond then left for the Bay of Islands, and Te Rarawa handed Te Wake to the magistrates Barstow and Williams, who committed him for trial on a charge of murder. The magistrates had neither a jail in Hokianga nor sufficient staff to guard Te Wake. The day after his arrest, he escaped and returned to his people. The magistrates wrote asking Te Rarawa to give him up, but in the iwi's view, the magistrates' failure to hold him meant the matter was now at an end.[77]

Tāwhai then wrote again to Richmond signalling that Ngāpuhi intended to fight. While Tāwhai asked for the Government's approval and support from its soldiers, he also (again) said that Ngāpuhi would go ahead regardless.[78] Officials feared that any attempt to re-arrest Te Wake would endanger settlers' lives and potentially draw the Government into a costly conflict with Te Rarawa, at a time when the Crown was still engaged in military conflicts in southern Taranaki and on the East Coast. Accordingly, Richmond wrote letters to Te Rarawa leaders asking them to give up Te Wake in order to keep the peace between themselves and Ngāpuhi.[79] Tāwhai responded and sent a long letter expressing frustration at the Minister's stance and accusing the Government of being willing to go to war for land (in Taranaki) but not to uphold the law: 'The people who . . . trample on the laws, you approve of them . . . [Yet] We who are carrying out and follow correctly the principles of the law are forsaken.'[80]

On 11 May, Te Hikutū and their Ngāpuhi allies sent a party of several hundred to attack a Te Rarawa pā at Te Karaka. The attack was repulsed, and one of the attackers killed. Te Hikutū then withdrew, and Tāwhai wrote again to the Native

75. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 449, 497.

76. Richmond was accompanying the Governor General, Sir George Bowen. The visit had been arranged for the Duke of Edinburgh who cancelled a planned visit to New Zealand after an assassination attempt in Sydney: 'The Governor's Journey to the North', *New Zealand Herald*, 20 April 1868, p 3.

77. In his letter, Tāwhai noted that they had no weapons and 'all the weapons we have are our hands only': Hone Mohi Tāwhai to Governor, 28 April 1868 (Armstrong and Subasic, supporting papers (doc A12(a), vol 3), p 924); Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 425–426, 428. Dame Whina Cooper, born in 1895, was Heremia Te Wake's daughter.

78. The magistrates placed Te Wake in a doorless shed. At the time of his escape, he was guarded by Barstow and two other officials, Hopkins and William Clarke (a magistrate's clerk and surveyor respectively; both were sons of the Chief Protector George Clarke senior). Edward Williams tried to persuade neutral Māori to guard Te Wake, but they refused: Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 425–426; 'Bay of Islands', *Daily Southern Cross*, 7 May 1868, p 3.

79. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 429–431.

80. Tāwhai to Richmond, 18 May 1868 (Armstrong and Subasic document bank, doc A12(a), vol 5, p 1:1964; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 430–431.

Minister, asking for guns and a man-of-war.[81] The Government sent the Hauraki Civil Commissioner, James Mackay, with several Hauraki and Waikato rangatira. In return for assurances of peace, and after several days of negotiation, Te Rarawa agreed to hand over Te Wake, who was taken to Auckland for trial.[82] As Mackay's report made clear, Te Rarawa feared Ngāpuhi but not the Government. On the contrary, 'we are looked on with contempt, and the bulk of the Native population think it would be an easy matter to drive us from the North altogether.'[83]

Nonetheless, Tāwhai was willing to allow the colony's legal system to take its course, and in this respect it was a significant adjustment on the part of a senior Ngāpuhi rangatira. In July, Tāwhai called a major hui at Herd's Point (Rāwene) with the intention of discussing means of maintaining peace and order in the district. Some 200 Māori attended, including most Hokianga leaders and some from Kaikohe, Waimate, and Matauri. Te Rarawa did not attend – Te Wake was awaiting trial at this point – and nor did rangatira from the Bay of Islands. The hui agreed on a set of recommendations which, in essence, provided that Māori would comply with and enforce the colony's laws.[84]

Accordingly, Tāwhai and others petitioned the House of Representatives asking that Hokianga once again have its own magistrate (as Williams' area was now too large), that assessors be reappointed, and that the area also be granted soldiers, lockups for prisoners, and schools. The petition promised that rangatira would assist in enforcing the law, and, significantly, that Māori would accept the sentences imposed, including prison terms.[85]

The Government sought advice from Williams and other officials, who warned that Māori would neither fully accept English laws nor enforce law against their own kin; rather, they were seeking alternative means of dispute resolution so that local land conflicts would not draw in the wider tribe and threaten to engulf the district. Williams also advised that Tāwhai was not seeking Pākehā soldiers, but for Ngāpuhi to be sworn in as soldiers. In effect, Ngāpuhi were seeking official approval for them to uphold the law themselves after the Government's retrenchment of Grey's rūnanga policy (see chapter 7, section 7.5.2.5). Nonetheless, officials recognised this as a potentially very significant advance in cooperation between the Government and Māori, and one that should be encouraged. The Government instructed Williams to find two new assessors and build a lockup and school at Waimā.[86]

81. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 431–432.
82. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 432–435, 438.
83. 'Report by Mr Commissioner MacKay Relative to the Surrender of Te Wake, Etc', AJHR, 1869, A-16, pp 3–4.
84. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p, pp 484–487; see also p 490.
85. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p, pp 486–488.
86. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 490–492; see also pp 485, 488.

11.3.2.1.3 What was the significance of Heremia Te Wake's Supreme Court trial and conviction in 1868?

Meanwhile, in September 1868, the contest for authority in the north moved to the Supreme Court in Auckland, where Te Wake was placed on trial charged with murdering Nuku. The trial took place before Justice George Arney. Te Wake, who pleaded not guilty, was represented by J C MacCormick, and the prosecution by Frederick M Brookfield.[87] MacCormick defended Te Wake on two grounds: first, that there was doubt about whether he had fired the fatal shot, or whether it was fired by his younger brother, Te Kawau; secondly, the incident had taken place under circumstances in which 'the ordinary rules of law could not be applied'. He explained that, in Hokianga, as in many parts of the North Island, it was not possible to apply English law 'in all its strictness' to incidents among Māori:

> the Maoris in many districts owed no authority, no subjection to the law. Would it be said that English law at this present time really was in force throughout the whole of this Northern Island . . . Would it not be equally absurd to say that the Maoris generally believed that they were amenable to English law in all its strictness.[88]

MacCormick therefore argued that the case must be judged under Māori customary law. Under that law, he contended, a state of war had existed, and those who killed could therefore not be judged as murderers.[89] This reflected the Te Rarawa view of matters. From their perspective, the killing was justified because Te Rarawa and Ngāti Kurī were at war, and Nuku had defied repeated warnings not to cross the boundary. Tāwhai did not take this view of the matter, although he, too, was assessing the incident through the lens of tikanga. He gave evidence that the killing had not taken place during a time of war, and it therefore was unjustified. According to his translated evidence: 'When both pas are fighting we do not call it murder. The two pas were not fighting when Nuku was shot.' Tāwhai said that Nuku was unarmed and had no hostile intent. Furthermore, as a result of the mediation, the main parties had agreed to meet in person and resolve the dispute. From a Ngāpuhi perspective, then, the killing was also unjustified under tikanga.[90]

The broader question concerned the extent to which the Supreme Court should determine the case according to customary law. MacCormick had argued in court for the recognition of tikanga. In our view, he was undoubtedly correct to assert that the Crown had little authority in Hokianga – as was evident from Te Wake's escape, the Government's unwillingness to use force to re-arrest him, the clear assertions by Ngāpuhi and Te Rarawa of their right to use force if they chose, and Mackay's admission that northern Māori held government authority in contempt. These were circumstances where tikanga was clearly to the forefront. But

87. 'Supreme Court – Criminal Sittings', *New Zealand Herald*, 8 September 1868, p 6.
88. 'Supreme Court – Criminal Sittings', *New Zealand Herald*, 10 September 1868, p 4; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 439–440.
89. 'Supreme Court – Criminal Sittings', *New Zealand Herald*, 10 September 1868, p 4; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 439–440.
90. 'Supreme Court – Criminal Sittings', *New Zealand Herald*, 8 September 1868, p 6.

the trial was being held in Auckland, where the Government did have authority, and in a court that applied the colony's laws. Brookfield and Justice Arney, both representatives of the Crown's authority though in different capacities, rejected MacCormick's arguments.

For the prosecution, Brookfield said that MacCormick had raised 'a new and most monstrous proposition' that Māori 'who had placed themselves under British law should . . . be allowed to commit murder, and be able to shelter themselves under the plea of Maori custom'. Brookfield rejected the view that Nuku had been killed as an act of war: 'When two tribes came together and fought, they were not justified, for they had courts to appeal to. They were under British rule and had no more right to . . . fight out their quarrels with guns than Englishmen had.' All who had gathered at the pā were committing illegal acts and were therefore equally culpable in the murder.[91]

Early in the trial, Justice Arney had expressed his view on the application of customary law, saying that no court 'could admit of any native customs being brought forward as an excuse for the taking of human life'. In his summing up, he reiterated this. He said this was the first time a Pākehā jury had sat on a case of this kind – that is, a case 'arising from an inter-tribal quarrel'. It was therefore important for its potential influence on Māori and their relationship with the law. It was the judge's assessment that

> the jury should not hesitate to pronounce that English law could reach cases of this kind. They were not there to administer the Maori revenge, but to administer law to the Maori, and that with justice and mercy. They would evade their duty if they were to tell the Maori that their law did not reach cases of this kind.[92]

The all-Pākehā jury could consider the surrounding circumstances, including the extent to which Te Wake might have been provoked, and they could consider Māori customary law in that context, but he concluded they should deliver their verdict according to English law.[93] Any other approach would be an invitation to Māori 'to go back and commence an internecine war'. The jury convicted Te Wake of murder, while making a recommendation of mercy. Justice Arney – as required under the colony's law – sentenced Te Wake to death, but passed the jury's recommendation for mercy to the Governor, expressing hope that Te Wake's life would be spared. The judge also hoped that the verdict would serve as an example to other Māori: 'Henceforth the Maori will know that if he kill a Maori under

91. 'Supreme Court – Criminal Sittings', *New Zealand Herald*, 10 September 1868, p 4; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 440–441.

92. 'Supreme Court – Criminal Sittings', *New Zealand Herald*, 10 September 1868, p 4; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 440–441.

93. MacCormick had observed that Māori defendants had a right to have their case heard by a Māori jury, but that he had selected a jury of Europeans: Supreme Court – Criminal Sittings', New Zealand Her*ald*, 10 September 1868, p 4; The Juries Amendment Ordinance 1844 made provision for Māori to serve on mixed juries if the trial involved the property or person of another Māori.

such circumstances as you have killed Nuku, it is murder.'[94] A few days later, the Governor commuted the death sentence, imposing a new sentence of penal servitude for life.[95]

Neither Te Rarawa nor Ngāpuhi were satisfied. Te Rarawa did not regard the killing of Nuku as murder and furthermore regarded the Government as siding with Ngāpuhi, after ignoring some 10 or 12 other killings in northern Māori communities (including three of Te Rarawa rangatira) over the preceding decade or so. For Ngāpuhi, the decision to commute the death sentence meant that justice had not been served. Auckland newspapers speculated that Te Wake would be released after some 12 to 18 months. If that was the case, Hōne Mohi Tāwhai told the Mangonui resident magistrate William B White, 'we, the whole of Ngapuhi chiefs, have made up our minds that henceforth no murderer, either native or European, shall be given up to the English for trial'. Since English law was 'a sham and a burlesque' (White's translation), Tāwhai said that Ngāpuhi would 'execute all who may commit murder in our district in our own way'.[96] The response of both parties suggests that the court's enforcement of British law had not been an appropriate solution for this kind of dispute, concerning a killing that occurred in the context of armed intertribal conflict.

Tensions remained high in the north while Te Wake remained in prison. In January 1869, according to a newspaper report, Te Rarawa was debating whether to join the Government in its wars against 'the Hauhau' or to have 'a skirmish with Ngapuhi' over Te Wake.[97] The Government's handling of this incident had done little to secure its authority in the region; on the contrary, it had aroused opposition from both Ngāpuhi and Te Rarawa. In March 1869, Te Wake escaped from Mount Eden Gaol. Officers pursued him, shooting at him several times before he got away.[98]

Te Wake was then able to make his way (via Māngere and Kaipara) back to his people in the north. The Government does not appear to have made any attempt to recapture him, and in 1869 Te Rarawa and Ngāpuhi made peace over the whole affair, and Ngāpuhi gave an assurance that Te Wake would not be harmed. By 1870, he was employed at Rāwene in a store owned by the former magistrate James Reddy Clendon.[99]

For Te Rarawa, the matter could not be completely closed until Te Wake obtained a pardon. Accordingly, leaders of the tribe raised the issue with the Government, and in 1873 the Native Minister, John Sheehan, told the House of Representatives that Nuku's killing was not a murder but an act of war, the opposite of what the

94. 'Supreme Court – Criminal Sittings', *New Zealand Herald*, 10 September 1868, p 4; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 440–441.

95. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 442.

96. 'The Hokianga Murder', *New Zealand Herald*, 15 September 1868, p 6; 'The Hokianga Murder', *New Zealand Herald*, 11 September 1868, p 3: Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 438, 442.

97. 'Hokianga', *New Zealand Herald*, 1 January 1869, p 3.

98. 'Escape of Prisoners from the Stockade', *New Zealand Herald*, 4 March 1869, p 4.

99. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 442–443.

Supreme Court had found. Sheehan also said that Te Rarawa, when they handed Te Wake to the Government, had not expected him to be treated as a murderer, but rather had expected his release. Te Wake had for some years been free and 'walking about the streets of Russell'. It was better for the dignity of the law that he be pardoned.[100] Accordingly, in 1874 Te Wake handed himself in to the Hokianga resident magistrate Spencer von Sturmer, swore an oath of allegiance, and was pardoned.[101]

Even the manner of the pardon was something of an insult to the Crown's authority. The Government had initially insisted that Te Wake hand himself in at the Supreme Court in Auckland. When Te Wake refused to travel, the Government relented. Despite the court's emphasis on the importance of enforcing British law in this case, the effort appeared to have failed. Instead, the conflict between Te Rarawa and Ngāpuhi was resolved through tikanga. As Judge Frederick Maning wrote of this incident, in his typical style, 'the time has not come yet wherein we are able to either pardon or punish natives in the north except in exactly such manner as they themselves, in their high mightiness choose'.[102]

11.3.2.1.4 To what extent did the Crown's authority on the ground change during the 1870s?

As Te Wake's escape from jail and subsequent pardon suggest, government officials continued to exercise very limited authority on the ground in this district during the late 1860s and early 1870s.[103] As Armstrong and Subasic observed, rangatira were 'unwilling to simply abandon their own customs and adopt Pakeha law'.[104] Williams, in 1872, reported that Māori remained reluctant to involve him in their 'quarrels', or else involved him as a neutral mediator rather than as a magistrate.[105] The situation was different in Hokianga, but this was likely due to the determination of Tāwhai and other rangatira to maintain peace among Māori and cooperate with the Government. In 1870, the Government had appointed Spencer von Sturmer as Hokianga resident magistrate, not only acceding to Tāwhai's request to re-establish the position but also agreeing to his preferred candidate. In 1870, Tāwhai and Te Tai Pāpāhia adjudicated on a case of accidental death at Waimamaku, and Tāwhai also attempted to develop his own code of law, which he sent to the Native Minister. In 1872, von Sturmer reported that he was having little difficulty enforcing law.[106]

100. Sheehan, 1 October 1873, NZPD, 1873 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 445).
101. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 445–446.
102. Maning to von Sturmer, 3 April 1874 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 445).
103. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 446.
104. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 910.
105. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 911–912.
106. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 495, 912; Jack Lee, *Hokianga* (Auckland: Reed, 1996), p 194.

Elsewhere in the district, Māori continued to take enforcement action among themselves and against settlers without involving the Government at all,[107] or to resist officials' attempts to enforce law. When a Whangaroa man, Heremiah Papu, shot another (Timoti Rahurahi) for pūremu (adultery) in 1874, the district's leaders refused to intervene. That this action was regarded a just cause for utu is indicative of the seriousness of the offence. They told Edward Williams that he would have to arrest Papu himself – when Papu was heavily armed and determined to resist. Williams did not have sufficient force available. When Tāwhai and Wī Kātene attempted to intervene, Whangaroa leaders said they would consider handing Papu over, but then took several weeks to deliberate on the matter. Among other things, they objected to the law being applied in this instance when several other killers had gone unpunished.[108]

In the meantime, Governor Sir James Fergusson visited the district, and rangatira raised the matter in their meeting with him. Fergusson then wrote to Native Minister Donald McLean that 'leaving it to the Natives themselves to deliberate . . . upon an open question whether a murderer shall be surrendered appears to . . . be injurious to their good Government and to throw contempt upon the administration of justice'.[109] Ultimately, the matter was resolved not by the Government but by Hōne Mohi Tāwhai, who persuaded Papu to hand himself in. Papu was taken to Auckland and tried in the Supreme Court, where he was convicted of murder and sentenced to three years in prison, the sentence being reduced because of provocation and was considerably lighter than Te Wake's. Ngāpuhi, meanwhile, finally resolved the matter in accordance with their own tikanga when an armed party of Rahurahi's relatives led by Mangonui Kerei visited Whangaroa and claimed his remains. According to Williams' accounts, they were met by a Ngāti Uru party; friendly speeches and mere and other weapons were exchanged, and Raharuhi's remains were removed 'without rancour'.[110]

After Papu's imprisonment, according to Armstrong and Subasic, 'northern Maori seem to have been more inclined to accept the application of English law, and indeed this was the last instance in which the issue was in serious doubt'.[111] We do not entirely agree that this was the last case; as we will see, there were much later instances of Te Raki Māori openly resisting, or ignoring, the Government's authority. Nonetheless, there does appear to have been a change of attitudes from about this time. Von Sturmer in 1876 and Williams in 1877 both reported that Māori were increasingly willing to accept the court's authority, and that constables were increasingly able to carry out arrests – even of rangatira – without having to involve the district's Māori leaders.[112]

107. For examples, see Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 913.
108. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 914–917.
109. Governor Fergusson to D McLean, 26 May 1874 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 918).
110. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 918–919; Untitled, *New Zealand Herald*, 9 July 1874, p 2.
111. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 919.
112. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 920–922.

This appears to have been a significant shift, for which there is no definitive explanation. On the one hand, by 1876 Te Raki Māori were feeling the combined effects of the Native Land Court and the Government's 'frenzied' land purchasing activities (discussed in chapters 9 and 10). Together, these developments undermined community authority and might have made Māori feel less able to resist the colony's laws, though these events also led Te Raki leaders to assert their independent authority, as we will see throughout this chapter.[113]

On the other hand, increased acceptance that colonial law and the courts might have a useful role to play perhaps reflected a desire among Te Raki Māori to engage with the Government and the settler population in ways that would advance peaceful settlement and therefore bring prosperity. This was the approach Hōne Mohi Tāwhai had advocated, though – as Te Raki leaders quickly came to learn – adaptation and increased settlement did not necessarily produce the results that Māori hoped for. In any case, adaptation was by no means complete in the 1870s. As we will see later in this chapter, for many years to come there would continue to be occasions on which Te Raki Māori resisted government authority or bypassed colonial law and resolved disputes among themselves, especially when those disputes concerned land.[114]

11.3.2.2 *Was Māori representation in Parliament sufficient to protect the tino rangatiratanga of Te Raki Māori?*

As discussed in chapter 7, when the first New Zealand general election was held in 1853, very few Māori were eligible to vote. The franchise was available to males aged 21 and over who met a property test that did not apply to Māori customary land. During the late 1850s and early 1860s, colonial politicians discussed various options to enfranchise Māori. Many reasoned that separate Māori representation within the colonial Parliament was better than separate institutions.

Accordingly, in 1867 the Maori Representation Act provided for the establishment of four temporary Māori seats in the House of Representatives (the lower house), including one seat for the territories north of Auckland. In 1876, the seats were made permanent, and in 1872 the Crown appointed two Māori to the Legislative Council (the upper house).

Claimants regarded Māori representation as inequitable and insufficient to protect Māori rights and interests.[115] The Crown submitted that Māori representation was fair and adequate because of the Māori seats provided from 1867 onwards.[116] The Crown noted that 'since the creation of the Māori electorates, Māori members of Parliament have been appointed to significant positions within government,

113. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 919.
114. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 919; see also pp 76–77, 744, 1104–1105, 1095–1097, and 1367–1389.
115. For example, see claimant closing submissions (#3.3.228), pp 259–262, 278–279.
116. Crown closing submissions (#3.3.402), pp 116–118, 166; Crown memorandum filing answers to post-hearing questions (#3.2.2681(a)), para 38.

including Acting Prime Minister'.[117] It further submitted that between 1890 and 1930, 'the ratio of population per seat was comparable for non-Māori and Māori'.[118]

11.3.2.2.1 Maori Representation Act 1867

The Maori Representation Act came into effect on 10 October 1867, establishing four Māori electorates: three in the North Island and one in the South Island. The Northern Maori electorate encompassed all territories north of the Manukau Harbour. All Māori males (including 'half-castes') aged over 21 were entitled to vote, and any Māori who was entitled to vote could stand as a candidate, provided he had not been convicted of a 'treason felony or infamous offence'.[119]

The Act also provided for provincial councils to establish Māori electorates, though none did before the councils were abolished in 1876.[120] Section 12 provided that the Act would remain in force for five years; once it expired, any Māori members of the House of Representatives or of a provincial council would remain in office only until the subsequent election. Some historians have interpreted the exclusion of voters accused of treason as a deliberate attack on the rights of Māori who had fought against the Crown in recent wars, but the provision merely echoed the wording of the franchise provision in the earlier New Zealand Constitution Act.

As the preamble to the Maori Representation Act explained, its purpose was to temporarily enfranchise Māori who would otherwise be excluded from voting 'owing to the peculiar nature of the tenure of Maori land', and the need to protect them by providing a special franchise – enfranchisement being 'expedient for the better protection of the interests of Her Majesty's subjects of the Native race'.[121]

The Bill's principal sponsor, the recently re-elected Napier member (and soon to be Native Minister) Donald McLean, presented the legislation as a means of giving Māori a voice in the House, and thereby securing peace in the colony.[122] All efforts to govern Māori had failed, he said, because rangatira had seen them as attempts to subvert Māori authority. For example, Māori throughout New Zealand continued to resent the Crown's arrest and execution of Maketū in 1842.[123]

In this speech, McLean gave no serious consideration to the option of recognising Māori rights to self-government; rather, he assumed that Māori discontent arose from their lack of representation in the House, which led to them having 'no voice in making the laws by which they are to be governed'. He also recognised that Māori paid a large portion of the colony's taxes, possessed about three-quarters of North Island land, and had a population of some 40,000 to 47,000; on all these grounds, he said, they were entitled to greater representation.[124]

117. Crown closing submissions (#3.3.402), p 116.
118. Crown closing submissions (#3.3.402), p 117.
119. Maori Representation Act 1867, ss 2–6, 12, sch.
120. Maori Representation Act 1867, s 11.
121. Maori Representation Act 1867, preamble.
122. Donald McLean, 14 August 1867, NZPD, vol 1, pt 1, pp 457–458.
123. Donald McLean, 14 August 1867, NZPD, vol 1, pt 1, pp 457–458.
124. Donald McLean, 14 August 1867, NZPD, vol 1, pt 1, p 458; see also pp 336–337.

McLean gave little explanation for the number of Māori electorates, except to acknowledge that it was 'limited' and that it would give Māori 'a voice in the administration of the country'.[125] As is clear from the debates, the number was determined not by reference to any principle but by political horse-trading; in particular, South Island members were resistant to any initiative that might increase the North Island's influence. The Government neither supported nor opposed the legislation, leaving McLean to lobby other members for their votes, which he won by limiting Māori influence so it would not swamp, or even challenge, that of settlers. Even then, the Bill passed only after its supporters agreed to back the establishment of two temporary electorates for West Coast goldminers to strengthen South Island representation.[126]

McLean and other members who supported the Māori franchise saw it as little more than an experiment to determine how Māori would perform in Parliament. These members believed that parliamentary representation would tend to 'elevate' Māori and hasten assimilation.[127] Some members argued that the initiative gave Māori equal rights with settlers, notwithstanding an obvious imbalance in the number of electorates (discussed later).[128] Some saw Māori representation as an answer to criticism from Britain about the colony's treatment of Māori.[129] Though the Act was not specifically intended to reward Māori loyalty to the Crown, some members believed it would have that effect as candidates could not stand if they had been 'attainted or convicted' of treason or other serious offences.[130]

Among those who opposed the measure or expressed misgivings, some believed the Māori electorates were too large to be workable,[131] while some said Māori would not understand House proceedings and would therefore be vulnerable to undue influence from other members;[132] accordingly, there was considerable debate about whether Māori should be represented by settlers instead of their own people.[133] Some members opposed universal male Māori suffrage, regarding it as a 'dangerous' precedent that would lead settlers to demand the same for themselves.[134] The Bay of Islands member, Hugh Francis Carleton, vehemently opposed

125. Donald McLean, 14 August 1867, NZPD, vol 1, pt 1, p 459.

126. M P K Sorrenson, 'A History of Maori Representation in Parliament', *The Report of the Royal Commission on the Electoral System*, 1986 (the Ministry for Culture and Heritage), p B19; Waitangi Tribunal, *Maori Electoral Option* Wai 413, p 5.

127. 'Native Representation Bill', 14 August 1867, NZPD, vol 1, pt 1, pp 459, 461; see also William Reynolds, 21 August 1867, NZPD, vol 1, pt 1, p 520.

128. J C Richmond, 14 August 1867, NZPD, vol 1, pt 1, p 460.

129. Henry Harrison, 14 August 1867, NZPD, vol 1, pt 1, p 461.

130. For example, see legislative councillor Colonel William Kenny, 13 August 1867, NZPD, vol 1, pt 1, p 416. All members of Parliament were required to take an oath of allegiance to the Queen. The same restriction applied to all voters under the New Zealand Constitution Act 1852, section 8.

131. Carleton, 21 August 1867, NZPD, vol 1, pt 1, p 518; Harry Atkinson, 21 August 1867, NZPD, vol 1, pt 1, p 520; see also John Richardson, 6 September 1867, NZPD, 1867, vol 1, pt 2, p 807.

132. William Reynolds, 21 August 1867, NZPD, vol 1, pt 1, pp 520–52; John Richardson, 6 September 1867, NZPD, vol 1, pt 2, p 806.

133. For example, see Arthur Atkinson, 14 August 1867, NZPD, vol 1, pt 1, p 461; Robert Graham, 14 August 1867, NZPD, vol 1, pt 1, p 462.

134. William Reynolds, 21 August 1867, NZPD, vol 1, pt 1, pp 520–521.

any special representation for Māori, though he did not ultimately vote against the legislation.[135]

While there is no evidence of the Crown directly consulting Māori about the Maori Representation Act, or even informing Māori that such a measure was being contemplated, some members did claim to be familiar with Māori views. The Parnell member, Charles Heaphy, told the House that Māori had not forgotten the promises made at the Kohimarama Rūnanga – namely, that similar conferences would be held each year, with opportunities for input into government policy and legislation. Māori also remembered the Native Commission Act 1865 (see chapter 7, section 7.3.2.5) and 'often asked . . . what steps would be taken to give them a share in the representation'.[136] That Act provided for the establishment of a Māori-dominated commission to inquire into the best way of conferring the franchise on Māori temporarily – that is, until they could secure Crown-derived titles for their lands – but also to consider more generally how best to admit Māori to 'equal political rights', and to report to the Governor and the General Assembly on all other matters affecting Māori interests and well-being.[137] Heaphy's comments may reflect comments made by Ngāti Whātua living in his electorate. His words may suggest that Māori were seeking information about the establishment of a national council or national conference of rangatira, empowered to advise on legislation as well as on Māori representation within the colonial assembly. It does not seem that a commission under the Act was ever appointed.

Few members, if any, appear to have considered whether four electorates would be sufficient to provide Māori with representation that was meaningful, effective, or proportionate to their numbers. Members were far more concerned about proportionality between the North and South Islands than they were with proportionality between Māori and settlers.[138] One legislative councillor, the retired army officer Andrew Russell, said he would have preferred six Māori electorates, but that 'would not have been carried through the other House'. He regarded four as better than none,[139] as he 'could not conceive a greater political injustice than was done [to Māori] in transferring their government from the Queen to the colonists,

135. Carleton, 14 August 1867, NZPD, vol 1, pt 1, pp 463–464; Carleton, 21 August 1867, NZPD, vol 1, pt 1, pp 517–518.

136. Charles Heaphy, 14 August 1867, NZPD, vol 1, pt 1, p 459; Donald Loveridge, 'The Development and Introduction of Institutions for The Governance of Maori 1852–1865', report for the Crown Law Office, 2007 (doc E38), pp 256–259.

137. The Act empowered the Governor to issue a commission directed to comprise not less than 20 nor more than 35 Māori, and to not less than three nor more than five Europeans. The Weld Government fell a month after the Bill was passed, and Loveridge says that the idea of the Commission 'quickly fell out of favour': Donald Loveridge, 'The Development and Introduction of Institutions for The Governance of Maori 1852–1865', report for the Crown Law Office, 2007 (doc E38), pp 258–259, 283.

138. For example, see J C Richmond, 14 August 1867, NZPD, vol 1, pt 1, p 460; Arthur Atkinson, 14 August 1867, NZPD, vol 1, pt 1, pp 460–461; John Hall, 14 August 1867, NZPD, vol 1, pt 1, p 462.

139. Andrew Russell, 6 September 1867, NZPD, vol 1, pt 2, p 810.

and placing them under laws in the making of which they had no voice, made by an Assembly in which they had no seat.'[140]

If McLean's Māori population estimates were correct, one electorate was being established for every 10,000 to 11,750 Māori.[141] By contrast, at the time the Maori Representation Act was being debated, there were 72 general electorates for an estimated settler population of 204,114, an average of 2,835 settlers per electorate.[142] If Māori electorates had been allocated on the same population basis, Māori would have been entitled to between 12 and 14 electorates (see appendix 11.III). In Te Raki, where the available evidence suggests that Māori remained in the majority,[143] the disparity appears to have been even greater. Whereas all Māori north of the Manukau Harbour shared a single representative, settler voters – with a smaller population – had five, at least for the time being.[144] Among settler politicians, population was by this time regarded as the principal basis for allocating general electorates, though property ownership and contributions to taxation were also regarded as relevant factors, and populations did vary from seat to seat as a result of political trade-offs.[145] On all these criteria, Māori in general, and Te Raki Māori in particular, were entitled to far greater representation than they were granted.[146]

Certainly, Māori in this district did not respond positively. They criticised the Government for lack of consultation, regarded the number of Māori electorates as entirely inadequate, and argued for either equal representation or a separate Māori assembly. Mangonui magistrate, William B White (whom we first discussed in chapter 6), reported that the Maori Representation Act was 'useless as far as

140. Andrew Russell, 13 August 1867, NZPD, vol 1, pt 1, p 414.

141. Donald McLean, 14 August 1867, NZPD, vol 1, pt 1, pp 457–458; see also pp 336–337.

142. William Reynolds, 3 September 1867, NZPD, vol 2, p 705. The settler population estimate was from 31 December 1866; see also Premier John Hall, 12 August 1881, NZPD, vol 39, pp 470–471. The December 1867 Census took place after the Maori Representation Act 1867 came into force. It found the settler population to be 218,637 – an average of 3,037 voters per electorate: Census of New Zealand, December 1867, AJHR, 1868, D-1, p 4.

143. O'Malley, 'Northland Crown Purchases – 1840–1865' (doc A6), p 62.

144. There were four general electorates: Mangonui (which encompassed the Far North and Whangaroa), Bay of Islands, and Marsden (Whāngārei), and Northern Division (encompassing rural territories from the Manukau Harbour to Whāngārei, including Kaipara). Northern Division had two representatives: McRobie, *New Zealand Electoral Atlas*, pp 32–33.

145. Donald McLean, 14 August 1867, NZPD, vol 1, pt 1, pp 457–458; Frederick Weld, 29 August 1865, NZPD, vol E, pp 368–369; William Stafford, 26 September 1865, NZPD, 1864–1866, vol E, pp 597–598. There was considerable population variation among settler electorates at the time (see Weld and Stafford), but nothing approaching the disparity between Māori and general electorates. In Britain, voting rights were traditionally based solely on property ownership. However, during the nineteenth century the franchise was gradually liberalised, and ultimately universal male suffrage was adopted in 1918. New Zealand followed a similar but more rapid path, introducing near universal male suffrage in 1879 and universal suffrage in 1893.

146. At 1865, Māori retained possession of 55 per cent of the territory in this inquiry district, and a greater proportion of the territory north of Mahurangi: Thomas, 'The Native Land Court in Te Paparahi o Te Raki' (doc A68), pp 15–16.

[Māori] are concerned'.[147] And Kerikeri magistrate, Robert Barstow, told his superiors that Māori were 'utterly indifferent' to the whole matter:

> [T]hey say that we Pakehas have passed a law that they should be represented and how; that this preliminary procedure is wrong, that we should have consulted them as to the number of representatives, and the manner of electing them, that, as we have initiated the plan, we had better carry it out.[148]

No rangatira of significance stood for the Northern Maori electorate in 1868, and very few voted.[149]

11.3.2.2.2 Te Raki Māori representation in practice

Te Raki Māori had not sought or been consulted about representation in Parliament, though as we have seen, in 1865 the Weld Government had been able to pass legislation to give effect to their intention that Māori should be consulted via a native commission. Te Raki Māori were thus initially sceptical about the 1867 legislation. In their view, Māori and settlers should have had an equal say in making the colony's laws. At a major hui in the Kaipara district in February 1868, many Ngāpuhi and other northern leaders rejected the colonial Government's offer of representation in the House of Representatives, on grounds that four members was nowhere near sufficient. Wiremu Pōmare of Kawakawa commented, 'we cannot consent to four members being elected. Let there be equal numbers on the Maori side and on the Pakeha side, and the thing would be at once established.'[150]

Winiata Tomairanga of Mangonui also objected: even 'if there were four Maoris and twenty Europeans, we cannot approve'. Other rangatira attended from Hokianga, Kaipara, Mahurangi, and Ōrākei; all agreed that Māori and settlers should have equal representation. Pāora Tūhaere of Ngāti Whātua – one of the few who had advocated for Māori representation – described the Māori electorates as another example of the Government promising equality and failing to deliver, and he expressed scepticism about the Government's motives.[151]

Throughout the north, rangatira were of the same view, as shown by annual reports from resident magistrates. From Waimate, Edward Williams reported that Māori were 'certainly not satisfied with the Native Representation Act'. They objected on two grounds: first, that they believed a member of one tribe could not represent another, and secondly, that Māori deserved equal representation. Māori

147. Report from W B White, Resident Magistrate, Mangonui, 5 September 1868, in AJHR, 1868, A-4, p 37; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 585–586.

148. Report from J C Barstow, Resident Magistrate, Bay of Islands, 7 March 1868, in AJHR, 1868, A-4, p 8; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 585–586.

149. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 583–584.

150. 'Maori Representation – the Meeting at Kaipara', *Daily Southern Cross*, 10 March 1868, p 2; see also Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 582.

151. 'Maori Representation – the Meeting at Kaipara', *Daily Southern Cross*, 10 March 1868, p 2.

Year	Member
1868–71	Frederick Nene Russell
1871–75	Wī Kātene
1876–79	Hori Tawhiti
1879–84	Hōne Tāwhai
1884–87	Ihaka Hakuene
1887 by-election	Wī Kātene
1887–90	Hirini Taiwhanga
1891–93	Eparaima Te Mutu Kapa
1893–1909	Hōne Heke Ngāpua

Table 11.1: Northern Maori members of the House of Representatives, 1868–1909.
Source: Armstrong and Subasic, 'Northern Land and Politics: 1860–1910' (doc A12), app 5, p 1548.

leaders 'remark that if they were allowed as many members as the Pakeha there might be something in it. But what, say they, are four among so many?'[152]

From the Mangonui district (which encompassed Whangaroa), William B White reported:

> The Native Representation Act has not attracted much interest amongst the people of this district. It is generally considered as useless as far as they are concerned – the number of representatives being too few; they contend there should be a representative from each tribe, and a chamber separate from the whites.[153]

Many Ngāpuhi leaders felt that the Hokianga spiritual leader Āperahama Taonui was best suited to the task of representing the tribe in Parliament, but he was as sceptical as other rangatira about the usefulness of a single seat.[154] Williams described a conversation in which Taonui outlined his concerns in a compelling critique of the new system:

> He first wished to know the motive for introducing Maori Members into the House. When told it was that the Maoris might have a voice in the Legislature, he replied, 'Very good; you say there are to be four Maori Members and about seventy Pakehas; what are these four to do among so many Pakehas; where will their voices be as compared with the Pakeha voices? How are they to understand anything the

152. Report from E M Williams, Resident Magistrate, Waimate, 1 June 1868, AJHR, 1868, A-4, pp 25–26; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 585–586.
153. Report from W B White, Resident Magistrate, Mangonui, 5 September 1868, AJHR, 1868, A-4, p 37; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 585–586.
154. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 585–586.

> Pakehas say, or the Pakehas anything the Maoris say? Is each man to have his interpreter by his side? If not, are they to listen to the Pakeha talk without understanding a word that is spoken – speak without being understood – give the Aye when asked to do so without knowing what they Aye to, and by-and-bye, when some new Act bearing upon the Maoris is brought into operation, be told, Oh, you assisted in passing it? It will not do.[155]

Taonui then suggested that a younger Māori might first try the position out and report back to his elders to determine whether there was any benefit in parliamentary representation.[156] The first election for Northern Maori took place on 15 April 1868 at Barstow's house in Russell.[157] According to the resident magistrate Williams, notices had been sent 'far and wide' advising rangatira of this event, yet when election day came, they showed 'no interest'. Instead, sometime after the appointed hour, a small group appeared and nominated Frederick Nene Russell, the son of a Kohukohu timber trader and his Ngāpuhi wife. As there was no opposition, Russell was declared elected.[158]

Although he was young (in his mid-twenties) and not a prominent rangatira, Russell was educated, wrote and spoke in English and Māori, and was well connected among settlers and Ngāpuhi; his mother was a close relative of Tāmati Waka Nene.[159] He was supposed to represent the entire district north of the Manukau, but the size of his electorate and the manner of his election both counted against him. Leaders of Ngāti Whātua, Te Rarawa, and Te Aupōuri all informed the Government that Russell could not speak for them.[160] Bay of Islands rangatira subsequently denied having known about the election and also refused to support him.[161]

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155. Report from E M Williams, Resident Magistrate, Waimate, 1 June 1868, AJHR, 1868, A-4, p 31 (app F); Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 585–586.

156. Report from E M Williams, Resident Magistrate, Waimate, 1 June 1868, AJHR, 1868, A-4, p 31 (app F); Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 585–586. Williams assumed that Taonui was not willing to stand until he had determined that the salary was worth claiming.

157. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 584–585.

158. Report from E M Williams, Resident Magistrate, Waimate, 1 June 1868, AJHR, 1868, A-4, pp 25, 31; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 583–584. Russell's father was the prominent timber trader George Frederick Webster, who lived among Ngāti Hao and married Tāmati Waka Nene's niece Herina Tuku. After Webster's death in 1855, his brother-in-law, John Webster, became Frederick's legal guardian and took over his education. In the 1866 general election, Webster was elected to represent Napier: Jennifer Ashton, *At the Margin of Empire: John Webster and Hokianga, 1841–1900* (Auckland: Auckland University Press, 2015), pp 97–98, 100, 104, 138–139; 'Native Intelligence', *Daily Southern Cross*, 2 May 1868, p 5; Claudia Orange, 'Treaty of Waitangi – Māori responses to the Treaty – 1880 to 1900', *Te Ara – the Encyclopedia of New Zealand*, http://www.TeAra.govt.nz/en/photograph/37970/first-maori-mps-frederick-nene-russell, last modified 20 June 2012.

159. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 584; 'Native Intelligence', *Daily Southern Cross*, 2 May 1868, p 5; see also 'Monthly Summary for the English Mail', *Daily Southern Cross*, 2 May 1868, p 5; John Cracroft Wilson, 14 August 1868, NZPD, vol 2, p 494.

160. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 585.

161. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 589.

The new member used his first speech in the House to criticise the system of Māori representation, arguing that the Māori members did not understand proceedings in the English language. Either Māori should have their own assembly, he said, or they should be able to elect trusted settlers to represent them, or 'they had better not be represented at all; for sitting in those seats the whole Maori race became responsible for the acts of the Assembly'.[162] In this, he echoed Taonui's concern that, by accepting seats in the House, Māori were giving up independence without acquiring any meaningful influence in return. Russell remained in the House for only two years, during which time he had little prominence, though he did vote consistently against the Government.[163] In September 1870, he retired from public life and took an appointment as a clerk in the Native Department.[164]

In 1869, Donald McLean became Native Minister and soon visited the north. At Waimate, Wiremu Kātene (Ngāti Hineira, Te Uri Taniwha) told him that 'the requirements of the Maori race cannot be carried out by the [Pākehā] assembly', and that Māori throughout the north wanted two national assemblies, one for Māori and one for settlers: 'let each make laws and submit them to each other . . . by this means peace would be attained in this island'. Kātene added that he had seen no good come from Māori representation in the House, and that even the most able Māori member would be unable to achieve the results Māori sought.[165] Others at the hui supported Kātene's views.[166] At another hui in April 1870, Kātene told McLean and Governor Sir George Bowen that Māori and settlers 'should enjoy equal legislative rights': 'The only great power in the Island is the meeting of the Assembly at Wellington . . . If it be a good thing to introduce Maori members into the Parliament, do not select a single one only to represent the Northern tribes. At present we are not properly represented.'[167]

The model proposed by Kātene was for separate Māori and settler assemblies which would review each other's laws – effectively forming part of a single legislature, with the Māori and colonial Parliaments operating in partnership. Kātene did not spell out the precise constitutional relationship: how, for example, might any disagreements be negotiated, would both houses have a right of veto, and would both operate under the Queen's mana? Nonetheless, his proposal provided a potential starting point for further exploration. Over the following decades, Te Raki leaders would continue to advocate for some form of Māori parliament (see sections 11.4 and 11.5). McLean responded that Kātene's views deserved

162. Frederick Nene Russell, 14 August 1868, NZPD, vol 2, p 493.
163. 'The North', *Otago Witness*, 1 October 1870, p 3.
164. 'The Daily Southern Cross', *Daily Southern Cross*, 30 September 1870, p 2.
165. 'Visit of the Hon D McLean to the North', *New Zealand Herald*, 13 January 1870 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 588). For Kātene's hapu, see Te Waimate Taiamai and Kaikohe Opening Statement, doc E58, p 26.
166. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 589.
167. 'Visit of the Governor to the North', AJHR, 1870, A-7, p 7; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 589–590.

careful consideration and he indicated that the Government was willing to consider greater powers for Māori at a local level.[168]

The official account of McLean's 1870 visit also noted that Ngāpuhi were by this time taking greater interest in political representation.[169] In February 1871, some 1,200 Māori (from a population of about 12,000[170]) gathered at Hokianga and Waimate to observe polling for the general election, and 508 of those voted in the Northern Maori electorate. Whereas the 1867 election had been uncontested, on this occasion there were three candidates, all from the Bay of Islands and upper Hokianga: Kātene, Hirini Taiwhanga of Ngāti Tautahi and Te Uri o Hua (whom we discuss in section 11.4.3), and Hōne Peeti of Ngāi Te Whiu. In a tight contest, Kātene was the successful candidate.[171]

Māori voters holding land under Crown grant also appear to have influenced the general election result for the newly established Mangonui and Bay of Islands general electorate, their votes contributing to the defeat of long-serving representative Hugh Carleton, who had led parliamentary opposition to Māori representation.[172]

Armstrong and Subasic suggested that one factor behind this increased interest in political representation was Premier Julius Vogel's plans for rapid growth in government spending on public works: Te Raki Māori had 'no doubt realised that their Member of Parliament could play a key role in directing such essential funding into their own districts'. Governor Bowen, too, in his April 1870 visit, had placed some emphasis on the franchise as a means to influence government policy and public works spending.[173] Kātene and other candidates may have also hoped to change the system from within; as discussed in section 11.3.4, one of Kātene's first acts was to propose the re-establishment of rūnanga in the territories north of Auckland.[174]

Certainly, Te Raki leaders had come to see parliamentary representation as an avenue for the exercise of influence on colonial authorities. They sent Kātene to Wellington with instructions and took steps to monitor his performance as their

168. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 590.

169. 'Visit of the Governor to the North', AJHR, 1870, A-7, p 7; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 590.

170. Wiremu Kātene, 6 September 1871, NZPD, vol 10, p 256.

171. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 591–592. Hōne Peeti was the leading candidate among those who voted at Waimate, but Kātene won with support from Hokianga: see Williams to McLean, 15 February 1871, AJHR, 1871, F-6A, p 11. For Peeti's hapū, see brief of evidence of John Rameka Alexander (doc H7), p 7. There was competition in all of the Māori electorates in 1871, whereas in 1868 only two had been contested: Sorrenson, 'A History of Maori Representation in Parliament', pp B22–B23.

172. D B Silver, 'Hugh Francis Carleton', *Dictionary of New Zealand Biography*, Te Ara – the Encyclopedia of New Zealand, https://teara.govt.nz/en/biographies/1c5/carleton-hugh-francis (accessed 19 June 2020). Regarding Māori influence on the election, see Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 591, 593. For insight into Carleton's views on Māori rights, see Hugh Francis Carleton, 21 August 1867, NZPD, vol 1, pt 1, pp 517–518; Carleton to Colonial Secretary, 1 November 1858, in 'Papers Relative to the Right of Aboriginal Natives to the Electoral Franchise', AJHR, 1860, E-7, pp 4–6.

173. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 591.

174. Wiremu Kātene, 19 October 1871, NZPD, vol 11, p 427.

representative.[175] Other than Ngāpuhi, northern tribes continued to regard the election as an irrelevance. Te Rarawa refused to take part because they were not willing to be represented by a Ngāpuhi rangatira, and the same was true for Ngāti Whātua at Kaipara. Even at Waimate, some 40 or 50 eligible Māori voters refused to cast their votes, apparently because they were not satisfied with the candidates on offer.[176]

Partly because of these concerns, throughout the 1870s and beyond, Māori advocated for increased representation in the colonial Parliament. In 1871, the Eastern Maori member Karaitiana Takamoana moved that the number of Māori representatives increase to 12 – three for each existing electorate. The House voted against the increase, though it did support Takamoana's proposal that Māori be represented in the Legislative Council.[177]

In 1872, Parliament extended the life of the temporary Māori electorates by five years but again rejected proposals to increase the number of Māori representatives.[178] In 1875, the Southern Maori member Hōri Kerei Taiaroa introduced a Bill to increase the number of Māori electorates to seven, which was still considerably short of equitable representation on a population basis. He noted that the House had seen similar Bills 'for several years past' and rejected all of them. Parliament did so again on this occasion.[179] Several times during the decade, Māori from around New Zealand sent petitions seeking increased Māori representation.[180] In 1876, the Māori electorates became permanent without any increase in representation.[181]

In debating proposals to increase the number of Māori electorates, Māori members continued to point out that Māori were not equitably represented and were unable to exercise meaningful influence even on matters of direct concern to their communities, such as land laws.[182] They argued that Māori must either be represented fairly or have their own legislature.[183] Kātene in 1871 said Māori representation 'may be likened to a cap which does not hide all the hairs of the head'. It was

175. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 592.

176. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 591–592.

177. 'Maori Representation', NZPD, 1871, vol 10, pp 471–472, 477; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 593–594.

178. 'Maori Representation Bill', 4 October 1872, 11 October 1872, 17 October 1872, NZPD, vol 13, pp 566, 595, 768; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 580.

179. Sorrenson, 'A History of Maori Representation in Parliament', p B24; Taiaroa, 13 September 1876, NZPD, vol 22, p 230.

180. For examples, see Hori Kerei Taiaroa, 7 October 1875, NZPD, vol 19, p 319; petition of H M Rangitakaiwaho and others, 29 August 1876, AJHR, 1876, J-6, pp 1–2.

181. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 580, 613.

182. For examples, see Wi Parata, 13 August 1872, NZPD, vol 12, p 451; Karaitiana Takamoana, 13 August 1872, NZPD, vol 12, pp 453–454; Hori Kerei Taiaroa, 13 August 1872, NZPD, vol 12, p 454; Wiremu Kātene, 7 October 1875, NZPD, vol 19, p 321.

183. Karaitiana Takamoana, 7 October 1875, NZPD, vol 19, p 320; Wiremu Kātene, 7 October 1875, NZPD, vol 19, p 321; Wi Parata, 7 October 1875, NZPD, vol 19, pp 321, 322; Karaitiana Takamoana, 15 September 1871, NZPD, vol 10, p 477.

not possible for Māori members to travel throughout their very large districts, let alone address all their issues or represent all tribes.[184]

Some prominent settler politicians (including Sir George Grey, who was then in opposition) appeared to be sympathetic to increased representation.[185] But many opposed any increase, fearing that Māori would somehow 'swamp' settlers in the House,[186] or upset the balance between the North and South Islands.[187] Some said existing representation was sufficient for Māori to air their grievances – an argument that suggested Māori enfranchisement was little more than a form of consultation, as distinct from a sincere attempt to provide Māori with fair representation or a meaningful share of power.[188]

Others said that Māori under-representation was fair because 'a large number [of Māori] repudiated the Queen's sovereignty',[189] or did not accept the colony's laws, or did not pay their fair share of the colony's taxation.[190] This argument ignored the very significant contributions Māori made to the colony's development through land and customs duties.[191] Some argued that Māori should not have increased representation because property-owning Māori could also vote in general electorates – a straw argument since this 'dual franchise' had also been available from the outset to settlers, some of whom voted in multiple electorates.[192]

Professor Keith Sorrenson, in his 1986 history of Māori representation in Parliament, wrote that Māori members were 'largely powerless' in the House. They sometimes held the balance of power when settler members were divided, and were able to exercise some influence through the Native Affairs Committee, but were outnumbered and their views ignored even on matters of vital interest to Māori, such as Native Land Acts. In his view, Māori representation was little more

184. Wiremu Kātene, 15 September 1871, NZPD, vol 10, pp 476–477. For speeches by other Māori members, see pp 474, 477; see also Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 593–594.

185. For examples, see Jerningham Wakefield, 15 September 1871, NZPD, vol 10, pp 472–473; Edward Stafford, 13 August 1872, NZPD, vol 12, p 455[Russell wanted the Bill thrown out]; Sir George Grey, 13 September 1876, NZPD, vol 22, p 240; Robert Stout, 13 September 1876, NZPD, vol 22, pp 233–234.

186. William Gisborne, 4 November 1879, NZPD, vol 33, p 20; Reader Wood, 4 November 1879, NZPD, vol 33, p 21; Seymour George, 4 November 1879, NZPD, vol 33, pp 80, 81; William Russell, 4 November 1879, NZPD, vol 33, pp 92–93.

187. William Swanson, 4 October 1872, NZPD, vol 13, p 562; 'Maori Representation Bill', 4 October 1872, NZPD, vol 13, p 566. South Island members were determined to preserve the island's numerical dominance over the North even though the North by this time had roughly the same total population.

188. Donald McLean, 15 September 1871, NZPD, vol 10, p 472; Donald McLean, 13 August 1872, NZPD, vol 12, p 450; William Fox, 15 September 1871, NZPD, vol 10, p 476.

189. William Fox, 15 September 1871, NZPD, vol 10, p 476.

190. John Hall, 12 August 1881, NZPD, vol 39, pp 471–472.

191. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 70, 82.

192. For examples, see William Buckland, 13 August 1872, NZPD, vol 12, p 454; William Reynolds, 13 August 1872, NZPD, vol 12, p 454; see also Legislative Council member Walter Mantell, 11 October 1872, NZPD, vol 13, pp 592–593.

than 'token' in a Parliament that was otherwise determined to acquire Māori land and Māori autonomy.[193]

Our view is that representation in Parliament gave Māori from this and other districts a voice in the colonial Legislature, but little more than a voice. For the period covered by this chapter, Māori representation was not equitable on a population basis. Nor was it sufficient to effectively protect Māori interests or treaty rights from the policies and actions of the settler majority. Nor, furthermore, was it sufficient to adequately represent all tribal interests in the Northern Maori electorate. We agree with Sorrenson that the inadequacy of Māori representation was a significant factor in Māori seeking a parliament of their own.[194]

11.3.2.3 *What was the Crown's response to Te Raki Māori proposals for local self-government?*

From his election in 1871, Wiremu Kātene pursued two major objectives: development of infrastructure in the north, in order to advance economic prosperity; and local self-government for northern Māori. In his first major speech, a translation of which appears in the *New Zealand Parliamentary Debates*, he joined with the Rodney member, Harry Farnall, to propose a £100,000 boost for roading and other public works north of Auckland. Kātene said the Government was borrowing vast sums of money from London and taking considerable customs duties from northern Māori, yet almost none of this funding was being spent in the region:

> If the neglect hitherto manifested towards these [northern] districts is to continue, I am not able to say what the consequences will be. The Ngapuhi are well known, and they will not be content to keep paying money while others derive all the benefits. Some of the Maori districts have been well treated and cared for by the Government, but the Ngapuhi, on the other hand, have protected the Europeans and also the Government, and all we get in return is the imposition of taxes.[195]

The Government responded by offering a much lesser sum than was sought, £40,000 over four years, while proposing that roads be funded by imposing rates on customary Māori lands. Kātene and other Māori members objected strongly to this proposal, which would inevitably have resulted in land loss; instead, they suggested that Māori might give lands or labour in return for roading.[196]

Later that month, Kātene moved a motion asking the Government to establish a system of local self-government for territories north of Auckland. Kātene's proposal was for a partnership body, comprising equal numbers of Māori and settlers,

193. Sorrenson, 'A History of Maori Representation in Parliament', pp B23, B26.
194. Sorrenson, 'A History of Maori Representation in Parliament', p B26.
195. Wiremu Kātene, 6 September 1871, NZPD, vol 10, p 256; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 956. Farnall, the Rodney member, estimated that Māori in the north paid annual customs duties of about £40,000, or £12 per head: Tom Bennion, *Maori and Rating Law*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997), p 7.
196. Wiremu Kātene, 12 September 1871, NZPD, vol 10, pp 362–363; see also pp 358–359, 476; Wiremu Kātene, 4 October 1871, NZPD, vol 11, pp 96, 105.

which would govern and administer regional or local affairs. The functions of this rūnanga would include gathering taxes; forming and repairing roads; fostering education; settling Māori–Māori and Māori–settler disputes; enforcing decisions made by the resident magistrate; and managing relationships between northern Māori and the colonial Government.[197]

Introducing the measure, Kātene said it would overcome Māori objections to the payment of rates and taxes, ensure that money raised was spent on local initiatives instead of being diverted to other parts of the colony, and require Māori and settlers to work together for mutual benefit. In a lucid explanation of the political realities of the day, Kātene pointed out that northern Māori could easily set up a rūnanga on their own, but its authority would not be respected except by the communities who had set it up. Passing a Bill would give it authority to enforce its decisions against settlers and Māori alike.[198]

Kātene's motion lapsed after Native Minister McLean proposed to 'assimilate' the proposed rūnanga into the existing system of local road boards.[199] In 1871, McLean introduced the Native Districts Roads Boards Bill, which applied to any part of the colony where Māori remained a majority of the population. It allowed the Governor to establish boards, comprising Māori and settlers, to manage local roading projects. The boards would receive some government funding but would also be empowered to impose rates on Māori lands, irrespective of whether those lands had passed through the Court.[200] There was initial confusion about the Act's intended effect on settlers' lands within any native roading district; however, the Attorney-General later confirmed that settlers' lands would continue to be subject to the existing local authority rating regime.[201]

While this was far less than Kātene had sought, it at least provided for Māori communities to exercise some measure of control over local rating and roading, when the alternative would mean subjecting Māori to settler-controlled roading boards. Effectively backed into a corner, Kātene voted for the legislation and attempted to persuade his people to support its implementation. The measure won little support from Te Raki Māori, who rightly saw it as an attempt to force them to pay more for public works when they were already paying – with little corresponding benefit – through customs duties, rates on land held under Crown grant, and sales of land to the Government at modest prices. Kātene told his constituents that he had sought a much more comprehensive measure for local self-government. Because of these reservations, Te Raki Māori made no attempt to bring the Act into force in their territories; nor did Māori in other districts show any enthusiasm. As a result, the Act was never used.[202]

197. Wiremu Kātene, 19 October 1871, NZPD, vol 11, p 427.
198. Wiremu Kātene, 19 October 1871, NZPD, vol 11, p 427.
199. Donald McLean, 19 October 1871, NZPD, vol 11, pp 427–428.
200. Native Districts Road Boards Act 1871, ss 3, 5(8).
201. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 960.
202. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 955–961. For Kātene's speech on the Bill, see Wiremu Kātene, 27 October 1871, NZPD, vol 11, pp 604–605; see also Bennion, *Maori and Rating Law*, pp 9–10.

The following year, 1872, was a time of instability in the colonial Parliament.[203] Premier William Fox, who had held office since 1869, resigned on 6 September. The new Government, led by Edward Stafford, lasted only a month before it was defeated by a ministry under the leadership of the legislative councillor, George Waterhouse. In turn, Waterhouse lasted only six months as Premier before he resigned and was replaced by Fox. For a brief period during September and October 1872, the votes of Māori members determined whether Governments survived or not. In order to win their votes, successive Premiers promised to return confiscated lands and increase Māori political influence.[204]

One result was that a long-discussed proposal to appoint two Māori members to the Legislative Council finally came to fruition in November 1872;[205] another, also in November, was that Wiremu Kātene was appointed to the Executive Council and so became New Zealand's first Māori Minister of the Crown. In December, the Western Maori member Wī Parata was also appointed to the Executive Council.[206] While neither held portfolios or sat in Cabinet, they were expected to advise Cabinet Ministers on Māori affairs and liaise with Māori communities, building support for government policies.[207]

A third result was the introduction of the Native Councils Bill 1872, which provided Māori communities with a significant measure of local self-government. In the House, McLean presented this Bill as a response to the considerable number of petitions and letters the Government had received from Māori around the country seeking greater control over their own affairs, particularly with respect to land. McLean noted that the Bill was likely to apply to 'two or three districts, where such Councils had been asked for by the people'.[208] McLean did not specify those districts, though other members referred to Wairarapa, the Central North Island, the East Coast, and Northland. Kātene told the House that this Bill was what he had been seeking when McLean had instead introduced the Native Districts Road Boards Bill.[209]

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203. 'Resignation of Ministers', 5 September 1872, NZPD, vol 13, p 156; 'Want of Confidence', 4 October 1872, NZPD, vol 13, p 579. McLean served as Native Minister in all of these ministries other than Stafford's.

204. Alan Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand* (Auckland: Auckland University Press, 1995), p 270; Sorrenson, 'A History of Maori Representation in Parliament', p B-23; *Evening Post*, 17 December 1872, p 2.

205. Sorrenson, 'A History of Maori Representation in Parliament', pp B23–B24. The Māori legislative councillors were Mōkena Kōhere (Ngāti Porou) and Wi Tako Ngātata (Te Āti Awa). Their appointments brought the total number of legislative councillors to 49. Thereafter, the council usually had two Māori members until it was abolished in 1950.

206. Ward, *A Show of Justice*, p 270; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 593; see also *Evening Post*, 17 December 1872, p 2; 'The General Assembly', *Southland Times*, 10 September 1872, p 2.

207. Bowen to Secretary of State for the Colonies, 6 November 1872 (Armstrong and Subasic document bank, doc A12(a), vol 7, p 2.322); Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 593.

208. Donald McLean, 22 October 1872, NZPD, vol 13, p 895.

209. Wiremu Kātene, 22 October 1872, NZPD, vol 13, p 897.

According to the historian Dr Vincent O'Malley, the establishment of native councils was consistent with McLean's general strategy of co-opting Māori institutions of self-government and bringing them into the fold of the colonial Government's authority wherever possible.[210] In Te Urewera, for example, he had recently concluded a peace agreement under which the Government recognised the right of Tūhoe and Ngāti Whare to manage their own affairs through a council of chiefs, Te Whitu Tekau.[211] As Dr O'Malley explained, the Government could not afford to ignore Māori institutions altogether if it wanted to bring Māori under the colony's laws; nor could it use active suppression without risking armed resistance. Co-option was the only remaining strategy, and 'had the benefit . . . of marshalling Maori institutions in aid of the assimilationist aim'.[212]

Under the Bill's provisions, in any territory where most people were Māori or most land was in Māori customary ownership, Māori could ask the Governor to establish a native district with a council comprising six to 12 elected Māori, a Māori president appointed by the Government, and the resident magistrate. The council would be empowered to investigate land titles, resolve land disputes, and make regulations covering matters such as public health and safety, sale of liquor, and livestock and animal control. The Bill did not provide for hapū control of land transactions but otherwise offered a significant step towards Government recognition of Māori rights to local self-government. In many respects, it provided for a system very much like Grey's 1860s rūnanga.[213]

It is significant, in our view, that this Bill emerged after Māori members had briefly held the balance of power. Under those rare circumstances, while they did not possess the numbers to push through legislation against the wishes of the settler majority, they did possess leverage that in the normal state of affairs was not available to them in the political system. Similar political circumstances would later contribute to the establishment of Maori Land Councils (section x11.5.3).

On this occasion, however, the legislation did not pass. The Māori members spoke in favour, and a significant proportion of settler members supported it. But there was also opposition from some members, who felt it would undermine the Native Land Court (McLean's view was that it would assist the Court) and grant Māori too much power over lands and settlement.[214] Kātene asked the objectors 'if it was for the Europeans alone to conduct Native affairs'; he proposed that Māori and Europeans should 'join together' for this purpose. This was another expression of his commitment to partnership, after his 1871 attempt to establish a joint settler–Māori rūnanga for Northland and his earlier proposal for Māori and settler assemblies able to review each other's legislative proposals.[215]

210. O'Malley, 'Runanga and Komiti' (doc E31), pp 93–94.
211. Waitangi Tribunal, *Te Urewera*, Wai 894, vol 2, p 870.
212. O'Malley, 'Runanga and Komiti' (doc E31), p 92.
213. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 888; O'Malley, 'Runanga and Komiti' (doc E31), p 94; Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, p 302.
214. O'Malley, 'Runanga and Komiti' (doc E31), pp 94–95; Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pt 2, pp 680–681.
215. Wiremu Kātene, 22 October 1872, NZPD, vol 13, p 897.

Seeing that the Bill did not have sufficient support, McLean withdrew it.[216] This was a significant blow to Māori leaders in this district and elsewhere. A few days afterwards, the Hokianga resident magistrate Spencer von Sturmer wrote to McLean saying there was 'a whisper going about amongst the people here, with reference to the "treaty of Waitangi", some change, or additional protection the people seem to want, but as they have said nothing definite I can only speak of it as a whisper'.[217]

In 1873, McLean introduced a new and watered-down Native Councils Bill, with fewer regulatory powers and a much more limited role over land title applications. McLean made it clear that this Bill was designed only for a few districts where the colonial Government had little or no practical authority:

> It was intended that this Bill should not apply to the north of Auckland, or to any districts where there were English Courts of law for settling disputes; but to such districts as those of the Urewera, Ngatiporou, and some parts of the Waikato. The Government desired to apply the measure, because in many of those districts the Natives had expressed a wish that some such law should be enacted, to enable them to take part in the management of their own affairs.[218]

Even this very limited measure was too much for many settler members. McLean again withdrew the Bill, saying he would make further modifications and bring it back in 1874. That did not happen, and for the rest of the decade the House did not consider any further proposals for Māori self-government at local or any other level.[219] The colonial Parliament did, however, pass Native Land Acts in 1873, 1874, 1877, and 1878, all intended to accelerate individualisation of customary Māori land title against Māori wishes. As we have discussed in the preceding chapters, the 1873 Act provided all those found by the Land Court to be owners in a block of land with individually held, tradeable shares, which contributed significantly to Māori land alienation in this district during the rest of the 1870s (see chapter 9, section 9.5.2, and chapter 10).[220]

Kātene's elevation to the Executive Council came at a price to him and Te Raki Māori. While he acquired some influence with Ministers, he was no longer free to speak out against government policies and was obliged instead to advocate on the Government's behalf amongst Māori. As a result, his constituents came to regard him as the Government's man, not their representative.[221] One of Kātene's last acts

216. O'Malley, 'Runanga and Komiti' (doc E31), p 95.
217. Von Sturmer to McLean, 27 October 1872 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 889).
218. McLean, 30 September 1873, NZPD, vol 15, p 1514.
219. O'Malley, 'Runanga and Komiti' (doc E31), pp 96–98; Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pt 2, pp 680–681.
220. Report on Petition of Maihi Paraone Kawiti and 269 others, 25 October 1876, AJHR, 1876, I-4, p 27 (Armstrong and Subasic document bank, doc A12(a), vol 8, p 2:492).
221. For examples of criticism of Kātene, see 'The General Elections', *Te Wananga*, 12 February 1876, p 79; 'Correspondence', *Te Wananga*, 12 February 1876, p 88.

during this term was to vote for abolition of provincial councils, which he blamed for the lack of spending on public works north of Auckland.[222] In 1876, he was defeated at the general election.[223]

In our view, Wiremu Kātene's proposal for local self-government north of Auckland was an important attempt to provide for the district's development in a manner that was consistent with the treaty relationship. Reflecting Te Raki Māori thinking at the time, it provided for Māori and settlers to work together in partnership through one institution. As Kātene explained, Māori would not object to rates and taxes if they had an effective voice in determining how those funds were used.

Kātene also recognised and clearly expressed that by this time, local self-government could only be fully effective if it was established by statute, and its decisions were therefore enforceable against settlers. His view reflected the shift in the colony's power balance since the late 1850s. When establishing institutions, Māori not only wanted Crown recognition as part of a functioning treaty partnership, but crucially by this time also *needed* Crown recognition in order for Māori institutions to operate effectively amid a growing settler population.

The Government clearly recognised that some form of local self-government was practicable at that time, and McLean responded with a series of legislative proposals offering Māori this in some degree. The Native Districts Roads Boards Act was a very limited response to Kātene's proposal. McLean's subsequent Native Councils Bills of 1872 to 1874 represented meaningful if limited attempts to provide for Māori rangatiratanga at a local level under the colonial Government's authority. On each occasion, Parliament missed an opportunity to recognise and provide for that local self-government.

The failure of these Bills, and the enactment of the Native Land Act 1873 and subsequent amendments, provided clear evidence for Te Raki Māori that Parliament was not willing to recognise their right of self-government or protect their interests. These events contributed to their loss of faith in Parliament and later calls for a national Māori legislature.

11.3.2.4 *What was the overall state of the treaty relationship between Te Raki Māori and the Crown by 1878?*

11.3.2.4.1 1868–75: A mutually beneficial partnership?

Notwithstanding the colonial Parliament's rejection of Kātene's efforts to establish self-government for the north, Te Raki leaders continued to pursue Crown recognition of their rights to tino rangatiratanga, and remained committed to a treaty relationship based on peace and mutual prosperity. During the 1870s, that mutual prosperity aspect remained elusive; Māori communities had some sources of income from gum digging and occasional road building projects, but otherwise

222. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 962–963.
223. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 595.

remained marginalised from the cash economy, while changes in land tenure undermined their efforts to develop land.[224]

During the early 1870s, McLean and other Government representatives visited the north regularly, and these hui provided Te Raki leaders with opportunities to express any grievances, including concerns about the district's lack of development, and to test the Crown's attitude to the treaty relationship. On these occasions, it was usual for rangatira to acknowledge their enduring relationship with the Queen, whom they continued to see as a protector in accordance with pre- and post-treaty arrangements. Typically, these sentiments were rendered in the settler press as expressions of loyalty, and in our view this was true in the sense that Te Raki leaders believed they had a personal relationship with the Queen.[225]

In March 1873, Ngāpuhi invited McLean and Governor Bowen to Waitangi for the unveiling of a memorial to the Hokianga leader Tāmati Waka Nene. Nene had been instrumental in establishing pre-treaty trading relationships, persuading Te Raki leaders to sign te Tiriti, and ensuring that the colonial Government survived the Northern War.[226] Bowen was coming to the end of his term and was reluctant to attend, but officials persuaded him, and so avoided what Ngāpuhi would have regarded as an insult.[227] The Governor stayed at the hui for a day, unveiling the memorial and praising Nene and Ngāpuhi for their 'unswerving loyalty'.[228]

McLean stayed on for the rest of the hui, where Te Raki leaders emphasised that the treaty was 'a solemn obligation binding on both sides':

> For 30 years the provisions of the Treaty of Waitangi had been respected, and as far as it was possible had been adhered to by the Ngapuhi and Rarawa tribes. They felt that this was an occasion, when so many of their young chiefs were growing up, to impress upon their minds the last solemn and dying injunctions of their chief and relative Tamati Waka, which were to preserve intact the terms of the treaty, and to live in perpetual friendship with the European people.[229]

Here, Te Raki leaders were reminding the Government's representatives that the treaty established a basis for Māori and Pākehā to live together in mutual benefit. They then made a series of requests of the colonial Government, seeking freedom from restrictions on sales of ammunition and liquor, the replacement of older native assessors with younger ones who were more familiar with English language and law, and government support for the establishment of schools, which (in the words of the *Daily Southern Cross*) would educate their children 'to become

224. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 41–43, 68–70.
225. For examples, see Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 896–901.
226. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 889–890.
227. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 889.
228. 'The Monument to Tamati Waka Nene', *Daily Southern Cross*, 20 March 1873, p 2; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 890.
229. 'Meetings of the Natives', *Daily Southern Cross*, 22 March 1873, p 3; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 890.

good subjects, and to take part in the administration of the public affairs of the country'.[230]

In an event that had tremendous significance to Ngāpuhi and particularly Ngāti Hine, Maihi Parāone Kawiti asked the Government to assume responsibility for the flagstaff on Maiki Hill. According to the same newspaper, Maihi Parāone said that his people had restored the flagstaff in 1858 as a symbol of reconciliation and a symbol of Māori commitment to live in peace with the Government and settlers. Māori had gone to 'some pains and trouble' to complete this restoration, and now asked the Government to accept the offering and 'clothe the flagstaff'.[231]

As Dr O'Malley explained, when the flagstaff had been restored in 1858, the Government had been 'desperate to avoid being seen to have any involvement . . . that might oblige it to defend Maiki Hill'. Even 12 years after the Northern War, it remained nervous about Ngāpuhi power – a nervousness that increased as the colony then became embroiled in war. The Government therefore ignored the flagstaff, allowing it and the flag upon it to fall into disrepair. Now Maihi Parāone was asking the Government to maintain the flagstaff in good condition – in essence, as a sign of respect – and in so doing to 'ensure that the mana of the flagstaff, and the mana of those who had made the momentous decision to erect it, were suitably acknowledged'.[232]

In our view, Maihi Parāone can also be seen as requesting that the Government pay closer attention to the treaty relationship and to its obligations within that relationship. Just as the Government had neglected the flag, it had also neglected the north. In the choice of issues raised, rangatira alluded to some of their concerns about the state of the partnership, such as discriminatory laws and exclusion from full participation in the colonial system of government.[233]

At that point, the full impacts of the Land Court and government land purchasing had not yet been felt, and Te Raki Māori continued to seek a partnership with the Government based on peace and mutual benefit, through which their district might be developed and play its full part in the colonial economy. Ngāpuhi at this time retained some faith in McLean and the colonial Government, but – as we will see – they were approaching a point where that faith would be sorely tested.

McLean, in response to Maihi Parāone, repeated earlier commitments to consult regularly with Te Raki leaders on matters of significance to them and the colony. He said that the country was now in a state of peace, and that a 'great step in advance' had been taken in Crown–Māori relations because Māori were now represented in Parliament and could express their wishes directly to the nation's

230. 'Meetings of the Natives', *Daily Southern Cross*, 22 March 1873, p 3; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 891.

231. 'Meetings of the Natives', *Daily Southern Cross*, 22 March 1873, p 3; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 891.

232. Vincent O'Malley, '"A Living Thing": The Whakakotahitanga Flagstaff and its Place in New Zealand History', *Journal of New Zealand Studies*, Victoria University of Wellington, 2009, no 8, pp 47–49.

233. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 890, 892.

leaders. He promised to ensure the flag was flown on ceremonial occasions and to look into the provision of teachers for schools.[234]

Several other events from the early 1870s underlined the sacredness of the treaty relationship to Ngāpuhi. In 1871, Ngāti Rangi opened a church, St Michael's, on the site of Ōhaeawai Pā where, a generation earlier, Ngāpuhi had inflicted a terrible military defeat on the British (see chapter 5). Ngāti Rangi leader Heta Te Haara established the church 'as a symbol of peace and a memorial to the valor of the troops'.[235] Some 400 metres from the church, 47 slain British soldiers lay buried where they had fallen on the battlefield. With permission from the Government, Ngāti Rangi disinterred them and moved their remains to the church's cemetery, which we visited during our inquiry. A burial service was conducted on 1 July 1872, and a memorial stone cross was erected: 'He Tohu Tapu tenei o Nga Hoia me nga Heramana o Te Kuini i hinga i te whawhai ki konei ki Ohaeawai i te tau o to tatou Ariki 1845. Ko tenei Urupa na nga Maori i whakatakoto i muri iho i te Maunga Rongo.' Heta Te Haara's grandson Te Waiohau Te Haara provided a translation: 'This is a sacred monument for the soldiers and the [sailors] of the Queen who fell in the battle here at Ohaeawai in the year of our Lord 1845. This cemetery was laid out by Maori after the restoration of peace.'[236]

Scholar Dr (now Professor) Merata Kawharu described a very different set of events which nonetheless also demonstrated Ngāpuhi commitment to keeping their side of the treaty bargain. At the time of the treaty, the principal chief at Waitangi was Te Kēmara of Ngāti Rāhiri and Ngāti Kawa. Other rangatira of that hapū included Marupō and Hōne Heke who had also signed te Tiriti, and later fought against the Crown during the Northern War. By the 1860s, leadership of the hapū had passed to a new generation, principally to Te Tane Haratua and Hemi Marupō, both of whom, over several decades, 'led initiatives that aimed to protect, promote and advocate for hapū mana'.[237]

During the 1860s, they were members of the Bay of Islands Rūnanga, where they worked with and alongside government officials in the administration of the district. In 1872, they opened the district's first native school at Oromāhoe on gifted land, reflecting the desire of Ngāpuhi leaders to ensure that their children were equipped to participate in the colonial economy and government. 'Broadly speaking,' said Professor Kawharu, 'the 1870s was still a time where Haratua and others throughout Ngāpuhi retained a degree of support for the Crown, the governor

234. 'Meetings of the Natives', *Daily Southern Cross*, 22 March 1873, p 3; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 891–892.

235. Waiohau Te Haara (doc H18), pp 4, 9–10.

236. Te Waiohau Te Haara (doc B17), paras 43–46; 'St Michael's Church – Ohaeawai', Ministry for Culture and Heritage, https://nzhistory.govt.nz/media/photo/st-michaels-church-ohaeawai, accessed 27 July 2020. Queen Victoria later wrote to the Governor expressing her appreciation to Ngāpuhi over the soldiers' re-burial: 'The Monument to Tamati Waka Nene', *Daily Southern Cross*, 20 March 1873, p 2.

237. Merata Kawharu (doc W10(a)), p 14; Mary Gillingham and Suzanne Woodley, 'Northland: Gifting of Lands' (doc A8), p 27.

and/or the Queen. They wanted to operate within the bounds of a kaupapa that was framed by mutuality and partnership.'[238]

Another example of how Te Raki leaders approached the treaty partnership can be found in their handling of conflict within Māori communities. As discussed in section 11.3.1, during the 1870s Māori communities became increasingly willing to place disputes before district courts and magistrates, their leaders having decided that this was a necessary step if they were to encourage settlement and commerce.[239]

The enduring Te Raki Māori desire for peace, partnership, and mutual prosperity was also evident when the Crown's representatives again visited the north during the mid-1870s, though by this time, as the Crown's land titling and purchasing programmes were accelerating, Māori leaders were showing some signs of frustration with the Crown. The new Governor, Sir James Fergusson, spent a few days in the district during June 1874, attending hui at Ōhaeawai, Hokianga, Mangonui, and Whangaroa.[240]

At Ōhaeawai, Te Haara acknowledged his people as living 'under the protection of our most gracious Queen'. Past conflicts had been buried at Maiki, and Ngāpuhi now wanted to live in peace and 'advance the prosperity of this island'. The treaty had been protected and its provisions 'should not be ignored', Māori and the Crown having become 'mutually engaged in maintaining [the Queen's protective] authority and her laws'.[241] In the 1880s and 1890s, Te Haara would become one of the leaders of the Kotahitanga movement which sought the establishment of a Māori parliament.

At Hokianga, Tāwhai (Te Māhurehure), Wiremu Tana Pāpāhia (Te Rarawa), and others welcomed the Governor before expressing numerous grievances about the Crown's laws and neglect of the district. Specifically, they were unhappy with the Native Land Act 1873, and wanted schools, roads, a doctor, a jail so they could enforce the colony's laws, and an increase in European settlement. If they wanted more settlement, the Governor responded, they should sell more land. As Armstrong and Subasic noted, this rather missed the point: before Māori communities could attract settlers, they needed roads and bridges. At Mangonui, rangatira also sought Crown investment in roads and schools. In January 1875, when McLean visited the Bay of Islands, Mangonui, and Whangaroa, the same topics were raised.[242]

By this time, partly due to Kātene's influence, spending on public works was accelerating. A June 1875 return shows almost £10,000 in expenditure on northern roads in the preceding year, including links from Whāngārei to the Bay of Islands,

238. Merata Kawharu (doc w10(a)), p 14.

239. Armstrong and Subasic, 'Northern Land and Politics' (doc a12), pp 920–922; see also pp 912–918 for examples of Māori non-compliance with colonial laws during the early 1870s.

240. Heta Te Haara and others to Governor Fergusson, 18 May 1874 (Armstrong and Subasic document bank, doc a12(a), vol 10, pp 2:1709–2:1711).

241. Heta Te Haara and others to Governor Fergusson, 18 May 1874 (Armstrong and Subasic document bank, doc a12(a), vol 10, pp 2:1709–2:1711).

242. Armstrong and Subasic, 'Northern Land and Politics' (doc a12), pp 894–896.

and on to Hokianga and Mangonui.[243] This was far less than Kātene had sought, but was nonetheless a marked increase from 1872, when spending in the district totalled £765.[244] Substantial progress had also been made on a telegraph line from Kaipara to the Bay of Islands; indeed, this was the largest telegraph project in the country at the time.[245]

Road building provided temporary employment opportunities for Māori communities and opened up connections between settlements.[246] But the benefits were offset by other developments. Timber and gum, previously the dominant sources of employment for northern Māori, had been in decline after 1870.[247] Attempts to establish other industries, such as inshore whaling, flax dressing, and flour milling, were hampered by lack of access to development capital.[248]

Most significantly, Māori communities were increasingly feeling the harmful effects of Native Land Court hearings. As discussed in chapter 9, those included hefty survey and court fees; costs of food and lodgings during lengthy court hearings; lost income from other ventures; and increased conflict among Māori communities as unresolved disputes were brought into the foreground.[249] Even more importantly, the Crown's system for recording ownership of and titling Māori land (as set out in the Native Land Act 1865 and the Native Lands Act 1873) undermined community authority, made land development all but impossible, and contributed to significant land alienation.[250] Several hundred thousand acres of Te Raki land passed through the Court in the decade after 1865 (see chapter 9),[251] and this opened the way for an acceleration in the Government's land purchasing.

In late 1876, shortly before his death in January 1877, McLean acknowledged that the Government had achieved its policy objectives for the north. It had purchased large areas of Māori land in the preceding few years.[252] Most of the remaining land, in his view, was either owned under Crown-derived title or was before the Court awaiting title; and as a result of these developments, McLean regarded Māori assimilation as already well advanced. As he put it, 'the time has arrived when the Ngapuhi and Rarawa tribes may be considered as upon an equal footing with the Europeans'. McLean's view however, was that the Crown should stop purchasing Māori land in the district, since any further sales would deny Māori

243. Public Works Statement, AJHR, 1875, E-3, p 13; see also Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 964–966.
244. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 962.
245. Public Works Statement, AJHR, 1875, E-3, p 27; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 932.
246. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 966–969.
247. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 924–927, 935.
248. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 935–936, 939–940.
249. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 52–56, 79, 912, 950.
250. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 807–811.
251. Thomas, 'The Native Land Court in Te Paparahi o Te Raki' (doc A68), p 21; statement 1.3.2(c).
252. Dr Barry Rigby noted that, within the district, the Crown acquired 294,753 acres between 1875 and 1876: 'Validation Review: Crown Purchases, 1866–1900' (doc A56), p 4, app A.

communities sufficient land to play a full part in the developing economy. The district, in other words, had reached a tipping point.[253]

In sum, the mid-1870s was a watershed for Te Raki Māori in their approach to the treaty relationship. From the 1850s through to the 1870s, they had pursued partnership with the colonial Government under the Queen's mana in the hope of advancing economic development and fulfilling the original treaty goals: peace and prosperity for Māori and settlers alike. The colonial Parliament and Government had responded with laws that undermined Māori autonomy, undermined development, and enabled land alienation. From this point, Te Raki Māori began to pursue a different approach to the treaty partnership.

11.3.2.4.2 1875–78: Did Te Raki Māori begin to lose faith in the Crown?

From the mid-1870s, as the impacts of the Land Court and government land purchasing were being felt, Ngāpuhi leaders became increasingly vocal about their rights under the treaty and the harm they believed had been done by the colonial Government's laws and policies. In 1874, Hōne Mohi Tāwhai and others petitioned the House seeking the repeal of the Native Land Act 1873. Further petitions were sent later that decade: in 1876 by Hirini Taiwhanga, Maihi Parāone Kawiti, and others; and in 1877 again by Tāwhai.[254] The latter sought repeal of existing Native Land Acts; an end to Crown purchasing; replacement of the new Native Minister, John Sheehan; and establishment of 'clear laws, which will result in the union of the two races'.[255]

In the absence of any Crown-sanctioned local rūnanga, Te Raki Māori attempted to find other ways to exercise local self-determination. In Hokianga, the abolition of provincial councils and establishment of counties in 1876 provided an opportunity for Māori to influence decisions over public works.[256] Under the Counties Act 1876, the franchise was based on ownership of rateable property under Crown grant, so Māori owning land under customary title were excluded.[257] When elections were held in 1876, most of the northern county councils were dominated by settlers. The exception was Hokianga, where Tāwhai and other rangatira held sufficient land under Crown grant to influence the election, forming a majority on the council as a whole and dominating two of its ridings.[258] More Māori were elected in 1878, including Hapakuku Moetara and Wharerau.[259]

253. Donald McLean, Statement Relative to Land Purchases, North Island, AJHR, 1876, G-10, p 1 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 668).

254. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 695–696, 861, 865, 867.

255. Maihi P Kawiti and 269 others, petition, AJHR, 1876, I-4, p 27 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 863) .

256. In the north, counties were established for Mangonui (including Whangaroa), Bay of Islands, Hokianga, Whangarei, and Rodney: Stirling, 'Eating Away at the Land, Eating Away at the People' (doc A15), p 18.

257. Counties Act 1876, ss 40–41; editorial, *Waikato Times*, 14 November 1876, p 2.

258. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 598; 'County Elections', *New Zealand Herald*, 20 January 1877, p 1 (supplement); see Thomas, 'The Native Land Court in Te Paparahi o Te Raki' (doc A68), app D, p 277.

259. Stirling, 'Eating Away at the Land, Eating Away at the People' (doc A15), pp 187–188.

Settlers were outraged, claiming that they were being 'taxed by non-ratepayers'.[260] Local officials also objected; Judge Maning of the Native Land Court wrote that 'the cannibal element' had taken over the council, turning the world 'clean upside down'.[261] There was similar outrage over Māori influence in the Mangonui-Bay of Islands general electorate at the 1876 and 1879 elections.[262] Officials therefore worked to diminish Māori influence. First, where road boards existed, their chairmen refused to give election officials the names of Māori qualified to vote. Secondly, the local registrar Edward Williams systematically removed Māori from the electoral roll, claiming that they did not meet the property qualification as their lands were collectively owned. This decision was later upheld by an official inquiry led by the Whanganui member of the House, John Bryce, who opposed the Māori franchise. Bryce also found the registrar had a conflict of interest since his brother was an election candidate. By the early 1880s, none of the northern councils had Māori representatives.[263]

At around this time, in the Hokianga and elsewhere, Te Raki leaders began to develop local committees to maintain order, manage relationships with the Crown's officials and legal system, and arrange land titles before the formal involvement of the Court. We introduced these matters in chapter 9 but return to them here. Hirini Taiwhanga, Hōne Mohi Tāwhai, Maihi Parāone, and numerous others were instrumental in this movement.[264]

In 1874, Maihi Parāone established Te Rohe Pōtae o Ngāti Hine over Ngāti Hine territories, extending from Waiōmio in the north to Mōtatau and Hikurangi in the south. According to historian Paul Thomas, the 'area was under [Maihi Parāone] Kawiti's overall authority and was divided into four sections with each section controlled by a group of representatives who held the land on behalf of larger groups of people'.[265]

Maihi Parāone informed the Crown, settlers, and other Māori 'about the boundaries of the Rohe Potae and its guiding principles'.[266] Within Te Rohe Pōtae o Ngāti Hine, the Native Land Court was prohibited, as were surveys and land sales.[267] Maihi Parāone allowed settlers and settler industries into this territory through a series of carefully controlled leases, and also developed Māori-run gum-digging, timber, flax, and flour-milling businesses, using the proceeds for community

260. 'A Semi-Maori County Council', *New Zealand Herald*, 15 January 1877, p 5; Stirling, 'Eating Away at the Land, Eating Away at the People' (doc A15), p 187.

261. Maning to von Sturmer, 27 December 1876 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 598).

262. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 597–598.

263. Stirling, 'Eating Away at the Land, Eating Away at the People' (doc A15), pp 188–190; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 596–598, 601.

264. O'Malley, 'Runanga and Komiti' (doc E31), p 181, see also p 99; Thomas, 'The Native Land Court in Te Paparahi o Te Raki' (doc A68), p 175.

265. Thomas, 'The Native Land Court in Te Paparahi o Te Raki' (doc A68), p 175.

266. Thomas, 'The Native Land Court in Te Paparahi o Te Raki' (doc A68), p 175.

267. Peter Clayworth, 'A History of the Motatau Blocks c 1880–c 1980' (commissioned research report, Wellington: Waitangi Tribunal, 2016) (doc A65), p 53.

projects.[268] Ngāti Hine's evidence was that 'Te Rohe Potae o Ngati Hine . . . served to deter the Government from trespassing on Maori land'.[269]

In 1876, Maihi Parāone established Te Rūnanga o Ngāti Hine, a tribal governance structure to provide leadership and protect Ngāti Hine autonomy within Te Rohe Pōtae o Ngāti Hine. As Ngāti Hine witness Pita Tipene described, Maihi Parāone 'saw that tribal structures were breaking down', and so he established structures that ensured 'cohesion and enhancement of tribal authority'.[270] Te Rūnanga not only provided leadership for Ngāti Hine but also acted to 'whakaoti rarurarū' (which we translate as 'resolve conflict'). In that sense, Mr Tipene said, it was 'like a court that provided a public forum where justice was provided within the tribe'.[271] Ngāti Hine enacted its own tribal laws, requiring offenders to pay fines to Maihi Parāone, the kaiwhakawā (judge).[272] Maihi Parāone threatened to prosecute Europeans who entered the territory without authorisation.[273] Ngāti Hine claimants told us that

> Maihi was consistently trying to maintain peace and work with the Crown, however in doing so he consistently sought to maintain rangatiratanga over our people, affairs and land. He continued [to] demand that Ngati Hine be allowed to live in accordance with our own tikanga and law, and he did not see that the Pakeha law had dominance over Ngati Hine.[274]

As well as establishing Te Rūnanga, Maihi Parāone opened a large hall at Taumārere, which he built as a courthouse (for both Māori and settler law), and as a parliament or place of governance where the Rūnanga could meet.[275] The house was called Te Porowini o Ngati Hine (The Province of Ngāti Hine), the name reflecting Maihi Parāone's decision that Ngāti Hine would forge their own self-governing path, one that acknowledged the Queen's mana but was independent of the colonial authorities and also the rest of Ngāpuhi.[276]

As we discussed in chapter 7 (see section 7.4.2.1), after his visit to the Bay of Islands in 1858, Governor Gore Browne had given Maihi Parāone a seal, with the handle in the shape of Queen Victoria's hand. According to the claimant Richard Dargaville, 'provincial seals' were also given to Pōmare II and Te Tirarau. To the

268. Thomas, 'The Native Land Court in Te Paparahi o Te Raki' (doc A68), p 175; Clayworth, 'A History of the Motatau Blocks c 1880–c 1980' (doc A65), pp 49–50.
269. Ngāti Hine, evidence (doc M24), p 53.
270. Pita Tipene (doc AA82), p 8.
271. Pita Tipene (doc AA82), p 11.
272. Ngāti Hine, evidence (doc M24), pp 53, 124; see also Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1346–1348.
273. Ngāti Hine, evidence (doc M24), p 52.
274. Ngāti Hine, evidence (doc M24), p 114.
275. Richard Dargaville (doc P40), paras 12–13; Pita Tipene, doc AA82, p 8.
276. Ngāti Hine, evidence (doc M24), pp 49–50, 52–53, 124. Also see 'The Kawakawa Hall', *New Zealand Herald*, 3 April 1876, p 3. Maihi opened the hall with a public meeting attended by settlers and Māori. A Union Jack flew in the hall, and Maihi was reported as acknowledging the Queen as sovereign, though we do not know what he said in Māori.

rangatira, the seals were symbols of their tino rangatiratanga and their unity with the Queen under the treaty.[277] Maihi Parāone brought his back to Taumārere and subsequently placed it in Te Porowini.[278] A later Governor, Sir George Phipps (the Marquess of Normanby), visited Te Porowini in 1876 and commended it as an example of a Ngāti Hine desire 'to assimilate your mode of life to that of the Europeans', and to 'foster harmony and good feeling between the two races'.[279]

During his tour, Normanby also visited Te Tii Waitangi, where a temporary nīkau whare rūnanga – called Te Tiriti o Waitangi – had just been opened. During the hui, rangatira reminded the Governor that their forebears had gathered at Te Tii to debate the treaty, and that the treaty relationship extended back further to exchanges between northern rangatira and the monarchs King George IV and King William IV. Rangatira expressed their enduring wish for Māori and settlers to live in peace and unity under the treaty, and the Governor expressed his pleasure that Māori were willing to 'fully confirm and ratify the acts of their forefathers'.[280]

As Armstrong and Subasic noted, Te Raki Māori were waiting for the Governor also to 'confirm and ratify' the treaty. Indeed, in our view, the rangatira intended to emphasise the continuity between pre-treaty and post-treaty times – including (as discussed in our stage 1 report) the Te Whakaminenga tradition of Ngāpuhi collective leadership, and the pre-treaty tradition of trade, mutual protection, and alliance between Te Raki rangatira and the Crown.[281]

Ihaka Hakuene told the Governor he intended to build a new wooden wharenui at Te Tii, which he would 'set aside . . . as a meeting-place for Ngapuhi for ever and ever'. Once the Governor had departed, rangatira discussed business matters with McLean, raising their by now recurring concerns about ammunition, schools, roads, land disputes, and the desire for settlement. Normanby also visited Mangonui and Whangaroa.[282]

The construction of these new whare rūnanga suggests a growing determination by Hakuene and others to bring renewed focus to the treaty and Māori rights to self-government. Over the subsequent years, Ngāpuhi leaders would build this site as (in the words of historian Dame Claudia Orange) 'a centre for inter-tribal discussions on treaty-related matters'.[283] Among other things, it would become a centre for Ngāpuhi tribal self-government (section 11.4.5), and for the intertribal Waitangi and Kotahitanga parliaments during the 1880s and 1890s respectively (sections 11.4.2 and 11.5.1).[284]

277. Erima Henare, transcript 4.1.4, Te Whitiora Marae, p 124.
278. Richard Dargaville (doc P40), paras 12–13.
279. 'Northern Tour of His Excellency The Governor', *Daily Southern Cross*, 18 May 1876, p 3.
280. 'The Native Welcome', *Daily Southern Cross*, 13 May 1876, p 3.
281. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 897–898.
282. 'The Native Welcome', *Daily Southern Cross*, 13 May 1876, p 3; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 897–898, 900.
283. Orange, *The Treaty of Waitangi*, pp 196–197.
284. Orange, *The Treaty of Waitangi*, pp 221–222; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1010, 1276.

In March 1878, Native Minister Sheehan attended a large hui at Kaikohe. There, according to a letter subsequently published in *Te Wananga*, Ngāpuhi and Te Rarawa rangatira asked the Government

> to look into all matters connected with our lands which were dealt with by the laws of the years 1873 and 1874, in respect of the bungling which was enacted by these laws of 1873 and 1874 of the old Government, which Government was conservative, exclusive, and injurious, and which is not now in power.

The rangatira saw these 'injurious' laws as a reflection on the colony's constitution, under which a settler-dominated Legislature made laws for Māori, and 'obstructing Governments' administered the country. They asked that all Bills be translated and circulated among Māori before any debate in Parliament. They also asked for the Māori electorates to be replaced with a new parliamentary system in which there would be an upper house, a house of representatives 'for English only', and another house of representatives 'for Maoris only':

> If such were the constitution of the Parliament of New Zealand we then should know that the Europeans and the Maoris were each concerned in devising and passing laws for all. And we, the Maori people, should also know that we were not to bear the heavy part of the burden laid on by the laws . . .[285]

This resembled Wiremu Kātene's 1870 proposal (section 11.3) for a Māori assembly sitting alongside the colonial Parliament, with each able to review the other's legislation. In Kātene's proposal, the rangatira did not mention any upper house; we presume that would have remained, and the system as a whole would operate under the Queen's protection in accordance with Te Raki Māori understanding of the treaty.

By this time, the settler population had overtaken that of Māori in the north. The distribution was however uneven, with Māori continuing to outnumber settlers by a considerable margin in the Hokianga county, and by a small margin in the Bay of Islands and Mangonui-Whangaroa, while being outnumbered in Whāngārei, Hobson (which covered northern Kaipara), and other counties. Settlers heavily outnumbered Māori in the country as a whole (see appendix 11.III). As this influx continued, the rangatira said, 'there is not any law by which the Maori can hold his place with the Europeans in the land'. If the change was not made, it would be 'in vain that the Maori people vote Maori members into the European House', and 'useless for Natives to send petitions in days to come to the House of Parliament as now constituted'.[286]

285. Correspondence, *Te Wananga*, 3 August 1878, p 390; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 900–901.

286. Correspondence, *Te Wananga*, 3 August 1878, p 390; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 900–901.

This letter from Ngāpuhi and Te Rarawa rangatira was significant because it was a call for a national Māori legislature, and also because the rangatira drew an explicit link between mass, Crown-funded immigration and the loss of Māori authority. Largely because of assisted immigration, during the 1870s the national settler population almost doubled over the course of the decade, and more than doubled in the Auckland Province.[287] Sheehan's response to the letter is not recorded.[288]

Te Raki Māori frustration with the colonial Parliament is likely to have been exacerbated by the fraught relationship between some Ngāpuhi rangatira and the member for Northern Maori from 1876 to 1879, Hori Karaka Tawhiti (Te Ihutai), who became a Minister of the Crown and was regularly accused of voting against the tribe's wishes.[289] When Tawhiti was elected, McLean actively courted his support, providing passage and accommodation during his journey to Wellington. Tawhiti was then appointed as a Minister in the Executive Council, against the wishes of a majority of Ngāpuhi leaders, who wanted him to oppose the Government. In August, they raised funds to send Hirini Taiwhanga to Wellington so he could check that Tawhiti was voting according to Ngāpuhi wishes.[290] When the Government fell in 1878, Ngāpuhi leaders sent Tawhiti a telegram urging him to support the rival Government led by Sir George Grey.[291]

In April 1878, Governor Phipps again visited Hokianga and the Bay of Islands, but in contrast to previous visits, there was very little ceremony and only a few short speeches.[292] Sheehan then visited Hokianga in May. The *New Zealand Herald* gave a brief account, noting that Hōne Mohi Tāwhai complained that the district

287. New Zealand Census 1871; New Zealand Census 1881; Jock Phillips, 'History of immigration – The great migration: 1871 to 1885', Te Ara – the Encyclopedia of New Zealand, accessed 16 February 2022.

288. Correspondence, *Te Wananga*, 3 August 1878, p 390; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 900–901. The Government had spent £447,000 on State-funded immigration during 1875, about $65 million in today's terms: Manuka Henare, Hazel Petrie, and Adrienne Puckey, '"He Whenua Rangatira" – Northern Tribal Landscape Overview' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2009) (doc A37), p 480.

289. 'Hori Karaka Tawiti', *Te Wananga*, 12 August 1876, p 294 (Armstrong and Subasic document bank, doc A12(a), vol 10, p 2:1649); Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 595; see also 'Native Land Court Bill', 7 August 1877, NZPD, vol 24, p 258; Hori Karaka Tawhiti, 30 October 1877, NZPD, vol 26, p 585. Tawhiti's father was the Pākehā shipbuilder David Clark, and his mother was Parehuia, the daughter of Te Ihutai rangatira Te Wharepapa: Manuka Henare (doc O20), p 40 n

290. 'Hori Karaka Tawiti', *Te Wananga*, 12 August 1876, p 294 (Armstrong and Subasic document bank, doc A12(a), vol 10, p 2:1649); Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 595; 'Native Land Court Bill', 7 August 1877, NZPD, vol 24, p 258.

291. Hori Karaka Tawhiti, 30 October 1877, NZPD, vol 26, p 585. In his early speeches, Tawhiti acknowledged that Māori had many grievances against the Crown, but blamed others – the provincial government, or Crown purchasing agents – not the Government. After Grey became Premier, Tawhiti became more outspoken, insisting that Māori be consulted on matters affecting them, in particular about land laws, and be strongly opposed to attempts to reduce Māori electoral rights (regarding land, see 'Native Land Sales Suspension Bill', 16 October 1877, NZPD, vol 26, p 315; 21 October 1878, NZPD, vol 30, p 968; regarding electoral rights, see 'Electoral Bill', NZPD, 25 October 1878, vol 30, p 1111).

292. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 901.

had been 'so long utterly neglected'. The newspaper also reported that Sheehan 'gave audience to all natives who had requests to make or grievances to be righted, and their name was legion'. No further details were recorded.[293]

By this time, Te Raki Māori were increasingly focused on securing their rights under the treaty and on developing autonomous institutions at local and inter-tribal levels. While they continued to engage with the colonial authorities, they concentrated more and more on freedom from colonial law and securing recognition of their article 2 right of self-government. We will consider those developments in section 11.4.[294]

11.3.3 Conclusions and treaty findings

Under article 2, Te Raki Māori were guaranteed the exercise of tino rangatiratanga and the right of autonomous self-government in their social, spiritual, economic, environmental, and political affairs. They had rights to conduct their own affairs in accordance with tikanga: to control and manage their resources, to make collective decisions and resolve internal disputes in accordance with their own values, to manage external relationships including their relationships with the Crown and settlers, and to determine their own institutional structures. They also had a right to representative self-government on the same basis as settlers, in accordance with article 3 of the treaty. The Crown was obliged to recognise and respect Māori rights of tino rangatiratanga and self-government, and in particular, to provide legal recognition for institutional arrangements that supported Māori autonomy and self-government. Where settler interests were affected, the Crown could negotiate with Māori communities, but it could not override their wishes or impose institutional arrangements without their consent.

During this period, Te Raki leaders advanced several institutional models for Māori decision-making. They advocated for equal or at least substantially increased representation in Parliament, for a parallel Māori parliament that could operate alongside the colonial Parliament as part of a single Legislature, and for the establishment of self-governing rūnanga in this district. The Crown provided for limited and inadequate Māori representation in the colony's legislature, while rejecting Māori calls to recognise and support Māori institutions of self-government.

11.3.3.1 *Parliamentary representation of Te Raki Māori*

The Maori Representation Act was initially intended as a temporary arrangement, and provided for Māori to have four representatives – far fewer than they were entitled to on a population basis. The number was not determined by any principle but by political negotiations over the balance between South and North Islands

293. 'The Native Minister's Visit to the North', *New Zealand Herald*, 24 June 1878, p 3 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 902).

294. See Orange, The Treaty of Waitangi, pp 189–191; Dr Merata Kawharu, 'Te Tiriti and its Northern Context' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2008) (doc A20), pp 264–265.

representation. This was a clear example of the colonial Parliament placing settler concerns above Māori rights. There was no consultation with Māori in this district or elsewhere about the establishment of Māori electorates, or about the number or location of those electorates. This was despite the fact that Parliament had earlier recognised the principle, in the Native Commission Act 1865, that Maori leaders should be invited to form a standing commission, including only a small number of Pākehā, which could consider and report to the Governor and the General Assembly on the best way to enfranchise Māori so that they might enjoy 'equal political rights' with other subjects of Her Majesty. It is significant that this promising initiative, which might have led to real dialogue between rangatira and Parliament on the proposed Māori seats, did not come to fruition. Furthermore, no provision was made for Māori to be represented in the Executive or the upper house (the Legislative Council).

By excluding women from the franchise, the New Zealand Constitution Act 1852 and the Maori Representation Act 1867 imported the formal gendered constraints placed on women in British public life. The historians Drs Manuka Henare, Hazel Petrie, and Adrienne Puckey argued these restrictions were 'contrary to the customary political systems in Te Taitokerau', where the position accorded to Te Raki Māori women was 'vastly different' from that recognised in nineteenth-century British law.[295] They pointed to '[a] number of examples from oral tradition and more recent history [that] indicate that far from being merely the passive recipients of respect, women from Te Taitokerau behaved as rangatira in their own right and took active leadership roles.'[296] As such, while the restrictions on the franchise were no greater for Māori women than Pākehā women, for Māori women these restrictions arose from a culture alien to their own. Alongside being culturally inappropriate, the exclusion of Māori women from public life and politics within the colony's system infringed on their ability to exercise their rangatiratanga and meant they 'encountered new risks' in exercising their customary rights and obligations.[297]

The treaty did not entitle the Crown to impose institutional arrangements on Māori without their consent. In this respect, the Crown clearly failed, as Māori from this district made clear in their initial responses to the new electorates. The Crown was obliged to ensure that Māori were represented in a manner that was fair and equitable (among themselves, and as between themselves and settlers), and sufficient to ensure that colonial law makers could not interfere with the tino rangatiratanga of Māori communities. The initial, temporary allocation of four Māori representatives was by no means equitable; settler politicians did not intend it to be. Initial Māori reaction suggested that they did not believe the Māori electorates would be sufficient to adequately represent all northern tribes, or to protect their interests from harm by settler politicians.

295. Henare, Petrie and Puckey, 'He Whenua Rangatira' (doc A37), pp 235, 510.
296. Henare, Petrie and Puckey, 'He Whenua Rangatira' (doc A37), p 234.
297. Henare, Petrie and Puckey, 'He Whenua Rangatira' (doc A37), p 510.

With respect to representation in the colonial Parliament, the Crown had two related obligations: first, to provide for fair and equitable Māori representation in comparison with the settler population; and secondly, to provide for representation sufficient to protect their treaty-guaranteed rights and interests, including the guarantee of tino rangatiratanga, from the actions of the settler majority. We have already found (in chapter 7) that Māori representation was not equitable on a population basis in 1867 when the Māori seats were established. As we noted, Māori would have been entitled to between 12 and 14 electorates at that time if Māori electorates had been allocated on the same population basis (see appendix 11.111). Although the settler population grew rapidly during the 1870s, Māori were still significantly under-represented throughout the decade. By our calculations, on a population basis they were entitled to 10 electorates at the time of the 1874 census on an overall population basis (see appendix 11.111).

On several occasions during the 1860s, Te Raki Māori expressed their dissatisfaction with Māori representation in Parliament and advocated for Māori and settler representation to be equal. In their view, if they were to be involved in the colony's law-making, it should be on a partnership basis.[298] In 1869, Wiremu Kātene and other Te Raki rangatira called for the establishment of a Māori legislature, and for the establishment of a system under which Māori and settler legislatures would submit laws to each other for approval.[299] In 1878, Te Raki leaders again called for a Māori legislature, reasoning that it was 'in vain' for Māori to send members to a settler-dominated Legislature and 'useless' for them to send petitions.[300]

During the period under consideration, the Crown did not actively entertain any proposal for a separate Māori legislature, or for Māori equality within the existing Parliament. It did on several occasions consider increasing the number of Māori electorates in the House of Representatives, and sometimes it came close to passing legislation to that effect. As discussed in section 11.3.1, Māori members introduced Bills to increase representation in 1871, 1872, 1875, and 1876. During this decade, Māori from around the country also sent numerous petitions supporting an increase. In 1872, the House of Representatives voted to increase the number of Māori electorates to five, but the Legislative Council rejected the measure.[301] In 1876, the Māori electorates became permanent without any increase in representation. The Crown increased Māori representation only once during this period, by adding two Māori members to the Legislative Council, where they formed a tiny minority of the council's 49 members.

During debates on this issue, Māori members consistently argued that they were under-represented and that they were too few to have meaningful influence on legislation affecting their people. As we will see, these arguments continued

298. For examples, see Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 582, 585–586, 588–589.

299. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 588–589.

300. Correspondence, *Te Wananga*, 3 August 1878, p 390; Armstrong and Subasic, 'Northernd Land and Politics' (doc A12), pp 900–901.

301. William Swanson, 4 October 1872, NZPD, vol 13, p 562; 'Maori Representation Bill', 4 October 1872, NZPD, vol 13, p 566; 'Maori Representation Bill', 14 October 1872, NZPD, vol 13, p 636.

well into the next decade. We note that the Crown did not address this aspect of Māori political activity in their submissions in our inquiry.[302]

A fact that should not be lost sight of is that many settler members were sympathetic to these views. But others opposed any increase in representation, usually for reasons that were at best paternalistic, self-interested, or racist. At various times, opponents of equitable representation claimed that Māori were not sufficiently educated, civilised, or loyal to deserve fair representation; or that they did not make sufficient financial contribution to the colony, notwithstanding the vast tracts of Māori land that were already in Crown possession by the 1870s. Sometimes, settler members objected on grounds that increased Māori representation would also mean increased North Island representation, as if Māori rights were contingent on the population balance between the islands. Often, settler members expressed overt fear that equitable Māori representation would 'swamp' or diminish settler influence.

Whatever the views of individual settler members of the Legislature, the Crown's treaty obligation was to provide a system that was fair and equitable, and that protected Māori rights and interests from the settler majority. As we found in chapter 7, four Māori representatives were not sufficient to represent the diverse interests of all New Zealand hapū and iwi, let alone exercise enough power to protect the tino rangatiratanga of New Zealand's Māori from the impacts of policies favoured by the settler majority.

Representation provided Māori with a voice in the colonial Parliament but (at least in the absence of other constitutional safeguards) inadequate protection for treaty rights. Te Raki leaders raised this issue at the first election in 1868, and on several occasions in Parliament. The reality was that the colonial Government did not intend Māori members to exercise significant influence over the colony, only to bring Māori views and grievances to Parliament's attention. As Wiremu Kātene experienced, Māori could lobby other members to exercise some influence over budget or policy decisions, but could not force the settler majority to accept Māori rights of autonomy and self-government, or prevent the enaction of legislation that undermined tino rangatiratanga. Hence, some Te Raki Māori regarded parliamentary representation as 'useless'.[303]

It is not clear what proportion of Māori representatives, if any, would have ensured that the colonial Parliament always made decisions that were consistent with its upholding of tino rangatiratanga, and we presume that is why Te Raki leaders sought recognition of alternative models under which a separate Māori assembly could share in the making of laws. In later decades, Te Raki leaders would turn these ideas into tangible legislative proposals, which we will consider later. For now, it is sufficient to observe that one Māori member could not adequately represent the diverse hapū and tribal interests of Te Raki, or protect tino rangatiratanga from the decisions of the settler majority in Parliament. Moreover,

302. Crown closing submissions (#3.3.402), pp 116–118, 166.

303. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 585–586; see also pp 900–901.

the Crown turned down multiple opportunities to at least partially address this issue by increasing representation.

Accordingly, we find that:

- By providing for Māori representation in the House of Representatives through the Maori Representation Act 1867 without first engaging with Te Raki Māori, and in particular without seeking their input on the number and size of electorates, the Crown breached te mātāpono o te kāwanatanga me to mātāpono o te houruatanga/the principle of partnership.
- By effectively denying the great majority of Māori representation in the General Assembly, and then providing for the election of only four Māori members to the House, including only one for all northern Māori, when they were entitled to between 12 and 14 on a population basis in 1867, the Crown breached te mātāpono o te kāwanatanga me te mātāpono o te mana taurite/the principle of equity. The Crown also breached this principle by failing to ensure that Māori were represented in the Legislative Council and in provincial assemblies (the Auckland Provincial Council in the case of Te Raki Māori).
- By rejecting legislative proposals to increase Māori representation during 1871, 1872, 1875, and 1876, the Crown breached te mātāpono o te kāwanatanga, te mātāpono o te mana taurite me te mātāpono o te houruatanga/the principles of equity and partnership.

11.3.3.2 *Proposals for rūnanga and native committees*

As discussed in section 11.3.2, in 1871 Wiremu Kātene sought parliamentary agreement for a proposal to establish a system of local self-government for territories north of Auckland, through rūnanga with equal Māori and settler representation. The rūnanga were to be empowered to carry out a wide range of functions in respect of roading, schools, dispute resolution, and managing relationships with the colonial Government. They were not to be empowered to deal with titles or administration of Māori lands, but – with the Native Land Court only recently beginning its work in the district – these functions were not yet causing significant concern for Te Raki Māori. Kātene's partnership model had potential to provide Māori with a meaningful say over development of the district, in a manner that aligned Māori and settler interests.

There can be no question that the model was within the scope of what colonial authorities considered possible at that time. The functions provided for in the Bill were similar to those already devolved to the local road, harbour, and other boards operating under the authority of central and provincial government. And its partnership model provided for less Māori influence over local affairs than had previously been provided for under Grey's new institutions, or under the 1871 Te Urewera peace agreement in which the Crown recognised the right of Tūhoe to local self-government under its authority. Yet the proposal was scarcely debated in Parliament; nor is there any evidence of the Crown entering any meaningful negotiations over its future. Instead, as we have set out, McLean introduced his own counter-proposal, the Native Districts Highway Boards Act 1871, which provided

Māori with far more limited powers, did not serve their interests, and was therefore never used.

In 1872, when rival parliamentary factions were courting Māori members for support, McLean introduced the Native Councils Bill, providing for elected Māori committees to investigate land titles, resolve land disputes, and carry out a number of the health and social well-being functions of local government. With respect to land, this Bill went further than Kātene's towards securing Māori self-government. McLean appears to have intended that the Bill formalise the Urewera peace agreement. Yet it did not pass, and neither did the watered-down version introduced the following year. Māori members supported both Bills, but their wishes were overruled by the settler majority, a result that reflected the relative lack of power of Māori members and (as discussed in chapter 7) the absence of any legal or constitutional provision for the recognition and exercise of tino rangatiratanga.

Although McLean's Bills were mainly aimed at districts where there was very little settlement or Crown presence, it would clearly have been possible to establish (or recognise existing) councils in northern and rural parts of Te Raki, where substantial tracts of Māori land remained in customary ownership and the settler population had not yet overwhelmed Māori – such as the territories that later became Te Rohe Pōtae o Ngāti Hine. Indeed, the establishment in the mid-to-late 1870s of Te Rūnanga o Ngāti Hine and other structures intended to exercise Ngāti Hine's autonomy were important assertions of hapū rangatiratanga and their political authority in the region. The Crown could have formally recognised these existing institutions and frameworks for governance, as Ngāti Hine consistently pushed senior Crown officials to do. The fact that the Crown did not formally recognise or provide for similar institutions was a serious missed opportunity.

Accordingly, we find that:

- By failing to take the opportunities offered by Wiremu Kātene's 1871 proposal for the establishment of rūnanga based on partnership in districts north of Auckland, and the Native Councils Bills of 1872 and 1873, the Crown breached te mātāpono o te houruatanga/the principle of partnership; it also acted inconsistently with its obligation to recognise and respect the tino rangatiratanga of Te Raki Māori and give effect to proposals for their self-government at a regional and local level in breach of te mātāpono o te tino rangatiratanga.

11.4 Did the Crown Recognise and Support Te Raki Māori Institutions of Local and Regional Self-Government during the Period 1878–87?

11.4.1 Introduction

In the wake of the Northern War, and up to the early 1870s, Te Raki Māori had largely survived the Crown's challenges to their autonomy, and to a large degree continued to manage their own affairs and engage with the Crown by choice. By the end of the 1870s however, the challenges to Māori authority had increased significantly. The Land Court's destructive impacts, large-scale Crown purchasing of

Māori land, growth in the settler population, and ongoing economic marginalisation all combined to undermine Māori community authority and jeopardise the vision of the treaty partnership that Te Raki leaders sustained.[304]

During the 1880s, the rate of land alienation would slow (see chapter 10, section 10.3.2), but the other challenges continued, and new challenges emerged. As settlers assumed control of county councils, they increasingly demanded the right to tax Māori land and communities, and the colonial Parliament responded by providing for rates to be charged on some customary lands.[305] These demands placed significant pressure on Māori communities, which typically had very few sources of cash other than declining gumfields and occasional labour on roads.[306]

Te Raki Māori responded in a variety of ways. Tribal leaders took further steps to develop autonomous Māori services and institutions: local committees were formed to deal with land disputes and to manage health, education, and social well-being; and regional Waitangi and Ōrākei parliaments were established to debate the issues facing their people and consider how they might best manage their relationship with the Crown.

They also engaged with the Kīngitanga, seeking a common approach to the pursuit of Māori self-government. And they continued to engage with the Crown, seeking freedom from destructive laws and policies, and recognition of their rights of self-government in accordance with their understanding of he Whakaputanga and te Tiriti.[307] Some communities, meanwhile, sought to avoid contact with local officials as they pursued spiritual deliverance from the yoke of government authority.

As discussed in section 11.3, the overarching issue for this chapter to determine is therefore a simple one: Did the Crown recognise and support institutions through which Te Raki Māori could exercise their rights of tino rangatiratanga?

For the period from 1878 to 1887, we are also concerned with the following more specific issues:

- In what ways did Māori electoral rights change during this period?
- What were the purposes of the Ōrākei and Waitangi parliaments?
- What were the Crown's responses to petitions and letters from Te Raki Māori?
- What led to the rise of prophetic movements in Hokianga, and how did the Crown enforce authority over them?
- To what extent did the Crown support Te Raki Māori komiti and rūnanga?

304. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 72, 82–83, 909–910, 997–998; Grant Phillipson, transcript 4.1.26, p [230].
305. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1116–1119, 1122–1123.
306. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1124–1125, 1129, 1134.
307. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1087–1088.

11.4.2 Tribunal analysis

11.4.2.1 *In what ways did Māori electoral rights change during this period?*

During the late 1870s and into the 1880s, Māori electoral rights continued to be a matter of considerable debate in the colonial Parliament. In particular, settlers increasingly objected to the 'dual franchise', under which the small number of Māori who owned property under Crown grant could vote in general electorates (settlers with property could also vote in multiple electorates).[308] From the late 1870s through to the end of the century, the colonial Parliament steadily liberalised the settler franchise while limiting Māori rights to vote in general electorates. During the same period, members of Parliament periodically proposed to reduce or even eliminate the Māori electorates. Consistently, Māori representatives opposed these measures, arguing that voting rights were protected by the treaty.[309] In 1878, when these matters were debated, the Northern Maori member Hori Karaka Tawhiti accused the colonial Parliament of having already stolen Māori authority over land and said they were now trying to steal their electoral rights.[310]

While this debate was occurring, Hirini Taiwhanga petitioned the colonial Parliament, repeating the call of Kaikohe Māori for a Māori house of parliament, explicitly framing this as a response to Māori under-representation. He wrote that Māori were British subjects under the treaty, yet '[t]here are 127 Europeans in the New Zealand Legislature [both houses], and only 6 Maoris'. As the settler population grew, or as settlers acquired universal suffrage, this 'oppression' would only worsen. The only solution Taiwhanga could see was 'a third branch of the Legislature . . . established for the Maori race'. Only if this branch was established would the Crown be justified in removing Māori rights to vote for the settler assembly. The Native Affairs Committee, chaired by John Bryce, made no recommendation.[311]

The following year, the Qualification of Electors Act 1879 introduced universal suffrage for settler males, subject only to a residency qualification.[312] It also introduced a more liberal property qualification, under which 'a large number of small

308. For examples, see William Buckland, 13 August 1872, NZPD, vol 12, p 454; William Reynolds, 13 August 1872, NZPD, vol 12, p 454; see also Legislative Council member Walter Mantell, 11 October 1872, NZPD, vol 13, pp 592–593.

309. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 593–606.

310. Hori Karaka Tawhiti, 25 October 1878, NZPD, vol 30, p 1111.

311. Petition of Hirini Taiwhanga, AJHR, 1878, I-3, p 7; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 602. Tawhiti was one of three Māori on the Native Affairs Committee, the others being Hori Kerei Taiaroa and Hoani Nahe. The eight settler members were Bryce, John Ormond, William Fox, Richard Hobbs, Ebenezer Hamlin, William Rolleston, John Sheehan, and Frederick Carrington: AJHR, 1878, I-3A.

312. The Act enfranchised any male aged 21 or over who had lived for 12 months in New Zealand and six months in their electorate: Qualification of Electors Act 1879, s 2(2); Neill Atkinson, 'Parliament and the People: Towards Universal Male Suffrage in 19th Century New Zealand', *New Zealand Journal of Public and International Law*, vol 3, no 1, 2005, p 166.

freeholders' became entitled to additional votes.[313] As introduced, the legislation made no provision for Māori to vote in general electorates, which the Government sought to justify on grounds that Māori customary lands were not yet liable for rates.[314] Many members regarded the proposal as disenfranchising Māori property owners at the same time as the settler property franchise was being liberalised. Māori representatives said they would accept the measure only if the number of Māori electorates was substantially increased. Hōne Mohi Tāwhai, who had succeeded Tawhiti as Northern Maori member, argued that property-based voting rights had been guaranteed to Māori under article 3 of the treaty, and he asked why recent immigrants should be entitled to vote as property owners yet Māori 'to whom the country belongs' could not: 'If you are strong in keeping away from us this right of voting, I simply say this: that some great trouble will arise in the northern part of this Island. . . . the roads in that part of the country will be stopped.'[315]

The Bill was then amended to provide that a Māori man could vote on the general roll if he was registered as a ratepayer or was the sole owner of a property worth £25 or more.[316] This was a more restrictive property test than that applied to settlers, and because it excluded collectively held land, its effect was to exclude many Māori who had been entitled to vote under the previous property test. According to the historian Neill Atkinson, '[t]his sleight of hand would soon produce the intended effect, with the number of Maori on general rolls falling from 2115 in 1879 to 918 in 1881.'[317] The impact was particularly significant in the Bay of Islands electorate, where Māori votes had been influential in determining the election result.[318] By 1886, there were only 82 Māori on the Bay of Islands general roll, from a total of 1,088 electors.[319]

During the 1870s and early 1880s, as the settler population grew, the number of general electorates also increased. At the 1866 election, there had been 70 general electorates; by 1878, the number had grown to 84; and this was further increased to

313. John Hall, 31 October 1879, NZPD, vol 33, p 11; Qualification of Electors Act 1879, s 2(1). The Act allowed all settler males to vote if they possessed freehold property worth £25 or more (about $4,500 in today's terms). In the view of some members, the measure opened the way for wealthy men to vote in several electorates, and indeed to buy properties for that purpose; for example, see Sir George Grey, 31 October 1879, NZPD, vol 33, pp 11–12.

314. The Government introduced this Bill as a companion measure to the Maori Representation Bill 1879. Together, these Bills would have removed all Māori from the general roll while making the future of the Māori electorates uncertain. The Premier, John Hall, explained the proposal to reduce Māori voting power on two occasions: John Hall, 31 October 1879, NZPD, vol 33, p 11; John Hall, 17 August 1881, NZPD, vol 39, p 592.

315. Hōne Mohi Tāwhai, 31 October 1879, NZPD, vol 33, p 22.

316. 'Qualification of Electors Bill', 11 November 1879, NZPD, vol 33, p 182.

317. Atkinson, 'Parliament and the People', p 174. The 1881 figure comprised 682 freeholders and 236 ratepayers, from a male population of about 23,993: Census 1881, app, 'Maori Population in the North and South Islands', tbls 1–2.

318. Hōne Mohi Tāwhai, 31 October 1879, NZPD, vol 33, p 22. The electorate was known as 'Bay of Islands' from 1881; previously it was 'Mangonui and Bay of Islands'.

319. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 610; Census 1886, chapter 35. In the same year, there were 12 Māori electors in Marsden and three in Rodney.

91 in 1881. Each increase ensured that a significant population gap was maintained. In 1881, each settler electorate represented 5,384 people, and each Māori electorate represented 11,024 (see appendix 11.1). Premier John Hall asserted that Māori were not entitled to 'strictly proportional representation' because the Legislature 'makes laws and imposes taxes which they do not obey and do not pay'. In Hall's view, under-representation was therefore 'a salutary lesson' for Māori, whose 'most certain means of being placed upon the same footing as Europeans in the matter of political power is to subject themselves entirely to the same laws and obligations.'[320] Some members regarded Māori as overtaxed and argued for increased representation;[321] meanwhile, others argued that Māori electorates should be done away with altogether.[322]

In a forceful speech, Hōne Mohi Tāwhai argued that the Māori seats had been guaranteed by the Queen under article 3 of the treaty, and if anything should be done away with, it was the 'treacherous' House of Representatives. He said that Māori had signed te Tiriti, allowing the Queen to appoint a Government 'to protect the Native race and ward off such evils as might threaten them', but, he asked, 'What has happened? The Government that was appointed by the Queen to look after the Maori race, to guard them from evil, has travelled in the opposite direction, and has tried as much as possible to oppress us.'[323]

Tāwhai said his relatives had protected settlers and honoured their relationship with the Crown. His own father, Mohi Tāwhai, had fought against Hōne Heke during the Northern War. Yet the Crown responded by denying Māori rights and enacting laws that opposed the treaty, which were then implemented by Crown officials in ways that exacerbated the harm. He demanded Parliament give effect to the guarantees:

> I have made myself acquainted with the Treaty of Waitangi, and I say that we are thereby endowed with privileges which the Europeans do not wish us to exercise. But why should we be deprived of such privileges? We cannot set this treaty on one side. We cannot ignore it, because if we do, we should be ignoring that which Her Majesty the Queen conferred upon us. It is the general cry among the Maoris of this island that the different measures passed by this House are not in accordance with what is contained in that treaty. I quite agree, and say that if that treaty were adhered to strictly, there would not be so much ill-feeling between the two races.[324]

320. John Hall, 12 August 1881, NZPD, vol 39, p 472.
321. John Sheehan, 12 August 1881, NZPD, vol 39, p 491; see also Sheehan, 12 August 1881, NZPD, vol 39, pp 613–614; John Lundon, 17 August 1881, NZPD, vol 39, p 524; William Hurst, 12 August 1881, NZPD, vol 39, pp 498–499.
322. James Wallis17 August 1881, NZPD, vol 39, pp 607–608; Samuel Andrews, 17 August 1881, NZPD, vol 39, p 606; see also p 597.
323. Hōne Mohi Tāwhai, 16 August 1881, NZPD, vol 39, p 547.
324. Hōne Mohi Tāwhai, 16 August 1881, NZPD, vol 39, p 548.

Through the rest of the decade, Māori continued to petition the colonial Parliament seeking an increase in representation.[325] Yet in 1887, the Government proposed to reduce the size of the House, cutting the number of settler electorates to from 91 to 70, and the number of Māori electorates from four to three.[326] All of the Māori representatives opposed this measure, pointing out that Māori were already under-represented, that Māori electorates were excessively large, and that increased Māori representation was necessary to protect Māori from damaging laws.[327] Then Northern Maori member Hirini Taiwhanga said he would accept reduction or indeed abolition of the Māori electorates, but only if the Native Land Court was abolished and Māori were first granted self-government:

> If they do not want any of us in the House we are quite willing to have a Council of our own . . . The Maoris should be allowed to administer their own affairs . . . I have the majority of Maori people at my back when I say we do not want to 'chum' with the English at all, because we have no chance in any Court of law, and we have no chance in this House here. Here we are four members against ninety-one Englishmen. If ninety-one oxen pull against four oxen, what are the four to do?[328]

But if Parliament was not willing to recognise Māori rights to self-government, it would be 'a great shame' to reduce the number of Māori members, Taiwhanga said. 'The Maori representation is small enough as it is.'[329]

In general, the settler members were far more concerned about the balance between town and country representation than about Māori, but some echoed the views of the Māori members. Former Premier Sir George Grey, an ardent assimilationist, said it was widely acknowledged that Māori representation was 'a sham': '[E]very member here knows that in truth the Natives have never had their fair share of representation, and never exercised in this House the power that they ought to have done.'[330]

Ultimately, the Government's hand was forced. Faced with the prospect of losing its majority, it agreed to retain the four Māori electorates in return for the support of Māori members for a reduction in the number of general seats.[331]

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325. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pt 2, p 981.

326. 'Parliamentary', *Taranaki Herald*, 8 December 1887, p 2.

327. Hoani Taipua, 5 December 1887, NZPD, vol 59, p 308; Hirini Taiwhanga, 5 December 1887, NZPD, vol 59, p 307; James Carroll, 5 December 1887, NZPD, vol 59, pp 307–308; Tame Parata, 5 December 1887, NZPD, vol 59, pp 336–337; Hirini Taiwhanga, 5 December 1887, NZPD, vol 59, p 352; Hoani Taipua, 6 December 1887, NZPD, vol 59, pp 373–374; Tame Parata, 6 December 1887, NZPD, vol 59, p 376.

328. Hirini Taiwhanga, 5 December 1887, NZPD, vol 59, p 352. Taiwhanga also said that settler politicians were happy to talk about abolishing Māori representation but 'they do not want to abolish [our] land'.

329. Hirini Taiwhanga, 5 December 1887, NZPD, vol 59, p 307.

330. Sir George Grey, 5 December 1887, NZPD, vol 59, p 314.

331. 'Parliamentary', *Taranaki Herald*, 8 December 1887, p 2; see also Henry Fitzherbert, 8 December 1887, NZPD, vol 59, p 497; James Carroll, 8 December 1887, NZPD, vol 59, p 499; Representation Acts Amendment Act 1887, s 2.

11.4.2.2 *What was the significance of the Ōrākei and Waitangi parliaments?*

From 1879, leaders of northern tribes – Ngāpuhi, Te Rarawa, Ngāti Whātua, and others – began to gather regularly for major hui in locations throughout the north, including Ōrākei, Waitangi, Rāwene, Aotea (Kaipara), and elsewhere. On one level, these 'parliaments' revived the tradition of the Kohimarama Rūnanga by bringing major tribal groups together to discuss their relationship with the Government; on another, they reflected the growing focus of Te Raki and other northern leaders on treaty rights, and in particular on establishing institutions for Māori self-government.[332]

These parliaments continued to meet throughout the 1880s; the 'Ōrākei' parliaments were convened by Ngāti Whātua at various locations, and the Waitangi parliaments convened by Ngāpuhi and Te Rarawa. They provided a forum where Māori could discuss matters such as the Land Court, land alienation, rates, taxes, and government interference in Māori fisheries and traditional hunting; and also a platform for coordinated approaches to the Queen and colonial authorities. At times, northern leaders sought to reach an accommodation with the Kīngitanga – one that would unite all northern tribes in their responses to the Crown.

11.4.2.2.1 The 1879 Ōrākei parliament

The first Ōrākei parliament was held in February and March 1879 at Ōrākei in Auckland. Its host and principal organiser was Pāora Tūhaere of Ngāti Whātua, who believed that Māori–Crown relations would have proceeded along a smoother and more harmonious track if the Crown had kept its promise at the 1860 Kohimarama Rūnanga to convene annual hui of Māori leaders. When his attempts to persuade the Crown of his case fell on deaf ears, he took the initiative himself.[333]

The hui took place in a purpose-built whare named Kohimarama and was attended by some 300 Māori, mainly from Ngāti Whātua, Ngāpuhi, and Mahurangi hapū. King Tāwhiao sent his secretary, Te Ratu. Also present were the government official Henry Tacy Kemp; John Bryce, then a member of the House of Representatives; and various other Pākehā observers.[334]

During opening proceedings, Tūhaere said the purpose of the hui was to breathe new life into the treaty. Thirty-nine years had passed since it had been signed, and many Māori did not understand its true meaning. Tūhaere then read the full text of te Tiriti and (also in te reo) the full text of Governor Gore Browne's 1860 speech at the Kohimarama Rūnanga, which in Tūhaere's view, 'repeated and confirmed' the articles of the te Tiriti. A report on the Ōrākei parliament, in which

332. Orange, The Treaty of Waitangi, pp 192, 196–198; Kawharu, 'Te Tiriti and its Northern Context' (doc A20), pp 264–265. Also see Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 903–904, 1026–1027.

333. Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 269. Te Hemara Tauhia of Ngāti Rongo worked with Tūhaere to organise this and other Ōrākei hui, but Tūhaere led the hui throughout.

334. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 904. John Bryce would later become a future Native Minister.

all speeches were translated into English, was included in the Appendices to the Journals of the House of Representatives.[335]

Discussions took place over many days and traversed all of the issues concerning Māori communities at this time: inadequate parliamentary representation, the Native Land Court, land alienation, rates and taxes, economic development, increasing government regulation of Māori fisheries, and more. Rangatira debated the nature of the treaty relationship, and in particular the balance between autonomy and partnership. Arama Karaka Pī, who had signed te Tiriti in 1840, said it had unified Ngāpuhi and the Queen, in accordance with the vision set down by Hongi Hika a generation earlier. Ngāpuhi 'hoped to be united with the pakeha' but also 'wished that Hongi should have the same power as the Queen'.[336]

Te Hemara Tauhia (Ngāti Rongo of Mahurangi) said he was present when te Tiriti was signed and recalled the discussions between Captain Hobson and rangatira. Since the days of Hongi, Ngāpuhi had sought friendship with and protection from Britain. As Tauhia saw it:

> They placed all their thoughts before the Queen, and left them for her to consider, and to devise measures for their benefit. The words of the Queen were that the mana of the chiefs would be left in their possession, that they were to retain the mana of their lands, fisheries, pipi-grounds, forests. These were the stipulations of the Queen in reply to the terms agreed to by Ngapuhi. Another promise of the Queen was that she would protect these Islands, lest foreign nations should come and fight against the people of these Islands. These were the only words of the Queen that I heard.[337]

Tauhia's understanding, then, is clear: Māori would retain their traditional authority, while the Queen would provide protection. This understanding, in our view, was reflected in the consistent stance of Te Raki leaders throughout the period covered by this chapter: that they were loyal to the Queen even as they sought freedom from the colony's laws and government. Other rangatira referred to te Tiriti as a charter for peace, under one God, one sovereign, and one law, but with guarantees that the Queen would protect Māori, who would retain control of their lands, forests, and fisheries.[338]

On the sixth day, the hui adopted a series of resolutions about the meaning and effect of te Tiriti. According to the Government's record of proceedings, those present resolved to stay loyal to the Queen, remain friendly to settlers, stand aside from any conflict that might erupt between Māori and the Crown, and 'adhere to

335. 'Paora Tuhaere's Parliament at Orakei', AJHR, 1879–11, G-8, p 8.

336. 'Paora Tuhaere's Parliament at Orakei', AJHR, 1879–11, G-8, pp 11–12; see also Richard Dargaville and Cheyne Foley (doc N5), para 10.

337. 'Paora Tuhaere's Parliament at Orakei', AJHR, 1879–11, G-8, p 17; Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 273. Tauhia had sought refuge with his relative Pōmare II during the 1830s to escape the fighting that took place in Mahurangi.

338. 'Paora Tuhaere's Parliament at Orakei', AJHR, 1879–11, G-8, pp 13, 16, 18, 25.

the terms of the Treaty of Waitangi and the Conference of the Kohimarama for ever.'[339]

These initial resolutions were printed in English. The remaining resolutions, printed in Māori, affirmed Māori rights under te Tiriti. Resolution 6 provided: 'Ma tenei runanga e whakamana kia tuturu tonu te mana rangatiratanga o nga iwi o enei motu kei ngaro i o tatau uri.' We translate this as: 'This Parliament will ensure that the highest chiefly authority [mana rangatira] of the people of these islands is maintained, so our descendants will not lose it.' Other resolutions confirmed the rights of Māori people to harvest fish, shellfish, eels, and birds within their tribal territories, notwithstanding any government regulations or claims to the contrary. These resolutions were clear statements of Māori rights under article 2 of the treaty.[340]

Having dealt with these principles, Tūhaere questioned whether it was still possible to exercise mana and rangatiratanga as guaranteed by te Tiriti in his address to the conference:

> When the Queen established her authority in this Island she promised that the chieftainship of the Maori people should be preserved to them. She has not deprived the chiefs of their mana. She left a share of the mana of the Island to the Native chiefs. That Treaty of Waitangi left the rights of the soil with the Maori chiefs. She also left the fisheries to the Maoris. She did not deprive us of those. She also left us the places where the pipis, mussels, and oysters, and other shell-fish are collected. . . . Let your opinions be clear, because there are many grievances in this Island, and it is for you to suggest some means by which they may be redressed. Let us see whether the stipulations made in the Treaty of Waitangi are still in force or not.[341]

In his view, the Native Land Court had taken Māori authority and replaced it with Crown grants.[342] Other rangatira said te Tiriti had brought protection from foreign powers other than Britain, but the Crown had since neglected the guarantees of mana and rangatiratanga. This, rangatira agreed, was not the fault of the Queen herself but of the colonial Government.[343] In order to resolve these greivances, Tūhaere emphasised the importance of Māori discussing their greivances with Crown officials, as they had at the Kohimarama Rūnanga in 1860. Speaking after Tūhaere, Ngāti Whātua rangatira Te Keene observed that subsequent Governors after Gore Browne had failed to fufil the promise to reconvene the Kohimarama Rūnanga, but 'now the Maoris have taken it upon themselves to hold a yearly Conference in a sort of way, and this is one of them.'[344]

339. 'Paora Tuhaere's Parliament at Orakei', AJHR, 1879–11, G-8, p 30.
340. 'Paora Tuhaere's Parliament at Orakei', AJHR, 1879–11, G-8, p 30.
341. 'Paora Tuhaere's Parliament at Orakei', AJHR, 1879–11, G-8, p 16.
342. 'Paora Tuhaere's Parliament at Orakei', AJHR, 1879–11, G-8, p 30; Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 274.
343. Kawharu, 'Te Tiriti and its Northern Context' (doc A20), pp 274–275.
344. 'Paora Tuhaere's Parliament at Orakei', AJHR, 1879–11, G-8, p 18.

The following day, the hui passed a series of resolutions aimed at preserving Māori control over lands and abolishing the Native Land Court.[345] At the close of the hui, it was agreed that the parliament would meet annually, and that Kaipara and Ōrākei Māori would attend the first hui at the new Tiriti o Waitangi meeting house at Waitangi.[346] This first Ōrākei parliament established key themes – protection of mana Māori, and rejection of laws that diminished that mana – which would be repeated at subsequent Māori parliaments in Waitangi, Aotea (Shelly Beach, Kaipara), and elsewhere in the north over the next few years.[347]

Soon after the parliament had concluded, Grey (who was then Premier) and Sheehan (the Native Minister) visited the Bay of Islands. On this occasion, the discussion at the meeting focused more on economic and social issues than self-government. While Te Raki leaders reiterated their desire to live in peace, they also raised a number of grievances, including their desire for railways and schools. Grey's response was that any action to develop the region would depend on their providing a share of the funds.[348]

In a subsequent report to the Native Secretary, the Hokianga resident magistrate Spencer von Sturmer noted that Māori were becoming increasingly distrustful of the Crown and were holding numerous hui where they discussed the treaty and native land laws. Their 'sullenness', he said, arose from their 'knowledge that their former power and influence . . . is rapidly passing away', as settlers increased in 'both numbers and territorial wealth.'[349]

11.4.2.2.2 The 1879 Kīngitanga hui

In May 1879, the Kīngitanga hosted a major hui to discuss peace terms with the Crown. Many thousands of people attended, including sizeable contingents from Ngāpuhi and other Te Raki tribes. The relationship between Ngāpuhi and the tribes of Waikato and Te Rohe Pōtae (the 'King Country') was traditionally fraught. They had clashed during the Musket Wars, and in the 1860s Ngāpuhi leaders had briefly considered entering the war against Waikato. But the 1870s had led to something of a thaw, as both sides searched for ways to resist the Crown's policies and protect their mana. King Tāwhiao had a representative at the Ōrākei parliament, and would have attended himself had he not been unwell.[350]

345. 'Paora Tuhaere's Parliament at Orakei', AJHR, 1879–11, G-8, p 35; see also 'The Maori Parliament at Orakei', *New Zealand Herald*, 8 March 1879, p 5.

346. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 904–906; see also 'Native Meeting at Orakei', *New Zealand Herald*, 26 February 1879, p 2; 'The Orakei Native Meeting', *New Zealand Herald*, 1 March 1879, p 5; 'The Maori Parliament at Orakei', *New Zealand Herald*, 8 March 1879, p 5.

347. Kawharu, 'Te Tiriti and its Northern Context' (doc A20), pp 276–277; see also Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 944–946, 1002–1003.

348. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 906–907.

349. Von Sturmer to Native Secretary, 7 May 1880 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 907–908).

350. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 908–910; Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 277.

During the hui, Tāwhiao insisted that his father Pōtatau Te Wherowhero had been 'ancestor of all people' and 'chief of this Island, of you all'. Having succeeded his father, Tāwhiao now insisted, 'I have the sole right to conduct matters in my land – from the North Cape to the southern end. No one else has any right.'[351] In effect, Tāwhiao was calling on all iwi to unite behind him in defiance of the colonial Government. While those at the hui shared common ground in their opposition to Government policies, many – including the leaders of this district – could not accept Tāwhiao claiming mana over them. For the next two days, rangatira debated Tāwhiao's authority and declared themselves either for or against the Kīngitanga. For Ngāpuhi and Te Rarawa leaders, Tāwhiao's stance left them with little option.[352] According to the *New Zealand Herald*, Hōne Mohi Tāwhai told the hui that Ngāpuhi had allowed the treaty to be made and had placed themselves under the Queen's protection:

> Governor Hobson arrived amongst the Ngapuhis, the Treaty of Waitangi was made, and the whole of my parents came under that treaty. They agreed to hand over all their lands and their bodies and all their heirs after them to be under the power of the Treaty of Waitangi. From the time of my parents until now, as I stand here, they have all been under the Treaty of Waitangi. Our lands, our bodies, our children, – they are all under the Treaty of Waitangi. The Treaty of Waitangi was agreed to by all the tribes of the Island as far as Taiaroa. Secondly, respecting the chieftainship, – it belongs to the whole of the people assembled here. From the days of our ancestors we put ourselves under the protection of the Queen until this day, and I am still under her protection.[353]

Other northern rangatira spoke in similar terms. Tūhaere's view was that Te Rarawa, Ngāpuhi, and Ngāti Whātua 'should be left to themselves'.[354] North Island Māori resistance to the Government would therefore continue along two parallel tracks: Te Raki iwi would continue to accept the Queen's protection, even as they sought freedom from the colony's Government and laws; Waikato and Te Rohe Pōtae iwi would be loyal to the Māori King.

11.4.2.2.3 The 1881 Waitangi parliament

The second Ōrākei parliament took place in March 1880, again with a significant Te Raki presence. Te Hemara Tauhia of Ngāti Rongo told those gathered that Māori had attempted to engage with Crown institutions 'and now we see the evil

351. 'Te Kopua Meeting', AJHR, 1879, sess I, G-2, p 3; Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 278.
352. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pt 2, pp 720–723; Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 278.
353. 'Te Kopua Meeting', AJHR, 1879, G-2, p 4; Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 278.
354. 'Te Kopua Meeting', AJHR, 1879, G-2, p 4; Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 279.

of them.'[355] Through the impacts of the Native Land Court, councils, road boards, and Crown agents, his people in Mahurangi and Kaipara no longer had sufficient land. The hui resolved that the Court should be abolished, that surveys and Crown titling should cease, and that remaining lands should remain under inalienable customary title.[356]

The rangatira at this parliament placed considerable emphasis on he Whakaputanga, through which Britain recognised the mana of Te Whakaminenga, the annual pre-treaty gathering of northern rangatira. The rangatira reasoned that te Tiriti had affirmed this relationship, and therefore provided a precedent for Crown recognition of Māori parliaments.[357] The third Ōrākei parliament, held in early March 1881, addressed many of the same issues as the 1880 parliament.[358]

By 1881, Ngāpuhi leaders had completed their new whare rūnanga at Te Tii Waitangi. Many hapū contributed to the £300 cost. According to the Ngāi Tāwake rangatira Mangonui Rewa (also known as Mangonui Kerei), the house was built to 'remind us all of the Treaty of Waitangi' and its child, 'the Treaty of Kohimarama.'[359] In our inquiry, Ngāti Hine provided evidence that the structure existed as 'a focal point for the discussion of Te Tiriti issues and a tangible reminder of the pledges that had been made by Maori and the Queen.'[360] Alongside the new whare, Ngāpuhi leaders erected a sandstone monument bearing the text of te Tiriti in te reo Māori.[361]

The first Waitangi parliament began on 23 March 1881. Ngāpuhi leaders invited the Governor, Sir Arthur Gordon, to attend and unveil the treaty monument. He declined, possibly on the advice of the Government; although Gordon had been in the colony for a short time only, he was already differing from his Ministers over the Government's arbitrary arrest and detention of ploughmen from the Parihaka community in southern Taranaki. Some Ngāpuhi leaders interpreted

355. 'Paora Tuhaere's Parliament at Orakei', AJHR, 1879, G-8, p 27; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 944.

356. Kawharu, 'Te Tiriti and its Northern Context' (doc A20), pp 282–287; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 944–946, 1002–1003.

357. Orange, The Treaty of Waitangi, p 195.

358. Armstrong and Subasic, 'Northernd Land and Politics' (doc A12), pp 1002–1004.

359. 'Paora Tuhaere's Parliament at Orakei', AJHR, 1879–11, G-8, p 31.

360. Ngāti Hine, evidence (doc M24), pp 52, 123; see also Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 902–904. In 1922, the whare was replaced with a new building which still stands at Te Tii.

361. Ngāpuhi leaders commissioned an Auckland stonemason to construct the monument. It is now known as Te Tii Memorial: untitled [column 7], *New Zealand Herald*, 14 August 1880, p 4. Also see Orange, *The Treaty of Waitangi*, pp 196–198.

Gordon's absence as a reflection of the Government's attitude to the treaty itself. The Government instead sent the Native Minister, William Rolleston.[362]

Long before the hui, senior Ngāpuhi rangatira had met to discuss the agenda. Āperahama Taonui, one of the few surviving treaty signatories, was a leading voice in these discussions. As mentioned in chapter 5, Taonui had fought against Hōne Heke during the Northern War, but later became disillusioned with the Government's land policies and was determined, in Dr Orange's words, to take 'positive steps . . . towards fulfilment of the treaty's promises'. He brought together rangatira of significant mana – Maihi Parāone Kawiti, Hāre Hongi Hika, Kīngi Hori Kira, Mangonui Rewa, and Heta Te Haara – to undertake the practical work required to bring this project to fruition. At the first two Ōrākei parliaments, rangatira had affirmed that the Queen had guaranteed their mana, but the colonial institutions of government had then set it aside. From this time, therefore, Te Raki Māori leaders determined to adopt Taiwhanga's 1878 proposal for a separate Māori parliament.[363]

The hui itself was a huge undertaking. Some 3,000 people attended from throughout the North Island, for whom Ngāpuhi supplied 'a stack of food three feet high, and half-a-mile long'.[364] The meeting opened with a brief welcome to Rolleston, followed by a haka so large it 'was distinctly heard at Russell, six miles off'. Then, with little fanfare, Ngāpuhi rangatira began to set out their vision.[365]

According to newspaper reports, Wi Raukawa was one of the first to speak: 'Welcome Treaty of Waitangi,' he said. 'We would like to know your opinion, if favourable or otherwise, to us Ngapuhi. Hold fast [to] the Treaty of Waitangi!' The former member of the House of Representatives, Wiremu Kātene, said he spoke for everyone present: 'There should be two Parliaments – one English, and another Maori.' Kātene also demanded the return of confiscated lands and the restoration of Māori control over customary fishing grounds and shell fisheries, and he assured the Governor of Ngāpuhi's enduring loyalty to the Crown.[366]

Ihaka Hakuene asked, 'Let the Colonial Office seal be handed to us.' Maihi Parāone said, 'My request is that we Maoris be allowed to manage our own concerns. Let there be a committee appointed to consider Maori subjects. The great

362. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1083; Claudia Orange, *The Treaty of Waitangi* (Wellington: Allen & Unwin, 1987), pp 200–201; Kawharu, 'Te Tiriti and its Northern Context' (doc A20), pp 289–290. Regarding Ngāpuhi response to the Governor declining his invitation, see 'Petition from Maoris to the Queen', AJHR, 1883, A-6, encl 1, pp 1–3. The petition is in Armstrong and Subasic's document bank: doc A12(a), vol 11, pp 3:334 to 3:336. Regarding Gordon and Parihaka, see Hazel Riseborough, *Days of Darkness: Taranaki 1878–1884* (Wellington: Allen & Unwin, 1989), pp 123–124, 129–130.

363. Orange, *The Treaty of Waitangi*, p 199; see also Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 288.

364. 'The Great Native Meeting at Waitangi', *New Zealand Herald*, 28 March 1881, p 3; Orange, *The Treaty of Waitangi*, p 198.

365. 'The Opening of the Great Native Meeting at Waitangi', *New Zealand Herald*, 24 March 1881, p 5; Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 289.

366. 'The Opening of the Great Native Meeting at Waitangi', *New Zealand Herald*, 24 March 1881, p 5; Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 289.

thing is, that Maoris should consider and have the management of their own affairs.'[367]

Maihi Parāone then read out the treaty. While the *New Zealand Herald* did not specify which text he read, we presume he read te Tiriti. He declared:

> Government has milked the cow of New Zealand; therefore evils are among us. Five tribes have agreed to keep our lands, and that a committee shall manage our own affairs. . . . Let the committee be appointed under the sanction of the treaty of Waitangi.[368]

Taiwhanga added his voice: 'The reason for two Parliaments is – for 41 years we have been suffering with your laws.'[369] Next, Mangonui Rewa spoke: 'You gave us a treaty; now give us a Parliament.' Hōne Mohi Tāwhai, the Northern Maori member of the House of Representatives at the time, said that Ngāpuhi 'are all agreed re the Maori Parliament'.[370] Te Hemara Tauhia of Mahurangi added: 'We have tried your Parliament, and have found it wanting.'[371] Whanganui leaders had also begun to establish regional parliaments,[372] and were present at this hui. Mete Kingi of Whanganui added his voice to the call for a national Māori legislature, as did Tawiau from Kaipara. So, too, did Pāora Tūhaere of Ngāti Whātua: 'Let us have a Parliament to ourselves. Let [the] Government watch it. Don't put it down till you see evil from it. The Parliament in Wellington have broken the treaty.'[373]

Previously, Te Raki leaders had suggested a Māori parliament operating alongside the colonial one as part of a single legislature. Here, they seemed to be suggesting a fully autonomous parliament making laws for Māori yet recognised by the colonial Parliament. From the available evidence, it is not clear whether any of the rangatira went into detail about how the two parliaments might work together, especially where Māori and settler interests intermingled. Ihaka Hakuene's request for the Colonial Office seal was, in effect, a request for Te Raki Māori to exercise the Queen's authority in New Zealand. The seal, provided by the Colonial Office to New Zealand Governors, was used on official documents to represent sovereign authority.

As well as making their case for a national Māori parliament, rangatira set out the many ways in which the colony's Legislature and Government had – in their view – breached the treaty guarentees, including confiscation and acquisition of land, imposing taxes on dogs and livestock, and allowing settlers to take fish and

367. 'The Great Native Meeting at Waitangi', *New Zealand Herald*, 28 March 1881, p 3.
368. 'The Great Native Meeting at Waitangi', *New Zealand Herald*, 28 March 1881, p 3. The five tribes referred to are Ngāpuhi, Te Rarawa, Te Aupōuri, Ngāti Whātua, and Ngati Rongo/Mahurangi.
369. 'The Great Native Meeting at Waitangi', *New Zealand Herald*, 28 March 1881, p 3.
370. 'The Native Meeting at Waitangi', *New Zealand Herald*, 25 March 1881, p 6.
371. 'The Native Meeting at Waitangi', *New Zealand Herald*, 25 March 1881, p 6 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1085–1086).
372. O'Malley, 'Runanga and Komiti' (doc E31), p 121.
373. 'The Great Native Meeting at Waitangi', *New Zealand Herald*, 28 March 1881, p 3.

shellfish from traditional fishing grounds.[374] The dog tax was 'formerly 5s, now 10s, next 20s, then horses, cows, and fowls,' said Mangonui.[375] 'I approve of the treaty, but not of the dog tax,' added Hamiora Ngatiura.[376]

Dr Kawharu, in our inquiry, noted that the Ōrākei parliaments of 1879 and 1880 had not promoted the establishment of a parallel Māori system of government but instead had focused on 'unity and building relationships with the government'. This new direction was a response to the failure of colonial authorities to protect tino rangatiratanga.[377]

While Rolleston acknowledged that 'some of the branches of the treaty' had been broken, he gave no encouragement on any of the points raised by the rangatira.[378] Regarding the establishment of a Māori Parliament, he said,

> I am unable to say how your proposal would work. Is the native Parliament to make laws for the Europeans? Is the present Parliament at Wellington to cease to legislate for both races? . . . I should mislead you if I were to tell you that any laws would be allowed to be passed out of the Parliament at Wellington.[379]

While issues of relative jurisdiction would have required further consideration and negotiation, Rolleston was not open to this possibility; rather, he asserted that all authority must remain with the colonial Parliament. As discussed in chapter 7, that was not an arrangement that Te Raki Māori had ever consented to. Nor did Rolleston address the underlying issue, which was the inadequate provision under the colony's constitution for Māori to meaningfully influence laws affecting them.

Unsurprisingly, Rolleston would not promise to hand over the Colonial Office seal, which he said could only be used by the Government in Wellington. Regarding the dog tax, which we discuss further in section 11.5.2.12, he suggested that Māori petition the Government seeking suspension of the law. He acknowledged that Māori were concerned about settlers making use of the foreshore and taking fish and shellfish, but the 'law of nations' provided that access should be free. Kātene said Māori understood this law and regarded it as fair in towns such as Russell, but not in traditional fishing grounds and those bordering Māori lands: 'our pipi beds are our own'. Concluding the hui, Rolleston undertook to consider the issues raised, while making 'no rash promises'. If Māori had grievances, he said, they should take them up with the colonial Parliament.[380]

Yet the experience of rangatira to date was that the colonial Parliament did not respond in a way that gave Māori any hope that their rights and interests would

374. 'The Great Native Meeting at Waitangi', *New Zealand Herald*, 28 March 1881, p 3.
375. 'The Native Meeting at Waitangi', *New Zealand Herald*, 25 March 1881, p 6.
376. 'The Great Native Meeting at Waitangi', *New Zealand Herald*, 28 March 1881, p 3.
377. Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 294.
378. 'The Opening of the Great Native Meeting at Waitangi', *New Zealand Herald*, 24 March 1881, p 5; Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 290.
379. 'The Native Meeting at Waitangi', *New Zealand Herald*, 25 March 1881, p 6.
380. 'The Great Native Meeting at Waitangi', *New Zealand Herald*, 28 March 1881, p 3.

be recognised or protected. Several months later, one sympathetic member of the House asked,

> how is it that we repeatedly hear the Native members asking, without response, why the Treaty of Waitangi is not adhered to – why the liberties and political rights there secured to them are not admitted? How is it that we find the same sentiments and the obligations of the Treaty perpetuated in the Constitution Act, and still no notice is taken of them?[381]

In any case, Ngāpuhi leaders did not wait: during the 1881 Waitangi parliament they established Te Komiti o te Tiriti o Waitangi, a regional committee established to provide for self-government throughout the tribal rohe (see section 11.4.5).

11.4.2.2.4 The 1885 and 1887 Waitangi parliaments

In the years after the first Waitangi parliament, northern leaders continued to hold annual hui, typically attended by many hundreds of people from throughout the district. Ōrākei parliaments were held at Reweti in 1882 and at Aotea (Kaipara) in April 1883, March 1884, and March 1885.[382] Discussions continued to focus on te Tiriti and numerous grievances about the colony's laws and government, including the impacts of the Native Land Court, government land purchasing, and taking Māori land for roads.[383]

In 1882, Ngāpuhi leaders petitioned the Queen seeking establishment of a Māori parliament; and two years later, King Tāwhiao visited London with another petition, also calling for a Māori parliament and self-government. On both occasions, the Colonial Office said it could not get involved in New Zealand affairs. Since the 1881 Waitangi parliament, Te Raki leaders had also sent several petitions to the colonial Parliament, seeking recognition of treaty rights and relief from harmful laws. None of these petitions led to significant responses from the Government. By the end of 1884, Te Raki leaders were considering another delegation to London. We return to all of these matters later, in section 11.4.3.[384]

The Ōrākei parliament met again at Aotea in March 1885.[385] Reports indicated there was considerable depth of feeling among all northern tribes about what they regarded as ongoing breaches of their rights. There was 'a strong feeling among the natives that they have not been well treated by the Government', the *New Zealand*

381. Joseph Tole, 17 August 1881, NZPD, vol 39, pp 618–619. Tole also noted that Premier John Hall's attitude was: 'the sooner the Natives became acquainted with our institutions and complied with our laws the better'.

382. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1003–1005, 1087, 1088, 1090; see also pp 943–944. In 1883, Ngāti Whātua opened a new parliament house – named Aotearoa – at Aotea. Ngāti Whātua leaders planned to erect a stone monument in front of the house with the words of te Tiriti and the Treaty inscribed on it: 'Native Meeting at Kaipara', *New Zealand Herald*, 30 January 1893, p 6.

383. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1090–1091.

384. 'Another Maori Mission to England', *Nelson Mail*, 18 November 1884; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1119.

385. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1090.

Herald reported. One common grievance was the immense cost of Native Land Court hearings; another, 'the somewhat cavalier manner in which their petitions have been treated by Parliament. They complain that they have sent petition after petition to the House, but nothing is ever heard of them.'[386] We will consider the substance of Te Raki Māori petitions later, in section 11.4.3.

The third Waitangi parliament took place in March 1887 and was attended by the Native Minister John Ballance. According to one newspaper report, the parliament was the largest gathering of Te Raki Māori for many years, with 500 in attendance, including '[e]very representative and distinguished chief of the Ngapuhi' and a large contingent from Te Rarawa.[387] Very little is recorded of the exchange between Ballance and rangatira. The Minister said he 'wished, on behalf of the Government, freely to acknowledge the binding nature of the treaty of Waitangi'. This did not mean that the treaty could not be modified, 'but it must be done with the consent of all'. In response, Maihi Parāone 'spoke at considerable length, principally with reference to the treaty of Waitangi . . . complaining that it had not been carried out in the spirit in which it was framed'. He nonetheless 'expressed gratification that the Government considered it as binding'.[388]

The following day, Ballance held a meeting with about 200 rangatira, who raised numerous grievances about land, the Land Court, public works, and government debt. As an example of the bias Māori perceived in government actions, Takotorua of Te Rarawa complained that Māori land was being taken without consultation to build roads connecting settlers' properties. Ballance claimed to have done a great deal for Māori, which earned a scornful response. Maihi Parāone said that existing laws must be reformed or 'he could not abide by them', and instead 'as regarded himself, his people, and his lands, he was quite prepared to govern them with his own laws'.

Notwithstanding his professed commitment to the treaty, Ballance said that repealing existing laws and allowing Māori to govern themselves 'would be very disastrous to their cause'. Furthermore, 'there could not be two law making bodies in the same country'.[389] We presume that at some point in the hui, Te Raki leaders had raised their proposal for a Māori parliament, or Ballance had otherwise heard of it. While he and Te Raki leaders shared a view of the treaty as binding, they did not share an understanding of what the agreement meant.

Rangatira asked Ballance to return the following day as they had so many concerns still to raise with him, but he declined and said they could visit his hotel

386. 'Native Meeting at the Bay of Islands', *New Zealand Herald*, 21 April 1885, p 6.

387. In its coverage, the *New Zealand Herald* noted that the rangatira attending included Maihi Parāone Kawiti, Taurau Kūkupa, Hōne Mohi Tāwhai, Pāora Tūhaere, and Īhaka Te Tai Hakuene: 'Bay of Islands News', *New Zealand Herald*, 9 March 1887, p 5.

388. 'Bay of Islands News', *New Zealand Herald*, 9 March 1887, p 5; see also 'Wellington News Notes', *New Zealand Herald*, 24 February 1887, p 6; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1091–1092.

389. 'Meeting of Northern Natives', *Auckland Star*, 16 March 1887, p 3.

in Russell if they wanted further discussions.[390] The hui continued without him, passing several resolutions, which had a significant focus on land. They included:

2. The Treaty of Waitangi must be preserved intact, as we regard such Treaty to be our only means of retaining our rights as formerly demanded by our ancestors in a letter written by them to George the Fourth . . .
3. All Native Land Court Acts, and the Native Land Administration Act 1886, should be repealed, and a new law be made under the provisions of the 71st clause of the New Zealand Constitution Act, 1852. All native transactions, whether formerly or hereafter, should come under this jurisdiction.
4. All native lands in the Northern Electoral District to be dealt with under the provisions of the Treaty of Waitangi.
5. These propositions or resolutions are open for adoption by the natives in any other district in New Zealand.
6. That [Northern Maori member] Ihaka Hakuene be requested during the next session to move that the Representation Act, 1867, be repealed, and move in place thereof, 'That a Maori Protection Bill be introduced.'[391]

In sum, the resolutions were proposing a system of local self-government for northern Māori, empowered among other things to deal with land title adjudication. The Native Land Administration Act (discussed more fully in chapter 9) provided for more community control over Māori land than previous Māori land laws, and so put a brake on sales of Māori land for a short period in the 1880s; however, many Māori opposed the Act for other reasons, including a provision allowing government agents to bypass safeguards against sale.[392]

Maihi Parāone moved the resolutions with support from Pāora Tūhaere and Te Tirarau Kūkupa, and the hui passed them unanimously.[393] Others in attendance included Ihaka Hakuene, Hirini Taiwhanga, Wī Kātene, Hōne Mohi Tāwhai, Takotorua of Te Rarawa, Matiu Te Aranui of Mangakāhia, and Eru Nehua of Whāngārei. Together these leaders represented territories extending from Auckland to the far north.[394] The reference to George IV was presumably intended to mean William IV, to whom northern rangatira wrote in 1831 seeking a trading alliance and protection from foreign threats and unruly settlers. Nine years later when they signed te Tiriti, many rangatira believed they were strengthening and reinforcing this essential bargain.[395]

390. 'Meeting of Northern Natives', *Auckland Star*, 16 March 1887, p 3.
391. The first resolution appointed Kīngi Hori Kira as chairman of Te Komiti o te Tiriti o Waitangi.
392. Waitangi Tribunal, *Te Mana Whatu Ahuru – Pre-publication Version*, Wai 898, pt 6, p 993.
393. 'Maori Parliament at the Bay of Islands', *Auckland Star*, 11 March 1887, p 3.
394. 'Bay of Islands News', *New Zealand Herald*, 9 March 1887, p 5; 'Meeting of Northern Natives', *Auckland Star*, 16 March 1887, p 3.
395. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 111–116. Hongi Hika had met George IV in 1820, but no letters were exchanged: *He Whakaputanga me te Tiriti*, Wai 1040, pp 98–108.

Maihi Parāone and other rangatira sent these resolutions to the Government, which did not respond directly.[396]

After Hirini Taiwhanga was elected to the House of Representatives in September 1887, he introduced a series of focused legislative proposals aimed at implementing the resolutions of the Waitangi parliament and granting Māori autonomy and self-government.

Taiwhanga's Maori Lands Empowering Bill 1887 proposed to repeal all existing Native Land legislation and instead establish an elected national committee of 25 Māori representatives who would award title to Māori lands and oversee land administration, including surveys, sales, leases, and mortgages of Māori land throughout New Zealand. Under the Bill, all Māori men and women aged 21 or over were entitled to vote for the national committee.[397] The Maori Lands Empowering Bill received its first reading on 14 October 1887 but was never debated.[398]

Taiwhanga's Maori Relief Bill 1887 provided for the Government to fund a deputation of Māori to London, for the purposes of persuading the Crown to bring the Maori Lands Empowering Bill into force and establish self-governing Māori districts under section 71 of the Constitution Act 1852.[399] Māori sent a large petition in support of the Maori Relief Bill. It received a first reading in May 1888 but was never debated.[400] The Premier, Harry Atkinson, dismissed it as 'utterly useless . . . a mere scrap of a Bill [that] would not provide anything'.[401] Taiwhanga responded by filibustering during debates on government Bills affecting Māori land, at times speaking for several hours to slow progress.[402]

Taiwhanga also introduced a Bill to disestablish the Native Land Court and prohibit individual Māori landowners from selling their shares directly to the Crown. Under the Native Land Administration Act 1886 which applied at the time, block committees would still be able to sell to the Government or private buyers. The Native Land Court Act 1886 and section 20 of the Native Land Administration Act Repeal Bill received its first reading in May 1888, on the same day as the Maori Relief Bill. It, too, was never debated.[403]

In October 1887, Taiwhanga also proposed the introduction of a broader measure repealing all colonial legislation applying to Māori and establishing a national system of Māori self-government in partnership with the Crown. According to

396. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 610, 1092.

397. Maori Lands Empowering Bill 1887, cls 6, 7, 10, 14, 15; untitled, *Poverty Bay Herald*, 22 December 1887, p 2. The committee could either determine the title itself, or validate any agreeement reached out of court.

398. 'First Readings', 14 October 1887, NZPD, vol 58, pp 62–63.

399. Maori Relief Bill 1887, cls 3, 4.

400. 'First Readings', 18 May 1888, NZPD, vol 60, p 137. Also see Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1074–1075; see also 'Sydney Taiwhanga', *Te Aroha News*, 21 January 1888, p 8.

401. Major Atkinson, 21 December 1887, NZPD, vol 59, p 953.

402. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1075.

403. Native Land Court Act 1886 and s 20 of the Native Lands Administration Act Repeal Bill 1887, cl 2; Native Land Administration Act 1886, ss 15, 20; 'First Readings', 18 May 1888, NZPD, vol 60, p 137.

a brief column in the *New Zealand Herald*, the proposed Maori Protection Bill was 'a more pretentious measure' which 'has for its object the protection of the Maori race and their lands'. The Bill proposed 'to repeal the Maori representation as existing, and instead [have] one Maori representative in the [General] Assembly and one in the Imperial Parliament'. A Māori council would be constituted 'for managing native affairs'. This would be elected by Māori, and 'deal with sanitary matters, schools, Maori land, moneys, and disputed land claims'.[404]

Under the Bill, a court would also be established to investigate land claims specified in a schedule, and including lands in Mangonui, Hokianga, Kaipara, and Whangaroa. The proposed court would be able to investigate claims arising before or after the Treaty of Waitangi, a move that in the *Herald*'s view would 'probably take us back to the days of Captain Cook' and provide plenty of business for lawyers. Finally, a special council comprising three 'honest and true foreigners', whom Taiwhanga intended to be selected from among people of Samoan, Rarotongan, or Fijian descent, would 'be charged with the question of settling roads and railways through Maori lands'. The Bill also proposed to repeal 35 Acts affecting Māori or their lands.[405] The *Herald* reported that Taiwhanga had approached the Native Minister seeking support for the Bill, which was unlikely to be forthcoming. As the parliamentary session was close to an end, the Bill would instead 'meet an untimely fate'. This Bill was never introduced.[406]

Of Taiwhanga's legislative proposals, the Maori Protection Bill – effectively proposing a system of Māori self-government with courts and an elected governing body – was the most comprehensive. The other Bills addressed specific issues of concern to Māori; in particular, abolition of the Court and its replacement with a new land titling system. Further discussion would no doubt have been necessary to bring any of Taiwhanga's proposals to fruition and to determine the relative jurisdictions of Māori and colonial institutions. But so far as we can determine, the colonial authorities did not engage in that discussion, nor engage with the underlying principle of Māori authority over Māori land. The proposed legislation reflected the considered wishes of the northern leaders gathered at the Waitangi parliament, yet was simply ignored in Wellington. This was clearly a missed opportunity.

After Taiwhanga's death in 1890, his successor, Eparaima Kapa, introduced another Bill similar to the Native Rights Bill. Kapa's Bill was also never debated (see section 11.5.2.1).[407]

404. 'Lobby Gossip', *New Zealand Herald*, 29 October 1887, p 5; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1074–1075.

405. 'Lobby Gossip', *New Zealand Herald*, 29 October 1887, p 5; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1074–1075.

406. 'Lobby Gossip', *New Zealand Herald*, 29 October 1887, p 5; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1074–1075.

407. Native Lands Administration Bill 1891; 'First Readings' NZPD, 1891, vol 72, p 50; Dr Donald Loveridge, Draft evidence of Dr Donald Loveridge as edited and completed by Crown counsel, 2015 (doc Z1(b)), pp 19–20.

11.4.2.3 *What were the Crown's responses to Te Raki Māori petitions and letters?*

During the late 1870s and throughout the 1880s, Te Raki Māori sent numerous petitions and appeals to the Crown requesting recognition of and protection for their treaty rights. As well as petitioning the House of Representatives, Te Raki leaders in 1882 and 1883 appealed directly to the Queen in London. At times, these appeals focused on perceived breaches of the treaty, concerning land laws, rates, and other matters. For example, in 1881 Te Hemara Tauhia petitioned the House saying it 'should not make any more laws affecting Maori lands, for they will be the cause of wars between the races'.[408] On several occasions, Te Raki leaders outlined their vision for Māori self-government, asking the Crown to give legal recognition to a Māori parliament or local committees.

11.4.2.3.1 1882: Hirini Taiwhanga's petition to the Queen

Hirini Taiwhanga was a leader of Ngāti Tautahi and Te Uri o Hua. Taiwhanga's father, Rāwiri, had fought with Hongi Hika during the wars of the 1820s; and his mother, Mata Rawa, was a Te Arawa war captive. After returning from war, Rāwiri became first Te Raki leader to adopt Christianity, and he pioneered the development of agriculture and horticulture in the district. He signed te Tiriti in 1840 and raised his children as mission-educated Christians.[409]

Hirini Taiwhanga was educated at St John's College, Auckland, and trained as a carpenter and then as a surveyor who provided maps for the Native Land Court; at the time he was the only Māori in this role. Taiwhanga married twice. His first wife was Mere Pohoi, the daughter of the Kaikohe leader Wī Hongi; this marriage enhanced Taiwhanga's mana within the hapū. Mere had several children before she died in 1876. Taiwhanga then married Sarah Ann Moran, an Irish migrant with a child from a previous marriage. Their wedding attracted considerable media interest because it was rare at that time (and possibly unprecedented) for a Māori man to marry a settler woman.[410]

From the late 1860s, Taiwhanga was prominent in Ngāpuhi affairs. He frequently took part in Waitangi and Ōrākei parliaments, spoke at hui with visiting Governors and Ministers, and was a perennial candidate for the Northern Maori electorate. By the mid-1870s, he was an outspoken critic of government policies, clashing with officials over land claims and electoral rights.[411] His outspokenness and determination took a considerable personal toll, earning him a reputation

408. Report on 'Petition of Hemara Tauhia and 32 Others', 19 July 1881, AJHR, 1881, I-2, p 5; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 868.

409. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 248, 250; Claudia Orange, 'Taiwhanga, Rāwiri', Dictionary of New Zealand Biography – Te Ara: Encyclopedia of New Zealand (accessed 14 February 2022).

410. Claudia Orange, 'Taiwhanga, Hirini Rāwiri', Dictionary of New Zealand Biography – Te Ara: Encyclopedia of New Zealand (accessed 14 February 2022); Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 330, 848–851.

411. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1048. For Taiwhanga's extensive involvement in political activities and land protests during the 1870s, see Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 565, 591, 595, 603–604, 608–609, 855–856, 859, 861–862, 865–866, 898, 906–907, 974–975, 1001–1003, 1008, 1021.

among government officials and agents as an 'agitator'.[412] The claimant Hōne Pikari (Te Uri o Hua) told us that Taiwhanga was 'a fighter' who campaigned tirelessly for tino rangatiratanga and 'to keep the New Zealand Government in check'.[413]

Disputes with the Government during the 1870s and early 1880s either directly or indirectly cost Taiwhanga his job, his livelihood, his family land, and a school he had established at Kaikohe. Specifically, in 1873 he was fired and lost his licence as a surveyor after a dispute with Judge Maning.[414] Soon afterwards, he established a school at Ōpanga (Kaikohe) for Māori and European children,[415] but in 1881 he was forced to sell the 45-acre site to repay a mortgage that had funded a trip to Wellington so he could present petitions to the Government. Taiwhanga occupied the school's site for two-and-a-half years, refusing to leave until the Whangaroa leader Paora Ururoa and other rangatira intervened. During his occupation, the Government closed his school.[416]

After almost a decade of petitions, protests, visits to Wellington, and attendance at parliaments and hui, Taiwhanga resolved to petition the Queen.[417] In March 1882, he called a meeting at Kaikohe, where he asked members of Hongi Hika's family to accompany him to London 'for the purpose of making known the wrongful acts of the Government of New Zealand towards the Native people'.[418] By involving Hongi's whānau, Taiwhanga was not only seeking to add their mana to the project, he was also placing his petition in the context of a Crown–Ngāpuhi relationship established by Hongi in 1820 and reinforced, from a Ngāpuhi perspective, by he Whakaputanga in 1835 and te Tiriti in 1840. Judge Maning acknowledged that '[T]he Treaty of Waitangi grievance is coming to a head'.[419]

Hōne Mohi Tāwhai opposed the petition, which was not signed by any Hokianga rangatira. According to Armstrong and Subasic, this was essentially for tactical reasons: Tāwhai was at the time seeking Government support for a system of native committees with meaningful powers of self-government.[420]

Support for Taiwhanga's petition was otherwise unanimous among the most senior leaders from Whangaroa, the Bay of Islands, Whāngārei, and Mangakāhia. Alongside Taiwhanga, signatories included Hāre Hongi Hika (Ngāti Uru, Ngāti

412. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 859, 1052, 1056, 1058.

413. Hōne Pikari (doc W11), pp 12–13.

414. Taiwhanga's maps produced for the Native Land Court frequently included lands the Crown had already taken or awarded to settlers under the old land claims process. Judge Maning refused to accept any of these plans. In 1873, on the recommendation of Maning and Mangonui resident magistrate William B White, Taiwhanga lost his licence as a surveyor and was forced to take up road work in order to feed his large family. His licence was later restored: Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 330, 848–852.

415. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1048.

416. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1048–1050.

417. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1051.

418. Tāwhai to Native Minister, 25 January 1882 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1051).

419. Maning to Webster, 2 April 1882 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1051).

420. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1065.

Tautahi, Te Tahawai), Kīngi Hori Kira (Ngāi Tūpango), Mangonui Rewa (Ngāi Tāwake, Te Patukeha), Maihi Parāone Kawiti (Ngāti Hine), Parore Te Āwhā (Te Rōroa, Ngāti Ruangāio), and Parore's nephews Wiremu Reweti Puhi Te Hihi and Hakena Parore.[421] Āperahama Taonui was also a key supporter prior to his death in 1882.[422]

Taiwhanga sent the petition to the Governor in August 1882, asking that it be forwarded to the Queen. The original has not survived, so we rely on the official English translation, which is reproduced in full in appendix 11.1. The petition stated that through the treaty, the Crown had become 'protector of New Zealand – to protect and cherish the Maori tribes'. But in the years since, colonial Governments had started wars in the Bay of Islands, Taranaki, and Waikato; seized and confiscated Māori land; invaded Parihaka; and committed numerous other 'evils' – all in response to Māori who were attempting to retain their lands in accordance with the treaty.[423]

In addition, the colonial Government had enacted numerous laws that were 'against the principles embodied in the Treaty', including all of the Native Land Acts brought into effect since 1862 without the consent of rangatira throughout the country, and the Immigration and Public Works Act 1870 through which £700,000 had been borrowed and spent. These laws were unjust and had caused great disorder and inflicted great suffering on Māori people.[424]

The petitioners told the Queen that they believed she had 'no knowledge as to the deeds of wrong that gave us so much pain, and which create lamentation among the tribes'. Europeans had said that the colonial Government made war under the Queen's authority, 'but our decision was that such acts were not sanctioned by you, O Queen, whose benevolence towards the Maori people is well known'. Rather, 'disorderly work' had been carried out 'so that a path might be opened up to seize Maori lands'. Here, Taiwhanga and his fellow petitioners were clearly distinguishing between the Queen, in whom was vested 'the sole authority affecting the Waitangi Treaty', and the actions of colonial Governors and Governments who had acted in breach of that agreement.[425]

The petitioners assured the Queen that there were 'no expressions of disaffection' towards her by the Māori tribes, 'including the tribes of the King'; they revered the Queen and beseeched her to hear their plea. They appealed that she would 'not permit increased evils to come upon your Maori children in New Zealand but sanction the appointment of a Royal English Commission to abrogate the evil laws affecting the Maori people'. They also asked the Queen:

421. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1051–1053.
422. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1056.
423. 'Petition from Maoris to the Queen', AJHR, 1883, A-6, encl 1, pp 1–3. The petition is in Armstrong and Subasic's document bank: doc A12(a), vol 11, pp 3:334 to 3:336.
424. 'Petition from Maoris to the Queen', AJHR, 1883, A-6, encl 1, pp 1–3. The petition is in Armstrong and Subasic's document bank: doc A12(a), vol 11, pp 3:334 to 3:336.
425. 'Petition from Maoris to the Queen', AJHR, 1883, A-6, encl 1, pp 1–3. The petition is in Armstrong and Subasic's document bank: doc A12(a), vol 11, pp 3:334 to 3:336.

> to establish a Maori Parliament, which shall hold in check the European authorities who are endeavouring to set aside the Treaty of Waitangi; to put a bridle also in the mouth of Ministers for Native Affairs who may act as Ministers have done at Parihaka, so that all may be brought back to obey your laws; and to prevent the continued wrongs of land matters which are troubling the Maori people through days and years; and to restore to the Maoris those lands which have been wrongfully confiscated according to the provisions of the Treaty of Waitangi; and to draw forth from beneath the many unauthorized acts of the New Zealand Parliament the concealed treaty, that it may now assert its own dignity.[426]

As the petition made clear, the Government's November 1881 invasion of the pacifist settlement Parihaka had further galvanised Ngāpuhi and other Māori in their determination to secure self-government in accordance with the treaty. Ten Ngāpuhi ploughmen were among those arrested at Parihaka, and the invasion raised fears among Māori throughout the country that this was to be the Government's new approach. As the petition explained:

> Armies were sent to Parihaka to capture innocent men that they might be lodged in prison ; to seize their property and their money, to destroy their growing crops, to break down their houses, and commit other deeds of injustice. We pored over the Treaty of Waitangi to find the grounds on which these evil proceedings of the Government of New Zealand rested, but we could find none.[427]

As was typical for Te Raki leaders, the petitioners attributed the strife to the colonial Government, not the Queen. They were aware that the Governor, Sir Arthur Gordon, had opposed the invasion.

Parore Te Āwhā donated £300 to send Taiwhanga, Reweti, and Hakena to London, where they hoped to deliver the petition to the Queen in person.[428] Government officials in New Zealand were openly derisive, but nonetheless feared that some in London might take Taiwhanga's requests seriously. The Native Secretary, Thomas Lewis, therefore developed a plan to undermine the mission by preparing a file attacking Taiwhanga's record and character. This was to be sent to the New Zealand agent in London, Francis Dillon Bell, so he could complete a 'hatchet-job' (Lewis's term) before Taiwhanga arrived.[429]

To prepare that file, Lewis sought reports from the resident magistrates James Stephenson Clendon (Hokianga) and William B White (Mangonui), Russell court clerk J H Greenway, and Judge Maning. They rehashed stories about Taiwhanga's record as a surveyor and his resistance to the sale of his Opanga block, as evidence

426. 'Petition from Maoris to the Queen', AJHR, 1883, A-6, encl 1, p 2.
427. 'Petition from Maoris to the Queen', AJHR, 1883, A-6, encl 1, p 2.
428. 'The Maori Deputation to the Queen', *New Zealand Times*, 3 May 1882, p 3; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1053.
429. Lewis to Native Minister, 4 May 1882 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1053).

of his poor character and 'scheming' nature.[430] Clendon, Greenway, and White all made the patently false assertion that Taiwhanga had no support from Te Raki leaders; they said that most rangatira had ridiculed his mission and denied that he represented them, and the few signatories had been duped, having little idea of the petition's content or purpose. In fact, those who signed were among the district's most senior rangatira, and Hika and Maihi Parāone had long track records in petitioning or appealing to the New Zealand Government. There is no evidence of any later repudiation of Taiwhanga's mission by Te Raki leaders.[431] The fact that he was later elected Northern Maori member of the House of Representatives also suggests he had support among Ngāpuhi.[432]

Maning, in contrast to the other officials, acknowledged that the petition was widely supported and reflected the 'growing dissatisfaction with their present position and prospects'. He wrote that Taiwhanga attributed this to deliberate Crown breaches of the treaty, whereas in Maning's view, Taiwhanga and his supporters had 'but a very vague and loose idea of what the "Tiriti" really is, or what benefits it confers on them'. Like other officials of his time, Maning regarded the treaty as granting the Crown sovereignty while reserving few or no rights to Māori other than those of citizenship. The real source of Te Raki Māori dissatisfaction, Maning wrote, was economic decline, for which the judge held Māori entirely responsible due to their 'indolent' ways.[433]

Lewis forwarded the report to Bell in London, and Bell promised to ensure the British government was aware of its contents.[434] According to Dr Orange, Bell then 'took pains to belittle the appeal [from Taiwhanga] and discredit the petitioners'.[435] Taiwhanga arrived in London in June 1882, where he was supported by the Aborigines' Protection Society.[436] He was not granted an audience with the Queen, but – with the society's assistance – did meet the Secretary of State for the Colonies, Lord Kimberley, along with several members of Parliament. After the nature of the petition was explained, Lord Kimberley said it 'ought to have been presented to the Governor and Government of New Zealand in the first instance'.

430. Maning, memorandum, not dated (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1056; see also pp 1054–1058). James Stephenson Clendon was the son of the former magistrate James Reddy Clendon.

431. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1054–1055.

432. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1065.

433. Maning, memorandum, not dated (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1056–1058).

434. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1059.

435. Orange, The Treaty of Waitangi, p 207.

436. 'Anglo-Colonial Notes', *Auckland Star*, 15 August 1882, p 2; Orange, *The Treaty of Waitangi*, p 207. The Aborigines' Protection Society was founded in 1837 and, along with other humanitarian organisations of the time, had significant influence on British policy towards New Zealand's colonisation (including its approach to the treaty). The Society advocated for policies aimed at 'protecting the defenceless, and promoting the advancement of uncivilized Tribes': Aborigines Protection Society, 'Report of the Parliamentary Select Commitee on Aboriginal Tribes (British Settlements) Reprinted with Comments by the Aborigines Protection Society' (London: William Ball, 1837).

Without hearing from them, he could give no definite answer. Taiwhanga and other rangatira then spoke. According to the official record of the meeting,

> Firstly, they complained that the Treaty of Waitangi had not been upheld, and urged that it should be maintained, and the English and Native races governed according to it; secondly, they desired that steps should be taken to unite more closely the English and the Native race, instead of the latter being treated by the former as a horse treated his enemy – kicking him away.[437]

They also asked that Te Whiti be freed.[438]

Although Taiwhanga and others spoke in Māori, the official account records only the English translation. When Kimberley pressed on why the petition had not been sent to the New Zealand Government, Wiremu Puhi Te Hihi replied that the colonial authorities 'had not acted as the Queen would have done under similar circumstances', and that Māori had grievances throughout the country. Kimberley responded that bypassing the colonial Government 'would not tend to the union of the English and Native races', and that the treaty 'was very simple, and provided that the possession of land was to be respected'. He did not see raupatu as a treaty matter: 'the point was whether they [the confiscations] were just'. What was more, 'The management of the land of New Zealand was absolutely handed over to the New Zealand Government, and the Queen was advised by the Ministers of the colony in regard to these matters, and not by himself, as there could not be two governments for one country.'[439] Lord Kimberley therefore referred the petition back to the colonial Government, in effect rejecting any British responsibility for honouring the terms or spirit of the treaty. He later passed the petition on to the Queen, with a recommendation that no action be taken.[440]

As discussed in chapter 7, Britain had granted responsible government to the colonial Government in 1856, but the Governor had initially retained responsibility for Māori affairs. During the 1860s however, responsibility for Māori affairs was progressively handed to the colony – a process that was essentially completed by February 1865 (with the exception that the Governor retained direct authority over imperial troops, which remained in New Zealand until 1870). Nonetheless, New Zealand was not fully independent of Britain, and would not become so until the mid-twentieth century. British authorities therefore retained some rights to involve themselves in New Zealand affairs. In constitutional terms, the colonial Governor was required to follow the Queen's Instructions, and he was required to accept ministerial advice because the Queen (through the Colonial Office) had

437. 'Petition from Maoris to the Queen', AJHR, 1883, A-6, encl 2, pp 4; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1061–1062.

438. 'Petition from Maoris to the Queen', AJHR, 1883, A-6, encl 1, p 2; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1080, 1085.

439. 'Petition from Maoris to the Queen', AJHR, 1883, A-6, encl 2, pp 4; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1061–1062.

440. 'Petition from Maoris to the Queen', AJHR, 1883, A-6, encl 2, no 4, p 6. Also see Orange, *The Treaty of Waitangi*, p 207.

instructed him to. In the 1880s, those Instructions still provided that the British government would have to approve some legislation, and that the Governor had discretion to refuse Ministers' advice in some circumstances. Furthermore, the Queen could issue new Instructions. However, those issued after 1865 contained no explicit protections for Māori treaty rights.

The colonial authorities would no doubt have vigorously resisted any attempt by the Colonial Office or British Parliament to interfere in response to Taiwhanga's petition, and such a course would likely have provoked a constitutional crisis. But, at the very least – having failed to adequately protect treaty rights in New Zealand's constitutional arrangements – Britain could have exercised considerable moral pressure on the colonial Government as it would in 1885, following Tāwhiao's visit to London (see section 11.4.2.3.4). On this occasion, as on others, it chose not to. This was not a matter of law but of constitutional convention. It was also a matter of practical convenience for both governments – the colonial Government because it wanted to retain final authority over all domestic affairs, and the imperial government because it did not have to resolve any questions of treaty breach that might arise. We agree with Dr Orange that 'Britain had abdicated responsibility for the treaty and for Maori affairs'.[441]

In response to the petition, the Premier, Sir Frederick Whitaker, wrote a memorandum further criticising Taiwhanga's character and arguing that the petition had little support. With respect to the treaty breaches alleged in the petition, Whitaker responded that most had occurred when the colonial Governors – in effect the imperial government – had responsibility for Native affairs.[442] Essentially, this was a denial of the roles played by settler Governments alongside the Governors in initiating the Taranaki and other wars.[443]

Turning to events since the 1860s when settlers had been granted responsibility for Māori affairs, Whitaker asserted that the capture and incarceration of Te Whiti was justified, and the Native Land Acts were 'not restrictive but enabling'. Their purpose was to 'relieve the Maori owners from the monopoly held by the Government; and to enable them to sell their lands to whomsoever they pleased'. The Acts were in no way compulsory: 'The Maoris were and are at liberty to avail themselves of the powers conferred, or to abstain from doing so, at their pleasure.'[444]

In our view, in light of consistent Māori protest over the Native Land Acts and their impacts on their collective landholdings (discussed in chapter 9), this was disingenuous at best. Whitaker did not respond to concerns over the Immigration and Public Works Act, except to claim that no land had ever been taken from Māori other than by confiscation, and that £700,000 had been spent to acquire lands that had been 'unprofitable waste'. In Whitaker's view,

441. Orange, The Treaty of Waitangi, p 207.
442. 'Petition from Maoris to the Queen', AJHR, 1883, A-6, encl 3, p 5.
443. See Waitangi Tribunal, *The Taranaki Report*, Wai 143 (Wellington: Legislation Direct, 1996), p 380.
444. 'Petition from Maoris to the Queen', AJHR, 1883, A-6, encl 3, p 5; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1059–1060.

> The general legislation of the Colony as to the Maoris has been more than just – it has been exceptionally favourable to them. When laws have been made applicable to the people of the Colony, the object has, in many instances, been to except the Maoris from their stringency; and there is no instance in which they have been placed in a less favourable position than the European population.[445]

He gave the example of Māori exemptions from property taxes, while ignoring Māori contributions to the colony's development through customs duties and land sales. Whitaker concluded: 'It may, indeed, with confidence be asserted generally, that there is not, and has not been, anything on the statute-book of the Colony, or in the conduct of the Colonial Legislature, as regards the Maoris, to which reasonable exception can be taken.'[446]

Settler media in New Zealand meanwhile subjected Taiwhanga to further criticism after his estranged Pākehā wife arrived in Auckland alleging she had been abandoned in poverty during his trip – a charge Taiwhanga vehemently denied, and he threatened to sue for libel.[447]

On his return to New Zealand, Taiwhanga attended several hui and also met Kīngitanga representatives, briefing them on the disappointing outcome.[448] After the British government sent official word that it would not investigate the petition, Parore Te Āwhā expressed his disbelief:

> I myself sent those person[s] to England to lay our grievances before the Queen – that is, before all her governing power – because all the grievances that we, the Maoris, suffer from arise from the Colony of New Zealand; hence our petition for the establishment of a Native Parliament in New Zealand.

Parore said that the petition had not been sent 'with the object of trampling on the authority of the Government of New Zealand'. However, the petitioners – and the Māori people – believed 'that the Queen's authority should be exercised directly over us'. They sought this arrangement because 'it is the Europeans of New

445. 'Petition from Maoris to the Queen', AJHR, 1883, A-6, encl 3, p 5.

446. 'Petition from Maoris to the Queen', AJHR, 1883, A-6, encl 3, p 6.

447. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1059–1060. For an example of settler newspaper coverage of Taiwhanga's petition, see *New Zealand Times*, 12 August 1882, p 2. Taiwhanga's troubled relationship with his second wife, Sarah Moran, also received extensive and lurid coverage. In the wake of her accusations against Taiwhanga, he was arrested after his return to New Zealand in 1883, charged with abandonment; but the case was dismissed. From then on, the pair lived apart, though Moran continued to seek child maintenance payments until Taiwhanga's death in 1890. During the 1890s, Sarah appeared in court several times for public drunkenness: Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1048, 1062–1064; 'Sydney D Taiwhanga's Domestic Troubles', *New Zealand Herald*, 5 July 1879, p 6; 'Sydney Taiwhanga's Family – A Melancholy Tale', *Nelson Evening Mail*, 30 September 1882, p 6; 'Law and Police', *New Zealand Herald*, 27 July 1885, p 3; 'Police Court', *Auckland Star*, 26 July 1883, p 2.

448. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1063.

Zealand who oppress the Maori people'.[449] Once again, Te Raki Māori – and in this case, a treaty signatory – were drawing a clear distinction between the Queen's protection, which they accepted, and the authority of colonial institutions of government over Māori, which they did not.

Colonial officials regarded Taiwhanga's mission as a failure and believed it would dampen Te Raki Māori enthusiasm for similar ventures in future. But that did not occur. Within months of his return, Taiwhanga was raising funds for a return trip, in the hope of placing his petition before the British House of Lords. Ngāpuhi very quickly raised £600 to support this mission, proposing to again send Taiwhanga and two other rangatira. This renewed initiative was similarly aimed at asserting treaty rights and addressing injustices such as the Waikato raupatu and the invasion of Parihaka. A new cause of concern was the increasing use by settlers of Māori fishing grounds without permission, contrary to the treaty. Taiwhanga also considered a Supreme Court action on these matters.[450]

11.4.2.3.2 1883: Māori MHRs appeal to the Aborigines' Protection Society

As in 1882, the Northern Maori member Hōne Mohi Tāwhai did not support Hirini Taiwhanga's initiatives, though he was sympathetic to Taiwhanga's underlying cause; at the time Taiwhanga was visiting London, Tāwhai was attempting to persuade the Government to establish native committees which he hoped would restore a significant measure of Māori self-government.[451]

Other Ngāpuhi leaders shared Taiwhanga's support for a separate Māori parliament. They continued to see value in forging closer ties with the Kīngitanga, while remaining unwilling to accept any inference that the King had mana over them. In April 1883, Maihi Parāone, Mangonui Rewa, Ihaka Hakuene, Taiwhanga, and 80 other Ngāpuhi attended a major hui at Whanganui where another petition to the Queen was discussed. The hui decided that King Tāwhiao should travel to London and petition the Queen directly – a decision the Ngāpuhi leaders were willing to accept so long as Tāwhiao visited Waitangi. Tāwhiao declined.[452]

In July of that year, Hōne Mohi Tāwhai and the other Māori members (Wiremu te Wheoro, Henare Tomoana, and Hōri Kerei Taiaroa) wrote to the Aborigines' Protection Society, which had earlier supported both Taiwhanga and Tāwhiao during their visits to London. The letter was sent at a sensitive time for both the Government and Māori leaders: Tāwhiao was preparing for his visit to London (section 11.4.2.3.4); other Māori leaders were attempting to persuade the Government to establish a system of Māori self-government through committees with meaningful powers (section 11.4.2.3.5); and the Government was seeking Māori agreement to open the King Country.[453]

449. Parore Te Awha to Native Office, AJHR, 1883, A-6, 25 April, 1883, pp 6–7; (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1063).
450. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1064–1065.
451. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1064–1065.
452. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1066.
453. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pt 2, p 867; F W Chesson to the Earl of Derby, 12 October 1883, BPP, vol 17, pp 128–129.

The members' letter set out Māori grievances about land laws, the Native Land Court, Crown purchasing, and more broadly, the workings of the colonial Government. We have only an English translation. Māori, the members wrote, were at risk of being 'swept from the land of the forefathers'. While they acknowledged the Queen's protective authority, 'Our protest is against the breaking of the bond of Waitangi by the Colonial Government, which being a party to a suit in the question of lands, acts also as its judge.'[454]

In their view, 'an elective body of Maoris' should be established to make laws for all Māori, determine questions of land title, raise taxes, and oversee public works, subject to the Governor's approval. In this way, the rangatira signalled their acceptance of the Queen's protective authority and also the role of the Governor as the Queen's representative, while seeking freedom from 'the evils that destroy us', those evils arising from the settler-dominated system of colonial Government.[455] They added: 'Every year . . . laws are made taking the control of land more out of our hands, and vesting it in the Minister for Native Affairs, and our voices being but four are powerless against eighty-seven representing the European portion of the population in the New Zealand Parliament.'[456]

The Aborigines' Protection Society forwarded the letter to the Colonial Office, drawing attention to its 'special importance . . . because it puts in an intelligible form the views of the most influential Natives as to the best mode of settling the questions at issue between the races'. The society also expressed regret that the Māori members of the House 'should be unable to obtain from the Colonial Government those reasonable concessions to Native feeling' they were seeking.[457]

The Colonial Office sought an explanation from the New Zealand Government. Native Minister John Bryce (best known for leading the Crown's invasion of Parihaka in 1881)[458] responded that the letter was 'an attack made from an irresponsible quarter in London' [the Aborigines' Protection Society] 'prompted,

454. Wi Te Wheoro, Hōne Mohi Tāwhai, Henare Tomoana, and H K Taiaroa to F W Chesson, Secretary, Aborigines Protection Society, 16 July 1883 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 998–999).

455. Wi Te Wheoro, Hōne Mohi Tāwhai, Henare Tomoana, and H K Taiaroa to F W Chesson, Secretary, Aborigines Protection Society, 16 July 1883 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 998–999).

456. Wi Te Wheoro, Hōne Mohi Tāwhai, Henare Tomoana, and H K Taiaroa to F W Chesson, Secretary, Aborigines Protection Society, 16 July 1883 (O'Malley, 'Komiti and Runanga' (doc E31), p 196).

457. F W Chesson to the Earl of Derby, 12 October 1883, BPP, vol 17, pp 128–129; O'Malley, 'Komiti and Runanga' (doc E31), p 196.

458. John Bryce was a Whanganui farmer and settler politician who served in local and provincial politics during the 1860s, and in the House of Representatives for much of the period between 1866 and 1891. He was a controversial and abrasive Minister of Native Affairs from 1879 to January 1881 and again from November 1881 to 1884. Aside from the invasion of Parihaka, he was best known for an 1860s incident in which a farmer militia he was leading caught and killed two Māori boys who had been chasing pigs on a settler's farm. Among Whanganui Māori he was known as 'Bryce kōhuru' ('Bryce the murderer'): Hazel Riseborough, 'John Bryce', in *The Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, https://teara.govt.nz/en/biographies/2b44/bryce-john, accessed 12 August 2021.

there is little doubt, by some tenth-rate politician . . . with probably a petty grievance against the Government'.[459] The 'tenth-rate politician' might have been a reference to Taiwhanga or to a settler named David McBeth who was an associate of Taiwhanga's and a vocal opponent of the Government's invasion of Parihaka. McBeth later acknowledged that he had been at a meeting of the members and other Māori leaders in Wellington when the letter was written. The letter 'was the joint production of the meeting, and its substance had, I believe, been before thoroughly discussed in Maoriland'. Although he was not the author, McBeth arranged for it to be sent to London and published in newspapers there.[460]

Regarding the substance of the letter, Bryce wrote that the Māori members' proposals were impractical and undesirable. First, Bryce said, there was little hope of a Māori decision-making body being able to agree among themselves or make decisions that Māori in general would accept. Secondly, he continued, Māori were scattered among a much larger settler population, making separate Māori and settler jurisdictions impossible. In Bryce's view, it was therefore 'self-evident that the Maoris must cast in their lot with the Europeans, accepting their institutions and laws'. Any other approach 'would assuredly result in disaster to the Native race'.[461] Here, the Minister was acknowledging that the colonial Government's assisted immigration policies had created significant practical difficulties for the exercise of tino rangatiratanga.

Bryce, at the time, was in fact negotiating with Māori in Te Rohe Pōtae and Waikato over the establishment of separate Māori jurisdictions, and would later – albeit with extreme reluctance – sponsor native committees legislation. Although he was personally hostile to Māori self-government, Bryce clearly regarded separate institutions as a possibility if they were established under government authority, their powers were limited, and they could be used to hasten the opening of Māori land for settlement.[462]

11.4.2.3.3 1883–85 Te Raki Māori petitions

With Tāwhiao pursuing his own course, Ngāpuhi leaders again considered sending a further delegation to London,[463] and to this end Te Komiti o te Tiriti o Waitangi (discussed in section 11.4.5) began to draft a petition calling on the Crown to establish a Māori parliament and honour its treaty guarantees. In December 1883,

459. Native Minister to Governor, 11 January 1884 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 999). Kawharu and O'Malley also described these events: Kawharu, 'Te Tiriti and its Northern Context' (doc A20), pp 299–300; O'Malley, 'Runanga and Komiti' (doc E31), pp 195–198.

460. 'McBeth, the Maoris, and the Aborigines Protection Society', *Poverty Bay Herald*, 28 November 1883, p 2; Ward, *A Show of Justice*, p 292.

461. Native Minister to Governor, 11 January 1884 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 999). Kawharu and O'Malley also described these events: Kawharu, 'Te Tiriti and its Northern Context' (doc A20), pp 299–300; O'Malley, 'Runanga and Komiti' (doc E31), pp 195–198.

462. Regarding the Native Committees Act, see Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pt 2, pp 867–870. Chapter 8 of that report discusses Bryce's negotiations with Te Rohe Pōtae Māori.

463. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1066–1067.

a Bay of Islands court official sent the Native Department what appears to be an unfinished draft:

> I. Make good those portions of the Treaty of Waitangi that have been broken;
> In as much as the Queen's right of purchase has not been carried out in a proper [manner] by her Land Purchase Agents in connection with Maori lands since the making of the Treaty of Waitangi;
> In as much as the Government have set aside her conditions
> In as much as the law has been trampled upon by them
> For the Treaty of Waitangi is 'the law' for New Zealand.
>
> II. Foreshores, pipibanks and fishing places—(1) that the 'mana' of those places be returned to the natives,
> (2) so that they should be as they were in Hone Heke's time.
>
> III. The wrongful purchase of Native Lands in former times—(1) paying for land with . . .
> (2) the simple pointing out of land . . . and being taken as indicating the boundaries
> (3) and the subsequent unauthorized survey of land without a proper person to point out the lines.
>
> IV. Native Land Courts—(1) to entirely abolish the Native Land Court (2) that our claims to land be adjudicated upon in accordance with the Treaty of Waitangi (3) that the acts relating to the Native Land Court which dealt a blow to the Treaty of Waitangi be abolished.
>
> V. The wrongful imprisonment of Te Whiti . . .
>
> VI. To alter the present (constitution of the) Parliament of New Zealand—(1) Europeans only make the laws
> (2) they should both have equal power to assent or dissent
> (3) so that they may have equal power in making laws.
>
> VII. The government laws relating to confiscation . . . that they be given back to the natives.
>
> VIII. The imposition of taxes on lands held according to Maori custom to be abolished—(1) That this law be abolished
> (2) This act is not in accordance with the Treaty of Waitangi. . . .[464]

464. Greenway to Under-Secretary, Native Affairs, 5 December 1883 (Kawharu, 'Te Tiriti and its Northern Context' (doc A20), pp 300–301). James Hamlyn Greenway was a clerk and interpreter at the Resident Magistrate's Court at Russell.

While clearly an early draft, this text is consistent with the objectives that Te Raki leaders had set out elsewhere: abolition of the Court, return of confiscated lands, release of Te Whiti, restoration of Māori control over customary fisheries, and establishment of a legislature in which Māori and settlers would have equal say and could review each other's Bills.

Discussion about a Ngāpuhi petition or delegation to London continued in 1884 at the Ōrākei parliament and elsewhere.[465] With Taiwhanga now embroiled in legal issues arising from the claim that he had abandoned his wife, the former Northern Maori member Wiremu Kātene became the public face of the campaign.[466] The *New Zealand Herald* reported that the proposed mission sought 'local self-government' for Māori, in accordance with the treaty. In particular, Māori sought 'freedom from European rates and taxes', including the dog tax, which we discuss later, in section 11.5.[467]

Kātene sought advice from the Government about the proposed journey to London and was told – by Native Minister John Ballance – that they would 'get no redress of any grievance' from the British government:

> The reason is plain, and ought to be known to the Maoris . . . The Colony has a constitution and Parliament of its own, and the Government and Parliament of England cannot interfere . . . The Maoris must seek redress from their own Parliament in which they have their representatives.[468]

In other words, Māori seeking relief from unwelcome colonial laws had no recourse other than to the settler-dominated body that was making those laws. Again, the path to redress from Britain was blocked. We reiterate here that the Crown had established the colonial Parliament and granted it authority over Māori affairs without consulting Māori, and without providing sufficient safeguards to ensure that colonial authorities would meet the Crown's treaty obligations; and furthermore, that the Crown did retain some residual power to reject the advice of the New Zealand Government (see chapter 7, section 7.3).

While Ngāpuhi for the time being abandoned any further plans to send a delegation to London, Kātene and six other rangatira instead sent a petition to the House of Representatives asking that it be forwarded to British authorities. It is

465. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1066–1067.

466. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1066–1067.

467. 'Another Maori Mission to England', *New Zealand Herald*, 18 November 1884 (see Armstrong and Subasic, supporting papers (doc A12(a), vol 11), p 3:98); Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1119.

468. Ballance to Kātene, 18 November 1884, 'The Maoris and Appeals to England', *Auckland Weekly News*, 29 November 1884, p 6 (Armstrong and Subasic document bank, doc A12(a), vol 11, p 3: 281); Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1067; see also untitled (column 4), *New Zealand Times*, 18 September 1884, p 2.

not clear whether this was the komiti's petition or another, as the petition does not appear in the House of Representatives' records.[469]

In 1885, Kātene sent yet another petition asking that Parliament consider the previous year's petition 'relative to restoring the clauses of the Treaty of Waitangi which have been abrogated'.[470] Armstrong and Subasic presumed that Kātene 'then despatched the petition to the Queen', but we have seen no evidence to confirm that. Nor have we seen any evidence that the Government in New Zealand took any action.[471]

11.4.2.3.4 1884: King Tāwhiao's visit to England

In the meantime, King Tāwhiao had been in London during July and August 1884, presenting his petition which sought the establishment of a national Māori parliament and government; self-governing Māori districts declared under section 71 of the Constitution Act 1852; the return of confiscated lands; and a system for mediation between Māori and colonial authorities. Like Taiwhanga, he appealed to the Queen in the hope that she would recognise his rights to autonomy and self-government when colonial authorities would not.[472]

Tāwhiao, like Taiwhanga, received a warm welcome from the Aborigines' Protection Society, while the New Zealand Government attempted to ensure he did not meet the Queen.[473] The Aborigines' Protection Society hosted Tāwhiao and his party, and endeavoured to arrange meetings with British authorities. The New Zealand Government, 'determined to thwart the mission', told the Colonial Office that Tāwhiao was a private citizen with support from no more than 1,000 Māori.[474]

Tāwhiao's attempts to meet the Queen were blocked, but he did win an audience with Lord Derby, the Secretary of State for the Colonies, who acknowledged that the treaty was 'a serious and a binding thing', and that Māori and settlers had very different views about land tenure and justice. Nonetheless, Derby had to acknowledge that Britain had long since handed power to the New Zealand colonial Government and could not act even if the Government had failed in its treaty duties.[475]

> New Zealand is very far off. It is the experience of all the world that countries cannot be effectually administered by persons at a distance, and that the wish of the

469. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1068; see also petition of Wiremu Kātene and 6 others, 5 November 1884, AJHR, 1884, I-2, p 16.

470. Petition of Wiremu Kātene and others, AJHR, 1885, I-2, p 30; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1068.

471. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1068.

472. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pt 2, pp 923–924. Tāwhiao's party included the Waikato rangatira Wiremu Te Wheoro (Ngāti Naho), Topia Tūroa of Whanganui, Patara Te Tuhi (Tāwhiao's secretary), and a translator.

473. Orange, *The Treaty of Waitangi*, pp 211–212.

474. Orange, The Treaty of Waitangi, p 212.

475. George Rusden, *History of New Zealand*, 2nd ed (Melbourne: Melville, Mullen and Slade, 1895), vol III, pp 356–357; see also Orange, *The Treaty of Waitangi*, pp 212–213.

> inhabitants must be consulted. In accordance with that view, the Crown and government of this country many years ago handed over to the inhabitants of New Zealand an almost entire power of managing their own affairs. Consequently it is for us, as I am sure the members of this delegation are fully aware, a very difficult and complicated mater to interfere in questions which we have practically, whether legally or not, handed over for many years past to be dealt with by the local authority.[476]

Having granted responsible government to the colonial authorities, Derby said, 'we cannot take back rights we have given, even if it could be shown . . . that those rights had not been used in the best manner'. Nonetheless, Derby said he would seek a response from the New Zealand Government and then consider the petition. But he encouraged Māori to put aside any idea of living in separate communities and instead to 'live under one law and subject to the same rules'.[477]

What concerned Tāwhiao and other Māori leaders was that responsible government had been handed to just some inhabitants of New Zealand, the settlers, and it was they who had effective control over the colony's rules and laws, as the Crown had provided no effective constitutional safeguards for Māori autonomy and self-government. As discussed in chapter 7, the imperial government retained some residual rights to involve itself in New Zealand affairs but had abdicated any responsibility for the treaty.

The Colonial Office therefore forwarded Tāwhiao's petition, like that of Taiwhanga, to the New Zealand Government. In response, the Premier, Robert Stout, flatly rejected the vast bulk of what Tāwhiao sought, claiming that it was 'quite certain that . . . there has been no infraction of the Treaty of Waitangi' since British troops left New Zealand in 1865; that autonomous Māori districts were unnecessary because the Native Land Court provided opportunities to deal with Māori land 'according to Native customs or usages'; and that Māori could if they wished establish local self-government under the Counties Act 1876.[478]

Stout said that what Tāwhiao was seeking was a Māori parliament 'which would not be under the control of the General Assembly'. Ministers did 'not deem it necessary to point out the unreasonableness and absurdity of such a request', but did note that Māori were already represented 'by able chiefs' in the House of Representatives and Legislative Council, and 'have practically no local affairs to look after' that could not be managed by native committees. Stout made no mention of consistent Māori protest over the powerlessness of native committees, the Native Land Court's role in destroying communal Māori authority over land, the

476. George Rusden, *History of New Zealand*, 2nd ed (Melbourne: Melville, Mullen and Slade, 1895), vol III, pp 356–357; see also Orange, *The Treaty of Waitangi*, pp 212–213.

477. Rusden, *History of New Zealand*, vol III, pp 356–357; see also Orange, *The Treaty of Waitangi*, pp 212–213.

478. 'Despatches from the Governor of New Zealand to the Secretary of State', AJHR, 1885, A-1, p 32; Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pt 2, pp 1009–1010.

significant underrepresentation of Māori in Parliament, or the exclusion of most Māori from the county council franchise.[479]

In the wake of Tawhiao's visit to England, the House of Commons debated the issue of indigenous rights in a British colony with a settler Government, and questions were asked about the imperial government's commitment to the treaty. Mr John Gorst, member for Chatham (who had been a resident magistrate in Waikato in the early 1860s and had retained a strong interest in New Zealand) was scornful of the imperial government's answer to the chiefs' petition, and suggested its attitude to them might be captured in these words:

> It is true we made a Treaty with you; but since the time we made that Treaty it has been convenient to us to hand over the entire territory so acquired from you to the Colonial Administration. If you complain that the solemn pledges given by Great Britain have been violated, do not come to us here in London, but apply to the Colonists in New Zealand, and see if you can persuade them of the truth of your complaints.

Lord Randolph Churchill (father of Sir Winston) argued strongly for the importance of treaty rights. This, he said,

> was not a case of ordinary internal government between the Government of New Zealand and the people who lived in that country, but it was a case in which the obligations of the Queen of England towards the Native Races were distinctly raised; and he wanted to know what action on the part of the Colonial Government, could relieve the Advisers of the Crown of the responsibility which they had, as Advisers of the Crown, to secure the carrying out of this most sacred of Treaty obligations? . . . If the Imperial Government had divested themselves of this responsibility for the faithful observance of Treaty rights such a monstrous doctrine would lead to any amount of injustice and oppression in the treatment of Native Races.[480]

In response, the Prime Minister, William Gladstone, supported the principle that when Englishmen were granted 'representative' institutions, they were also given 'virtually and substantially full control over the Native Races'.[481] Soon afterwards, Secretary of State Lord Derby, wrote to Governor Sir William Jervois in New Zealand, making it clear that Britain no longer accepted any responsibility for the treaty: 'under the present constitution of New Zealand the government of all her Majesty's subjects in the Islands is controlled by Ministers responsible to

479. 'Despatches from the Governor of New Zealand to the Secretary of State', AJHR, 1885, A-1, p 32; Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pt 2, pp 1009–1010.

480. Hansard's Parliamentary debates, House of Commons, 3rd series, vol 294, 4 June 1885, cols 1770–1771; vol 302, 1885, cols 1247–1248, 1253, 1261–1264, 1257–1258, 1771. Mr Gorst took advantage of a debate in the House on salaries and expenses of government departments to raise the issue because it 'was the only opportunity afforded him of doing so'.

481. Hansard's Parliamentary debates, House of Commons, 3rd series, vol 294, 4 June 1885, col 1264.

the General Assembly, in which the Natives are efficiently represented by persons of their own race.'[482]

Therefore, it was 'no longer possible to advise the Queen to interfere actively in the administration of Native affairs any more than in connection with other questions of internal Government'. Furthermore, the imperial government could not give any instructions about the applicability 'of a treaty which it no longer rests with them to carry into effect'.[483]

Nonetheless, Derby did attempt to exert some moral pressure on the colonial Government. He expressed confidence that it 'will not fail to protect and to promote the welfare of the Natives by a just administration of the law, and by a generous consideration of all their reasonable representations'. And he concluded,

> I cannot doubt that means will be found of maintaining to a sufficient extent the rights and institutions of the Maoris without injury to those other great interests which have grown up in the land, and of securing to them a fair share of that prosperity which has of necessity affected in many ways the conditions of their existence.[484]

In essence, then, the imperial government regarded the original treaty promises as remaining in force – including the maintenance of Māori rights and institutions, and the expectation that Māori would share in the colony's prosperity. But these promises were now the colonial Government's responsibility. The outcome of Tāwhiao's petition therefore rested with a colonial Government that had already rejected it.

Tāwhiao's mission and its fate aroused great interest among Ngāpuhi. In April 1885, major hui at Kawakawa and Te Tii Waitangi discussed the mission. About 500 Te Raki Māori attended the Waitangi hui, where they were joined by Tāwhiao and a 140-strong delegation. Ōrākei parliament leaders Pāora Tūhaere (who was linked by marriage to both Ngāpuhi and Waikato) and Te Hemara Tauhia also attended. Their purpose was to discuss an alliance encompassing all upper North Island tribes in support of te Tiriti – and a possible combined delegation to London.[485]

In the view of Mangonui magistrate Helyar Bishop, Ngāpuhi were 'constantly in a state of agitation and dissatisfaction', very suspicious of the Government which they saw as 'an opposing power, determined to grind them down as low as possible', and 'constantly harping upon the Treaty of Waitangi, embassies to England, Acts, which they contend are ultra vires . . . petitions to the Queen etc'. Like other colonial officials, Bishop could not comprehend any real source of grievance,

482. Derby to Governor Jervois, 23 June 1885, AJHR, 1885, A-2A, p 12.
483. Derby to Governor Jervois, 23 June 1885, AJHR, 1885, A-2A, p 12.
484. Derby to Governor Jervois, 23 June 1885, AJHR, 1885, A-2A, p 12.
485. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1068–1069; 'Native Meeting at the Bay of Islands', *New Zealand Herald*, 21 April 1885, p 6; Orange, *The Treaty of Waitangi*, p 217.

attributing it to a combination of self-aggrandising leaders and a desire for 'some sort of wild home-rule'.[486]

Northern rangatira had called the hui in the hope that Māori could speak in future with one voice, increasing their influence with the Crown. To this end, they drafted 'an everlasting covenant' declaring the union of the northern tribes and the Kīngitanga under the treaty. Notwithstanding the previous responses from the colonial and imperial governments, northern leaders expressed some optimism that a joint approach might finally resolve issues such as confiscated lands and increasingly urgent concerns about government regulation of customary fisheries.[487]

Tāwhiao, however, insisted that he sign the covenant as King, implying, in Dr Orange's words, 'an unacceptable subordination of Ngapuhi to Waikato'.[488] Maihi Parāone made attempts to salvage the situation, and he and a handful of other northern rangatira signed the document under protest, but most Ngāpuhi leaders refused. The King, meanwhile, sought support for his own petition, which was signed by some members of Ngāti Hao and Te Pōpoto under the leadership of Maria Pāngari (discussed further in section 11.4.4), the granddaughter of Tiriti signatory Patuone. Despite much common ground between Kīngitanga and northern Māori aspirations, there would be no enduring alliance.[489]

11.4.2.3.5 1886–87: Te Raki Māori petitions and appeals to the Government

Early in 1886, Ballance visited the Bay of Islands as part of a North Island tour, in which the Minister sought support for new Māori land law proposals aimed at restoring some degree of community control over decisions to alienate Māori land.[490] Ministerial visits to the north had been rare since McLean's death in 1877,[491] and as Armstrong and Subasic observed, on occasions when Ministers did

486. H W Bishop to Native Secretary, 30 April 1885 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1069, 1119).

487. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1068–1069; Orange, The Treaty of Waitangi, p 217. Regarding fishing rights, see Anne-Marie Jackson, 'Erosion of Māori Fishing Rights in Customary Fisheries Management', p 65.

488. Orange, The Treaty of Waitangi, p 217.

489. 'The Result of Tawhiao's Northern Tour', *New Zealand Herald*, 11 May 1885, p 5; Orange, *The Treaty of Waitangi*, p 217; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1068–1069, 1091.

490. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pt 2, pp 1039–1040. By restoring a small measure of communal control, Ballance hoped to persuade Māori – particularly those in Te Rohe Pōtae and the central North Island – to place their lands before the Court and offer them for sale. The proposals were later enacted in the Native Land Administration Act 1886, under which elected block committees would make decisions to sell or lease land. Any subdivision, sale, or lease would be administered by a Crown-appointed commissioner. The Crown could purchase directly from owners or a block committee.

491. Premier John Hall visited the Bay of Islands in 1882, but there is no record of him holding any significant meetings with Māori: Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1109. So far as we can tell, John Bryce did not visit the north at any time during his 1879-to-1884 tenure as Native Minister.

visit, Māori leaders no longer placed so much emphasis on 'expressions of loyalty and references to the historical relationship between the Crown and Maori'.[492]

Responding to questions about Kātene's petitions, Ballance asserted that the treaty 'had been faithfully kept' and that Parliament was willing to deal with any Māori grievances, 'but if they are not well founded, how could Parliament redress them?'[493] According to Armstrong and Subasic, 'Patronising claims by Government Ministers that one disaffected individual had somehow duped the northern tribes into opposing benign Government measures are clearly and demonstrably false.'[494] Ballance's tone in this hui can be contrasted with his stance in Te Rohe Pōtae and Waikato the previous year, where he promised Māori 'large powers of self-government', a pledge that his Government subsequently refused to honour.[495]

Through the rest of the decade, Te Raki leaders continued to protest and appeal to the Government through means that included petitions, letters, and questions in Parliament. In July 1886, Kātene and nearly 12,000 others petitioned the House asking that their rights to shellfish beds and fisheries be secured. 'They say that those places were secured to them by the Treaty of Waitangi, in the year 1840. They pray that they may be returned to them, in accordance with the provisions of that treaty.' On this occasion, the Native Affairs Committee recommended that the Government 'as soon as possible' convene an inquiry to define and secure Māori rights 'as far as possible'.[496]

Five years later, in June 1891, then Northern Maori member Eparaima Kapa asked whether the Government intended to consider the petition. The Native Minister, Alfred Cadman, undertook to consider this 'large and important' matter once the House went into recess at the end of August.[497] Parliament's only response was the Oyster Fisheries Act 1892 (discussed in section 11.5.2), which regulated oyster fisheries while providing that the Governor could specify districts where Māori could take oysters for personal consumption.[498]

In March 1887, Maihi Parāone wrote to Ballance about land issues, asking that the Crown 'let the Maoris be ruled in accordance with their own custom', and that it govern for all New Zealanders instead of imposing injustice on Māori while giving 'care and attention . . . to your European people'.[499] Two months

492. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1070.

493. 'The Native Minister at the Bay of Islands', *New Zealand Herald*, 12 April 1886, p 5; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1070.

494. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1071.

495. 'Notes of Native Meetings', AJHR, 1885, G-1, p 27; Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pt 2, p 972. Ballance's attitude towards Waikato and Te Rohe Pōtae leaders also hardened between the 1885 and 1886 tours: see Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims – Pre-publication Version*, Wai 898 (Wellington: Legislation Direct, 2018), pts 1–2, pp 1039–1040.

496. Petition of Wiremu Kātene and 11,976 others, AJHR, 1886, I-2, pp 27–28.

497. Kapa and Cadman, 24 June 1891, NZPD, vol 71, p 220.

498. Oyster Fisheries Act 1892, s 14; Jackson, 'Erosion of Māori Fishing Rights in Customary Fisheries Management', p 65.

499. Kawiti to Native Minister, 15 March 1887 (Ngāti Hine, evidence (doc M24), pp 124–125).

later, Hāre Hongi Hika told a visiting member of the House of Lords that the New Zealand Parliament consistently passed laws that were contrary to the treaty and disregarded any efforts by Māori members to enact better laws. The colonial Government generally mismanaged Māori affairs.[500]

In 1888, Maihi Parāone wrote again, this time to the Governor, complaining that the Crown had ignored his previous petitions.[501] Te Raki leaders also sent numerous petitions to the colonial Parliament addressing specific grievances concerning land, fisheries, and other resources that were subject to treaty guarantees.[502] Consistently, their experience was that the Crown took little or no action.

In sum, then, by the end of the 1880s Te Raki leaders had appealed to the Crown in numerous ways seeking redress from harmful laws and for the establishment of a system of government that protected their right of tino rangatiratanga. The district's leaders sent petitions, wrote to and met with Ministers, and travelled to London, all without adequate responses. While the Government engaged on occasions, it was unwilling to engage with Māori understanding of the treaty, or to consider any options that might meaningfully transfer power from the colonial institutions of government.

The consistent rejection of their appeals to the colonial and imperial governments, and the dismissive nature of their responses, would ultimately strengthen the resolve of Te Raki Māori leaders to pursue Māori self-government and to build a broader coalition of Māori throughout the country – a point we will return to in section 11.5.

11.4.2.4 *What led to the rise of prophetic leaders in Hokianga and how did the Crown enforce authority over them?*

While Te Raki tribal leaders responded to the steady encroachment of Crown authority during the 1880s by engaging with the Government and seeking recognition of Māori institutions, some northern Māori attempted to withdraw from the influence of Government by remaining on papatupu (customarily owned) lands and avoiding as far as possible the reach of the Land Court, Crown officials, and local government. Some of these groups coalesced around prophetic leaders who foresaw both political and spiritual deliverance for their people.

During the 1880s, three related prophetic movements emerged in Hokianga as more localised responses to the encroachment of the authority of the Government and the harmful effects of its land policies. The first of these leaders was Maria Pāngari, the daughter of Āporo Pāngari, of the Upper Waihou district. Her family were members of the Catholic Church, but were also described by Dr Bronwyn Elsmore as belonging to one of the 'old tohunga' lines.[503] In February 1885, Maria Pāngari claimed to experience a vision of Jesus Christ, and foretold his return on

500. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1071.
501. Ngāti Hine, evidence (doc M24), pp 125–126.
502. See, for example, Merata Kawharu (doc W10(a)), p 14.
503. T G Hammond, 'Our Maori Work', *The Outlook*, vol 16, no 15, p 33 (Bronwyn Elsmore, *Mana from Heaven: A Century of Maori Prophets in New Zealand* (Auckland: Reed Books, 1999), p 268).

28 March that year.[504] The *New Zealand Herald* characterised her prophecy in this way:

> on the ranges of the Hokianga crowds of defeated Maori's will immediately assemble, a great river will then suddenly appear from Heaven and wash all the spirits of the departed there congregated, and all will become white as the pakeha, and reign with Christ.[505]

In a short time, Maria Pāngari gained a large following among Hokianga Māori. Her followers established a camp near an existing kāinga at Waioro Stream, north of Kaikohe. The historian Dame Judith Binney wrote that 'most of the people were kin to Patuone, and most, like Maria herself, were Roman Catholic believers.'[506] Spencer von Sturmer, the resident magistrate in Hokianga, reported 'large numbers of Natives from all parts flocked to her settlement, amongst others nearly all the Natives from the Upper Waihou, Hokianga.'[507] Press reports on the number of Pāngari's followers ranged between 200 and 1,500, although Armstrong and Subasic considered that 'the lower figure seems more likely'.[508] Regardless, this suggests that at least a sizable portion of the Māori population in Hokianga, which totalled 2,364 in 1886, engaged with this movement in some capacity.[509]

Alcohol was banned among Pāngari's followers, and many apparently sold their possessions in preparation for the millennium, including their horses, cattle, and crops – some for a mere tenth of their value.[510] They erected a house in preparation for Christ's arrival.[511] They also ceased attending the Native Land Court. Armstrong and Subasic record that purchasers took advantage of this fact to divest some followers of their land interests.[512]

Maria Pāngari's rise as a spiritual leader prompted anxiety among the settler population, and she received substantial coverage in the settler press. A report from the Magistrate's Court at Russell indicates the member of Parliament for the Northern Māori district, Ihaka Hakuene, visited the settlement but found no

504. Elsmore, *Mana from Heaven*, p 268.
505. 'Another Maori Seer', *New Zealand Herald*, 16 March 1885, p 5.
506. Judith Binney, 'Ani Kaaro, Maria Pāngari, Rēmana Hane', in Charlotte Macdonald, Merimeri Penfold, and Bridget Williams, eds, *The Book of New Zealand Women: Ko Kui Ma Te Kaupapa* (Wellington: Bridget Williams Books, 1991), pp 334–335.
507. Spencer Von Strummer, 'Report', AJHR, 1885, G-2, p 2 (Elsmore, *Mana from Heaven*, p 269).
508. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1097.
509. The census found that the total Ngāpuhi population in Hokianga was 1,850 in 1886: Statistics New Zealand, 'Results of a Census of the Colony of New Zealand: Taken for the Night of the 28th March 1886': https://www3.stats.govt.nz/Historic_Publications/1886-census/Results-of-Census-1886/1886-results-census.html?_ga=2.256138251.1252279194.1637023782–1708844518.1637023781#d50e563658, accessed 17 November 2021.
510. Elsmore, *Mana from Heaven*, p 269.
511. Elsmore, *Mana from Heaven*, p 269.
512. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1098.

intention to harm settlers.[513] On 27 March, Maria Pāngari travelled to Kawakawa to visit Maihi Parāone and address the settlers to warn them of her prophecy.[514]

Maria Pāngari and her followers – who were reported to number about 350 at the time – attended the Waitangi parliament in April 1885 (see section 11.4.2.2). Pāngari's group were amongst the only supporters of King Tāwhiao's proposed union between Te Raki Māori and the Kīngitanga, and a compact was formed between Ngāti Hao and the Kīngitanga.[515] Maria Pāngari and her followgers then joined Tāwhiao when he returned to Waikato on 8 May, and travelled on to Taranaki with the intention of visiting Parihaka. However, Maria died before they arrived and was buried at Pātea.[516]

Ani Kaaro (Ngāti Hao) assumed leadership of the movement when Maria died, having been among the party that travelled to Waikato and Taranaki. The wife of Ngākete Hāpeta, she was the daughter of chief Hohaia Patuone and Harata, and the granddaughter of the esteemed Ngāti Hao rangatira, Patuone. After Maria's death, Ani led the group on to Parihaka to spend time with the prophet Te Whiti o Rongomai III and his relative Tohu Kākahi (Ngāti Te Whiti) who spread a message of peaceful resistance to land confiscations and the millenarian belief that God would restore Māori rangatiratanga and land throughout the Waihou Valley.[517] Upon their return to Hokianga, Ani Kaaro and her followers sought to gain further support from the local community and distributed gifts from Te Whiti.[518] In July 1885, a group of women disrupted the survey of Motukaraka; they were reported to declare 'themselves to be adherents of Te Whiti, the Parihaka prophet'.[519]

In 1887, Maria Pāngari's sister, Rēmana Hi, made a rival claim for leadership of the movement when Ani Kaaro was out of the district.[520] Rēmana Hi's descendant, Makarita Tito, told us that 'Rēmana had disputed the best way to get Ngāti Hao (Hau) lands closed from milling and European settlement'.[521] Ani Kaaro ordered that Rēmana and her followers be removed from their settlement, even though they included her own father, Hohaia Patuone. Rēmana Hi camped nearby at Ōkaihau, and relations between the groups remained poor.[522] However, in August 1887 Ani Kaaro was reported to have informed Hokianga Police Inspector Francis McGovern that she no longer considered herself a prophet. McGovern later reported that, although meetings still occurred at Ani's camp, 'nothing whatsoever

513. 'Religious Frenzy Among the Northern Natives', *New Zealand Herald*, 26 March, 1885; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1098.

514. 'The Maori Prophetess', 7 April 1885, *New Zealand Herald*, p 5.

515. Binney, 'Ani Kaaro, Maria Pāngari, Rēmana Hane', p 336. Regarding the number of Pāngari's supporters, see 'The Maori Prophetess', 7 April 1885, *New Zealand Herald*, p 5.

516. Elsmore, *Mana from Heaven*, pp 272–273.

517. Judith Binney, Vincent O'Malley, Alan Ward, *Te Ao Hou: The New World, 1820–1920* (Bridget Williams Books: Auckland, 2018), p 122.

518. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1099–1100.

519. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1100.

520. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1101.

521. Makarita Tito (doc AA129), p 16.

522. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1101; Makarita Tito (doc AA129), p 16.

bordering on Hauhauism prophesying' took place.[523] In August 1889, there were still 33 people at the camp when McGovern visited, but he 'did not believe that any disturbance would occur'.[524]

Press reports frequently referred to adherents of this new movement as 'cannibals', which Armstrong and Subasic describe as 'an appellation stemming from an unsubstantiated rumour'. Nevertheless, Rēmana Hi and her followers attracted substantial attention from both settlers and Hokianga Māori.[525] As a result of these allegations, several local rangatira met at Waihou in May 1887 to consider their responses. Some were concerned that the charge of cannibalism would undermine Ngāpuhi relations with Pākehā; others, including Hohaia Patuone's son, that their close relatives had joined the movement.[526]

Two elements of this meeting provide insight into the relative authority of rangatira and government officials at the time. First, the Ngāti Hau rangatira Eru Nehua said he had raised the matter with the Native Minister John Ballance, who had written in response to say he believed the group should be dispersed but that he agreed to leave the matter to 'the chiefs of Ngapuhi'. On the one hand, this exchange suggests there was a degree of mutual respect between Ngāpuhi leaders and the Minister; on the other, it suggests that the Government still regarded its power to intervene in Ngāpuhi matters as limited.[527]

Secondly, the Rāwene constable Edwin Hughes attended the meeting with warrants to arrest three members of the group for ignoring summons to appear in court. When Hughes said he intended to arrest the trio, rangatira told him not to; they would go into the settlement and subdue Rēmana's followers, and only afterwards could he make arrests. The constable agreed to this position. Nehua then led a party of some 150 into the enclosure where Hi and her followers, dressed all in white, had been completing a ritual. A small group attacked Nehua and his party with sticks, but they were quickly subdued. While Nehua attempted to dismantle the camp, one of his party freed the captives – his relatives – and they escaped into nearby hills. According to newspaper reports, Nehua was dismayed by this turn of events and announced that he would not intervene again.[528]

A week later, McGovern visited the camp. Rēmana denied the accusation of cannibalism, and the inspector acknowledged that he had no evidence that would justify any charge. Nonetheless, he warned Rēmana and her people that they would arrested if they broke any laws. In early July, a Pākehā shopkeeper named William Hearn stumbled into the group's sacred enclosure, ignoring several warning signs.

523. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1101.
524. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1101.
525. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1101; Correspondent, 'Outbreak of Fanatacism Amongst the Natives', 4 June 1887, *New Zealand Herald*, p 1.
526. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1101–1102; Correspondent, 'Outbreak of Fanatacism Amongst the Natives', 4 June 1887, *New Zealand Herald*, p 1 (supp).
527. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1101; Correspondent, 'Outbreak of Fanatacism Amongst the Natives', 4 June 1887, *New Zealand Herald*, p 1 (supp).
528. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1101; 'Outbreak of Fanatacism Amongst the Natives', 4 June 1887, *New Zealand Herald*, p 1 (supp).

Rēmana's followers seized him, tied him up, took the £1 he was carrying, then released him.[529]

In response to this incident, McGovern and the resident magistrate Bishop led a party of 21 armed men (including two Native constables and a group of civilian 'special constables'[530]) into Rēmana's camp. An interpreter attempted to read an arrest warrant and was ignored, then asked to leave. A group of Rēmana's followers armed with sticks, mere, and other weapons then set upon the official party, and a fight broke out, ending when the police fired shots, wounding one man. Police arrested Rēmana and 22 of her supporters, charging them with assault and resisting arrest. In court, Rēmana said her movement stood for peace – hence its white clothing – but 'the pakehas had no right on their sacred ground'. She and her followers were convicted, and most were sentenced to prison terms which ranged from one to three months.[531] After their release, Rēmana's followers returned to Upper Waihou where they continued their spiritual practices.[532] In June 1890, Bishop reported that the movement was not likely to cause any further trouble.[533]

It is clear that these movements emerged in a period of political and social crisis for Te Raki Māori in which the encroachment of government authority was increasingly threatening Māori lands and livelihoods, and there were few, if any, effective channels for political expression – especially for wāhine Māori. Each prophet envisioned a time of redemption and victory for their people, and their beliefs and practices enabled their followers to prepare for it.[534]

The experience of Rēmana and her followers also provides insight into the ongoing contest between the Government and Māori over enforcement of colonial law. Although most Te Raki Māori were by this stage complying with the colony's laws, it remained unclear whether they felt compelled to or chose to in order to maintain peaceful relations with the Crown and settlers. As this example shows, the consent, or at least acquiescence of rangatira was still needed for law enforcement, in some conflicts at any rate. In chapter 9, we also described the 1888 clash over gum royalties at Porotī, which escalated into armed conflict. After the resident magistrate failed to settle the dispute, Maihi Parāone and other rangatira intervened and mediated a resolution.[535] The Government's monopoly on use of force to settle disputes was not yet complete. The next major test would occur in Hokianga in 1898, as we will see in section 11.5.2.12.

529. 'The Hauhau Prisoners', *New Zealand Herald*, 26 July 1897, p 5. The *Herald* report said that Hearn got lost during a fog.

530. Section 28 of The Justices of the Peace Act 1882 authorised the swearing in of special constables where any 'tumult, riot, or felony' has taken place or is expected, and the existing constabulary is not sufficient to keep the peace.

531. 'The Hauhau Prisoners;', *New Zealand Herald*, 26 July 1887, p 5. The magistrate discharged two elderly women and one man who was ill.

532. Elsmore, *Mana from Heaven*, p 279.

533. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1103.

534. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1104.

535. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1039–1041, 1043–1045.

11.4.2.5 *To what extent did the Crown support Te Raki Māori komiti and rūnanga to provide for local self-government?*

11.4.2.5.1 Te Komiti o te Tiriti o Waitangi

When Te Raki leaders established the first Waitangi parliament in 1881, they committed to establishing a system of Māori self-government at local and intertribal levels. Through the parliaments, they developed a system of northern regional decision-making by tribal representatives and laid the groundwork for the later development of national institutions through the Kotahitanga movement. At a Ngāpuhi tribal level, they created a committee of senior rangatira – Te Komiti o te Tiriti o Waitangi – as an alternative to the colonial Government and courts. Dr Kawharu named its members as Rai Pāngari, Hare Matenga, Werohia Haehae, Hōne Peti, Heremaia Hiku, Rewiri Kohiparu, Akuhata Haki, Iraia Ruka, Wi Kaire Tui, Pairama Tipa, Titore Tango, and Tukaru Tango.[536] The Komiti met at Te Tii and, according to Dr O'Malley, appointed its own police 'and engaged in a wide range of judicial and social functions, including investigations into land titles'.[537] The first such title hearing was held in April 1881. Other functions included managing land negotiations with the objective of preserving as much as possible in Māori hands, and lobbying the Government over Ngāpuhi concerns.[538]

Within a few years, a network of informal local committees was operating under the auspices of Te Komiti o te Tiriti o Waitangi. Into the 1890s, Kaikohe, Hokianga, Whangaroa, and Bay of Islands committees were playing significant roles in managing local disputes, keeping land out of the Court, and negotiating with Crown officials on behalf of their people.[539] Te Rūnanga o Ngāti Hine continued to operate, and indeed was among the most active and powerful of the local committees.[540]

To local Crown officials, tribal rūnanga and komiti were something of a threat, both on a personal level and to the Crown's objectives. In 1884, the Mangonui magistrate Bishop complained that Te Komiti o te Tiriti o Waitangi

> has been appointed imbued by general consent with large judicial powers, and members travel round the northern districts, adjudicating in cases of every description. Some decisions of a most extraordinary character have been told to me, but the Natives appear to invariably manage to ultimately settle the disputes by mutual consent, and they loyally uphold and carry out the dicta of these curiously-composed tribunals.[541]

536. Kawharu, 'Te Tiriti and its Northern Context' (doc A20), pp 294–295.
537. O'Malley, 'Runanga and Komiti' (doc E31), p 181.
538. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 730, 1016–1017, 1024–1025, 1158–1159, 1175–1176; see also Kawharu, 'Te Tiriti and its Northern Context' (doc A20), pp 294–295; Orange, *The Treaty of Waitangi*, p 217.
539. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1346–1348; Thomas, 'The Native Land Court in Te Paparahi o Te Raki' (doc A68), pp 170–172.
540. Thomas, 'The Native Land Court in Te Paparahi o Te Raki' (doc A68), p 170.
541. Bishop to Native Secretary, 12 May 1884 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1011–1012).

Bishop, badly misreading the situation, said this 'agitation' could be attributed to a few disaffected individuals and would not last long.[542] Ngāpuhi leaders were nonetheless aware that their committees had no status under the colony's laws. The committees could make and enforce decisions with the consent of Māori communities, but there was little prospect of local officials or settlers accepting those decisions as binding. Indeed, at times local officials explicitly rejected the legitimacy of committees, insisting that the Government alone could apply and enforce law.[543]

Nor could the committees guarantee that their decisions, including those concerning land titles, would be final. As Paul Thomas noted, 'If any of those involved were dissatisfied with the decision, they could apply to the Native Land Court and receive a legally binding title determination.'[544] A case in point was the Te Pupuke block, which we discuss in chapter 9 in relation to the Native Land Court.[545] On other occasions however, the komiti were able to secure agreement among Māori before the lands went to Court, reducing the risk that there would be lengthy and costly hearings.[546] In our view, the lack of legal authority makes the operation of these komiti all the more remarkable, especially as, according to the available sources, it seems that dissent from their decisions was rare.

11.4.2.5.2 Māori proposals for statutory recognition of komiti

While Te Raki leaders developed and operated their own institutions, they also recognised that statutory recognition was becoming increasingly important. Komiti could make decisions about land rights or take steps to resolve disputes, but without statutory powers there was no guarantee that their decisions would be respected by the Crown, settlers, or indeed all Māori.

During the early 1880s, rangatira from this and other districts made a series of attempts to establish committees that had legal standing, backed by an Act of Parliament. In 1880, then Northern Maori member Hōne Mohi Tāwhai travelled throughout the north, discussing a proposal for legislation that would empower local Māori committees with 'authority to enquire into disputes arising in the district in connection with the surveying of land, applications for the investigation of title to lands, and the sale of lands upon the application of the persons interested in the land under dispute'.[547]

Tāwhai had support both from other Māori members and from Māori leaders in many parts of the country. In October 1880, he had presented his proposals to Native Minister Bryce, who promised to draft a Bill for the House of

542. Bishop to Native Secretary, 12 May 1884 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1011).

543. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1012–1013, 1016–1017; O'Malley, 'Runanga and Komiti' (doc E31), pp 186–187.

544. Thomas, 'The Native Land Court in Te Paparahi o Te Raki' (doc A68), p 168; see also pp 171–172 for an example of komiti decisions being contested in court.

545. See Alexandra Horsley (doc A57).

546. Orange, The Treaty of Waitangi, p 217.

547. Draft Bill, enclosed in Tāwhai to Native Under-Secretary, 21 January 1881 (O'Malley, 'Runanga and Komiti' (doc E31), p 186).

Representatives to consider. Bryce resigned soon afterwards (because other Ministers were refusing to fully support his hard-line stance against the Parihaka community) and his temporary replacement, William Rolleston, refused to consider the Bill on grounds that no Māori committee could have any authority outside its own tribal rohe.[548]

In July 1881, the Eastern Maori member Henare Tomoana introduced the Native Committees Empowering Bill, which was a modified and somewhat watered-down version of Tāwhai's proposal. Tomoana's objective was to give legal powers to the Māori committees already in place in Te Raki and elsewhere by making their decisions enforceable under the colony's legal system.[549]

This Bill allowed Māori committees to inquire into minor civil disputes, and pass bylaws 'for the better suppression of intemperance, and the regulation of social order'. Committees could also inquire into land titles with the parties' consent, but could not make binding decisions; rather, the Native Land Court would be required to 'take judicial notice' of the decisions of committees when making its own rulings.[550]

Tomoana told the House that Māori throughout the country wanted statutory recognition of their right 'to control their own local affairs' under a system of local government. They sought statutory recognition because the Crown 'had control over all the affairs of the colony'.[551]

Hāre Hongi Hika and 20 other rangatira petitioned the House asking that the Bill be passed into law. When the House considered the Bill during 1882, the Māori members spoke in favour and said there was strong support among their communities.[552] According to Tāwhai, 'The Maori people considered it was a necessary thing to have a measure of this kind passed, that they might appoint Committees throughout their districts to manage their internal affairs, and to decide upon cases cropping up amongst themselves.'

The Bill was not an attempt to establish Māori authority separate from the Queen, he argued; the colonial Parliament was established under the Queen's authority, and the committees could be established under the same authority.[553]

Settler members of the House also supported the Bill, but for different reasons. The main ground was that the Bill gave Māori very little power and would be of some assistance to the Court.[554] In O'Malley's assessment, the support reflected a common view that limited self-government under a Crown-sanctioned scheme

548. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1012–1013, 1016–1017; O'Malley, 'Runanga and Komiti' (doc E31), pp 186–187.
549. O'Malley, 'Runanga and Komiti' (doc E31), p 188.
550. O'Malley, 'Runanga and Komiti' (doc E31), pp 187–188; Native Committees Empowering Bill 1881, ss 11, 16.
551. Henare Tomoana, 15 September 1881, NZPD, vol 40, p 661; O'Malley, 'Runanga and Komiti' (doc E31), p 188.
552. O'Malley, 'Runanga and Komiti' (doc E31), pp 188–189.
553. Hōne Mohi Tāwhai, 13 July 1882, NZPD, vol 42, pp 299–300.
554. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1014–1015.

was better (that is, more likely to lead to assimilation) than ongoing tolerance of informal Māori self-government outside the rubric of the colony's laws.[555]

As one member put it, the Bill would 'give the Natives an opportunity of seeing what they could do if they had a little self-government'.[556] A small number of members genuinely supported Māori self-government. Wairau member Harry Dodson pointed out that Britain had many county laws, and distinct laws for the various countries in the United Kingdom: 'he would be glad to see many of the Native affairs at present dealt with in that House intrusted to the Natives themselves'.[557]

But other members were implacably opposed, either because they opposed any legislation that treated Māori as a special class, or because they simply regarded Māori as incapable of self-government.[558] Bryce, who by the time of the debate was once again the Native Minister, was in this camp. He opposed the Bill on grounds that it treated Māori and settlers differently, and that it proposed a 'very radical' change to New Zealand's system of justice.[559] His entire policy aimed towards 'assimilating the treatment of the Maoris to the treatment of the Europeans'.[560]

Tāwhai countered that Bryce should not then be called 'Native Minister', and should hand his power over to one of the Māori members. Tāwhai cited the treaty. If Bryce thought the Bill gave Māori too much power, he should consider what the treaty said: 'namely, that the Maoris were to have as many powers and privileges as are given to British subjects'. The Bill, in Tāwhai's view, would bring Māori and settlers closer, by allowing Māori 'to administer the law among themselves'.[561]

Other members pointed out that Parliament had enacted many laws that treated Māori differently from settlers.[562] Newton member William Swanson said he could not help but laugh when members spoke about one law for all New Zealanders: 'Let a Maori go and buy a gun, let him try to lease or sell his land, then see whether there was one law for the Maori and European.' In Swanson's view, if Māori wanted the committees, the House should agree.[563] The Southern Maori member Hōri Taiaroa commented that it was 'not fair that you should confine to yourselves – that is to say, the Europeans – the sole management of affairs affecting the Native race'.[564]

Ultimately, Bryce's hand was forced by a combination of political pressure and Māori protest. In spite of his opposition, the Bill passed its second reading by a considerable margin, creating a very real possibility that it might ultimately become law. The Government was also facing potentially embarrassing questions from the Colonial Office in London over Parihaka and the petitions from Taiwhanga and

555. O'Malley, 'Runanga and Komiti' (doc E31), p 190.
556. Major Harris, 13 July 1882, NZPD, vol 42, p 303.
557. Harry Dodson, 13 July 1882, NZPD, vol 42, p 305.
558. O'Malley, 'Runanga and Komiti' (doc E31), pp 190–193.
559. John Bryce, 13 July 1882, NZPD, vol 42, p 296.
560. John Bryce, 3 August 1882, NZPD, vol 43, p 127.
561. Tāwhai, 3 August 1882, NZPD, vol 43, p 128.
562. O'Malley, 'Runanga and Komiti' (doc E31), p 191.
563. William Swanson, 13 July 1882, NZPD, vol 42, p 304.
564. Hori Taiaroa, 3 August 1882, NZPD, vol 43, p 128.

Tāwhiao. At the same time, the Government was desperate to open Te Rohe Pōtae to the main trunk railway, and the leaders of that district were making that conditional on Crown recognition of their right to self-government.[565] Māori in other districts were similarly demanding self-governing institutions, including recognition of the rights of tribal komiti to determine land titles.[566]

Bryce, in response to these pressures, determined to establish native committees, but without the powers that Māori sought. He therefore sought to delay further consideration of Tomoana's Bill until 1883, when he introduced another competing measure.

11.4.2.5.3 The Native Committees Act 1883 and the northern committees

Bryce's Native Committees Bill 1883 allowed committees to investigate land titles 'for the information of the Court'. As Dr O'Malley has observed, the committees were to have no power to pass local bylaws, could not try cases of theft or assault, were debarred from investigating disputes over matters worth more than £20, could investigate cases involving less than this sum only with the consent of both parties, and had no power to levy fines.[567]

Nonetheless, when Bryce introduced the Bill, he claimed that it delivered what Māori had been asking for.[568] Tāwhai and other Māori members voted in favour, presumably on the basis that the Bill was better than nothing. The Bill passed through the House without dissent. In the Legislative Council, several members questioned the wisdom of establishing a statutory body that had no real power and was intended to (in one member's words) 'throw a little dust into the eyes of the Native members'.[569] Nonetheless, the measure passed in September 1883.[570] In Dr O'Malley's view, the committees were 'practically impotent from the outset'.[571]

Early in 1884, native committee districts were proclaimed under the Native Committees Act for the Bay of Islands (also encompassing Hokianga and Mangonui) and Kaipara. Local reaction was mixed. On the one hand, there was competition for places on the Bay of Islands Native Committee, and a large turnout for elections at Hokianga.[572] The Hokianga magistrate Spencer von Sturmer

565. O'Malley, 'Runanga and Komiti' (doc E31), pp 193–198; John Bryce, 3 August 1882, NZPD, vol 43, pp 127–128. Bryce attempted to defer the Bill for six months so he could introduce a competing measure, but lost. Nonetheless, the Government kept the Bill down the order paper for the rest of the parliamentary session: 'Native Committees Empowering Bill', 3 August 1882, NZPD, vol 43, p 137.

566. For example, see Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, pp 468–470; Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, Wai 814, 2 vols (Wellington: Legislation Direct, 2004), vol 2, p 445.

567. O'Malley, 'Runanga and Komiti' (doc E31), p 201.

568. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pt 2, pp 867–868.

569. Sir George Whitmore, 29 August 1883, NZPD, vol 46, p 341.

570. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1014–1015.

571. O'Malley, 'Runanga and Komiti' (doc E31), p 201.

572. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1016.

concluded that Māori were trying to 'work' the Act in the hope that they could use it to create meaningful local self-government.[573]

On the other hand, many Te Raki Māori were sceptical, regarding the committee, with justification, as an inferior Crown-sponsored version of their existing network of committees under Te Komiti o te Tiriti o Waitangi.[574] According to the magistrate Bishop, 'the Ngapuhis do not like the idea of their self-constituted tribunals being overshadowed by a body endowed by law with certain judicial powers'.[575] It was not the judicial powers that Māori objected to, however, but the weakness of those powers.

The elected members of the Bay of Islands Native Committee were Hōne Mohi Tāwhai, Heremia Te Wake, Te Maungake, Te Tai, Hare Ngāmanu, Kuatakaki, and Hare Mahenga. Tāwhai (who retired from Parliament at the 1884 election) was elected as chairman. Before taking office, the members were required to take an oath of allegiance to the Crown. The committee operated for five years and dealt with in excess of 50 land title applications. Modest fees covered most administrative costs. Tāwhai received an annual stipend of £50 to cover his own salary and that of a clerk. In contrast, Native Land Court judges received £600 a year.[576]

Despite the election of the Bay of Islands Native Committee, many Te Raki Māori chose not to engage with it. One objection was that the committee lacked real power, though other concerns were that the committees were underfunded, and that the districts were far too large to provide for meaningful local government. Many Te Raki leaders reasoned that they continued to be better served by their own informal rūnanga or komiti, which also operated with the consent of the parties but were not under the Crown's control. Those committees continued to operate in parallel to the Bay of Islands Native Committee, though Te Komiti o te Tiriti o Waitangi refrained from investigating questions of land title between 1884 and 1889 while the official committee was functioning.[577]

11.4.2.5.4 The demise of the Native Committees

In 1887, three prominent northern rangatira – Tūhaere, Maihi Parāone, and Taiwhanga – advocated for the abolition of the Bay of Islands Native Committee, which they saw as an agent of the Government and as facilitating the Court's work instead of providing a genuine Māori alternative.[578] Tāwhai responded to these concerns by appealing to both the Government and the House of Representatives for increased powers, reasoning that the committee was more efficient, more

573. Von Sturmer to Native Secretary, 20 April 1885 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1016).

574. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1016–1017.

575. Bishop to Native Secretary, 12 May 1884 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1017).

576. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1019–1020, 1022, 1024.

577. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1018–1024; O'Malley, *Agents of Autonomy*, pp 164–165, 168.

578. Clayworth, 'A History of the Motatau Blocks c1880–c1980' (doc A65), p 55; Thomas, 'The Native Land Court in Te Paparahi o Te Raki' (doc A68), p 169.

effective, and far less expensive than the Land Court at resolving land and other disputes. In Tāwhai's view, it was necessary to work under the Crown's authority in order to achieve solutions that were binding on all parties and therefore durable. Nonetheless, the Government responded by warning Tāwhai that the committee's powers were indeed limited and must not be exceeded. In the wake of this disappointment, the Bay of Islands Native Committee became less active and ultimately ceased operations in the late 1880s.[579]

Until that time, and notwithstanding the constraints under which it performed, the Bay of Islands Native Committee had been one of the more active in New Zealand, and it operated for as long as any committee formed under the 1883 Act.[580] Like others around the country, the committee could not overcome its lack of meaningful power. Historians have concluded that Parliament had never intended to grant Māori any proper degree of autonomy or self-government, and that the Government then deliberately frustrated the committees' efforts. Dr O'Malley concluded that the committees' failure was deliberate and preordained.[581]

We agree, and we see the Government's rejection of Tāwhai's requests as clear evidence of this. Tāwhai was a senior leader – the son of one of the Crown's key Northern War allies, a former member of the House, a rangatira who had a long track record at mediating disputes in the north and at working constructively with the Government – yet when he sought meaningful power, the Government did not give his ideas serious consideration. This was an opportunity to strengthen local autonomy within the machinery of the State, and the Government rejected it.

In 1891, a few years after the Bay of Islands Native Committee ceased to function, the Native Land Laws Commission concluded that the Native Committees Act was 'a hollow shell' which 'mocked and still mocks the Natives with a semblance of authority'. Māori wished only for 'a living Act, giving them power to do something for themselves'.[582] The commission also recommended that land titles should be determined by Māori komiti or rūnanga, as Te Raki Māori had been seeking, though the Government did not adopt this recommendation.[583] As the Bay of Islands Native Committee became less active, Te Komiti o te Tiriti o Waitangi resumed its former functions, including those concerning informal land title adjudication. Te Komiti remained active until at least 1907, far outlasting the Government-sanctioned committees.[584]

Te Rūnanga o Ngāti Hine also continued to operate throughout this period, and Ngāti Hine became increasingly assertive as its authority faced challenges during the 1880s. Two significant events during 1886 and 1887 provide some insight into

579. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1023–1026.

580. O'Malley, *Agents of Autonomy*, p 181; O'Malley, 'Runanga and Komiti' (doc E31), pp 206, 211–212, 225, 227, 231.

581. O'Malley, *Agents of Autonomy*, pp 163–164; O'Malley, 'Runanga and Komiti' (doc E31), p 216.

582. 'Report of the Commission Appointed to Inquire into the Subject of Native Land Laws', AJHR, 1891–II, G-1, p xvi; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1025.

583. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1188, 1190–1191; Thomas, 'The Native Land Court in Te Paparahi o Te Raki' (doc A68), p 171[checked].

584. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1024–1025.

the strength of Ngāti Hine independence and into the challenges Ngāti Hine faced in the absence of support from the Crown for Māori self-government. In 1886, a young Ngāti Hine rangatira, Wiki Moeanu, threatened to take a Native Land Court claim over Te Rohe Pōtae o Ngāti Hine lands at Mōtatau. On hearing of this, Maihi Parāone Kawiti wrote to the Native Minister (Ballance) describing the boundary of the Rohe Pōtae and warning that the Government should not interfere: no survey, title hearing, or sale would be permitted.[585] He wrote:

> Kore e ahei kia pakarua e tetahi tangata ke atu mo te mea Kei au te mana pupuri me te mana ki runga a ki tenei whenua.
>
> These boundaries cannot be encroached upon by any other person for I have the power to hold the land and the mana over it.[586]

Wiki also wrote to the Native Minister, and the Native Department began to make plans to survey the block. Maihi Parāone then wrote again, declaring that the land was reserved under the treaty and section 71 of the New Zealand Constitution Act. In a clear assertion of tikanga over the colony's property law, Maihi Parāone said that the reserve had been created by the whole of his people, so no individual could make a decision to survey. When the Native Department persisted with its preparations, Maihi Parāone warned the Native Minister that any attempt to survey the land would result in fighting.[587]

Faced with this open defiance of the colony's laws, Ballance relented and negotiated with Maihi Parāone over how to resolve the dispute. In itself, this was a remarkable outcome – a reflection of Maihi Parāone's continued strength and the Government's unwillingness to test his resolve. Of the options Ballance presented to him, Maihi Parāone rejected the Court and the Bay of Islands Native Committee. Parāone then suggested that the matter be placed before Te Komiti o te Tiriti o Waitangi, which Ballance rejected.[588]

Finally, both agreed on an arbitration committee with one appointee each from the Crown, Maihi Parāone, and Moeanu. The committee ruled in Maihi Parāone's favour, acknowledging that Te Rohe Pōtae o Ngāti Hine remained in customary ownership and Maihi Parāone therefore retained his rights as principal rangatira. Notably, the committee observed that the result would have been different in the Court, where Maihi Parāone's role as paramount chief would have carried less weight.[589]

In April 1887, after a major hui at Waiōmio, Ngāti Hine published *Ko te Ture mo te Whenua Papatupu*, a document that described the boundaries of their territories and declared their enduring mana, in accordance with he Whakaputanga,

585. Clayworth, 'A History of the Motatau Blocks c1880–c1980' (doc A65), pp 56–58.
586. M P Kawiti to Ballance, 5 December 1885, original in te reo with Native Department translation (Clayworth (doc A65), p 57).
587. Clayworth, 'A History of the Motatau Blocks c1880–c1980' (doc A65), pp 58.
588. Clayworth, 'A History of the Motatau Blocks c1880–c1980' (doc A65), pp 57–63.
589. Clayworth, 'A History of the Motatau Blocks c1880–c1980' (doc A65), pp 57–63.

te Tiriti, and section 71 of the New Zealand Constitution Act. In calling to Māori throughout the motū, it asserted:

> [W]hakarongo nga iwi Maori, puta noa ki nga topito e wha o te motu nei, ki te rongo ehau nei e mea ana nga pire me nga ture ate kawanatanga kia whakakorea rawatia atu te mana o matou o nga Maori i runga io matou whenua papatupu me nga ture me nga tikanga ano a matou a nga Maori o Niu Tireni kia kauwa rawa matou nga Maori e whaimana ki runga ki a matou ture me a matou tikanga katoa a te Maori.[590]

> The Maori people, from the four corners of this Island, listen for I have heard of the bills and legislation of this government . . . will effectively remove forever our mana of the Maori over our birthright (lands) and laws and rules that belong to us the Maori of New Zealand so that we have no more mana over what is ours as Maori.[591]

Ngāti Hine had therefore gathered to examine he Whakaputanga, te Tiriti, and the Constitution Act:

> Katahi ka huihuia te whakaminenga nui o ngati hine ka tirotirohia aua pukapuka ka tahi Kamatauria kei ora ano nga Iwi Maori me o ratou whenua Katoa me a ratou tikanga katoa me to ratou mana katoa a kua tino mohiotia inaia nei kei nga Maori ano to ratou mana ki o ratou whenua papatupu me a matou tikanga katoa kia matou whakamaori ano.[592]

> At once we gathered the people of Ngati Hine to look at and discuss those books and were clear that the Maori people were well, as are all of our lands, our laws, and our mana and we are clear now in the knowledge, that the Maori have full mana over their birthright (lands) and all of their laws as they relate to us as Maori.[593]

Te Ture then affirmed Maihi Parāone's 1876 decisions that they would not allow the Native Land Court, or surveys, or land sales within the defined territories, but the lands would remain whenua papatupu (customary lands), in which Māori would retain absolute authority.[594] Te Rohe Pōtae o Ngāti Hine remained in force for the rest of the century, despite efforts by Crown officials to undermine it.[595] Te Rūnanga o Ngāti Hine, established in 1876, remains in operation to this day.[596]

590. 'Ko Te Ture mo te Whenua Papatupu', p 9 (Erima Henare (doc D14(b)), p [66]).
591. Erima Henare, translations (doc D14(d)), p 6.
592. 'Ko Te Ture mo te Whenua Papatupu', p 9 (Erima Henare (doc D14(b)), p 66).
593. Erima Henare, translations (doc D14(d)), p 6.
594. Erima Henare, translations (doc D14(d)), p 9.
595. Mr Clayworth describes officials' various attempts to break open the Rohe Pōtae o Ngāti Hine during the 1890s. The Crown succeeded in 1900 with the introduction of Maori Land Councils and papatupu block committees: Clayworth, 'A History of the Motatau Blocks c1880–c1980' (doc A65), pp 65–74.
596. Pita Tipene (doc AA82), pp 11–12.

11.4.3 Conclusions and treaty findings

During the period from 1878 to 1888, as Te Raki Māori faced significant challenges to their authority and livelihoods, they responded by establishing institutions of self-government at local and regional levels, and by seeking legal recognition for Māori rights of self-government.

At a local level, they established and sought legal recognition and empowerment of Māori komiti, so they could conduct title investigations, manage land transactions, and carry out other administrative and judicial functions. The continued assertions of authority by Te Rūnanga o Ngāti Hine and the maintenance of their Rohe Pōtae are notable reflections of their determination to realise the treaty agreement as Māori understood it, to resist the Government's misinterpretation, and always to maintain a dialogue with the Government in an attempt to ensure that it came to understand the significance of the treaty to Māori.

At a national level, Te Raki Māori sought the establishment of a Māori house of parliament to work alongside the colonial Parliament, so laws could be enacted that would benefit both peoples. They presented their proposals to the Crown through regional parliaments and other hui, petitions, letters, ministerial meetings, and even delegations to London. The colonial Government either dismissed or rejected most of these initiatives, denying that its legislative encroachments over Māori lands, resources, and people were in breach of the treaty. Its sole concession to Māori was the Native Committees Act 1883 which provided Māori with extremely limited powers of local self-government.

11.4.3.1 *Proposals for a Māori parliament*

From the late 1860s, Te Raki Māori advocated for a Māori representative assembly, established as part of the colonial Legislature. These proposals were a response to the under-representation of Māori in Parliament, and the consequent inability of Māori representatives to influence legislation meaningfully. Kaikohe Māori raised this issue when they petitioned Parliament seeking 'a third branch of the Legislature . . . established for the Maori race'.[597] Te Raki leaders made a sustained attempt at the 1881 Waitangi parliament to persuade the Native Minister to establish 'two parliaments – one English, and another Maori'.[598] Maihi Parāone sought an elected committee to manage Māori affairs, 'appointed under sanction of the treaty of Waitangi'.[599]

Hirini Taiwhanga's 1882 petition to the Queen sought the establishment of a Māori parliament to 'hold in check the European authorities who are endeavouring to set aside the Treaty of Waitangi'.[600] In 1883, Hōne Mohi Tāwhai and the other Māori members of the House of Representatives also wrote to the Aborigines

597. Petition of Hirini Taiwhanga, AJHR, 1878, I-3, p 7; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 602; F E Maning to E M Williams, August 15, 1868, Archives New Zealand, Auckland (doc 1:2238).

598. 'The Opening of the Great Native Meeting at Waitangi', *New Zealand Herald*, 24 March 1881, p 5; Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 289.

599. 'The Great Native Meeting at Waitangi', *New Zealand Herald*, 28 March 1881, p 3.

600. 'Petition from Maoris to the Queen', AJHR, 1883, A-6, encl 1, pp 1–2.

Protection Society seeking the establishment of 'an elective body of Maoris' to make laws, determine land titles, raise taxes, and oversee public works.[601] The 1883 petition of Te Komiti o te Tiriti o Waitangi called for Māori to have 'equal power in making laws'.[602] Te Raki Māori raised the issue again at Waitangi in 1887 when the Native Minister was present.[603]

None of these proposals represented a rejection of the treaty relationship between Queen and Te Raki Māori, nor of the authority of the colonial Government over settlers. Consistently, Te Raki leaders were careful to explain that any Māori legislature would exist under the Queen's protective mantle, as part of their direct personal relationship with her.[604] The proposals did, however, amount to a clear rejection of the colonial Government's assumed right to exercise power over Māori. Alongside their proposals for a Māori parliament, Te Raki leaders called for abolition of the Native Land Court and its replacement with Māori committees, along with the repeal of all laws affecting Māori land.

While some details varied from one proposal to the next, they all claimed the right to a Māori legislature that would operate alongside the existing settler-dominated one and act as a check on its power. Some proposals called for Māori and settler assemblies to make legislative proposals to each other; under other proposals, the Legislative Council would continue to exist, presumably with the power to determine whether Bills from the Māori or settler assemblies would proceed. The discussions in 1885 about a possible alliance between Ngāpuhi and the Kīngitanga, whose relationship had often been tense historically, reflected just how much Ngāpuhi rangatira had lost faith in the Crown and its institutions.

Behind the specific details of these proposals and discussions was a wish for freedom from, and political leverage against, the harm caused by the settler-dominated Legislature. During the 1880s, that Legislature accelerated its assimilationist agenda, imposing new taxes and rates on Māori, and extending the Crown's control over Māori lands, fisheries, and other resources. In the words of Hōne Mohi Tāwhai's petition, Māori wanted to be 'free from the evils that destroy us'.[605] Te Hemara Tauhia said, 'We have tried your Parliament, and have found it wanting.'[606] Tāwhai, in 1881, asked why the Queen had appointed a Government to look after Māori interests, and it had instead 'tried as much as possible to oppress us'.[607]

601. Wī Te Wheoro, Hōne Mohi Tāwhai, Henare Tomoana, and H K Taiaroa to F W Chesson, Secretary of the Aborigines Protection Society, 16 July 1883 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 998).

602. Greenway to Under-Secretary, Native Affairs, 5 December 1883 (Kawharu, 'Te Tiriti and its Northern Context' (doc A20), pp 300–301).

603. 'Meeting of Northern Natives', *Auckland Star*, 16 March 1887, p 3.

604. See, for example, Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1063.

605. Wi Te Wheoro, Hōne Mohi Tāwhai, Henare Tomoana, and H K Taiaroa to F W Chesson, Secretary of the Aborigines Protection Society, 16 July 1883 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 998–999).

606. 'The Native Meeting at Waitangi', *New Zealand Herald*, 25 March 1881, p 6 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1085–1086).

607. Hōne Mohi Tāwhai, 16 August 1881, NZPD, vol 39, p 547.

Ministers responded in various ways, without seriously engaging with Māori demands for recognition of their tino rangatiratanga. They said variously that they could not see how a Māori legislature would work, dismissed such proposals as being of no use, rejected the possibility that two legislative bodies could coexist, and denied that the colonial Parliament had ever enacted legislation in breach of the treaty. In 1887, the House of Representatives did not debate any of Hirini Taiwhanga's legislative proposals. Most often, when Te Raki Māori sought Crown recognition for a Māori parliament, the Crown simply took no action.

There were notable exceptions in 1882 and 1883, when the petitions of Te Raki leaders were sent to the imperial government in London. Then, fearing embarrassment over the litany of grievances they raised, the colonial Government went on the offensive, impugning Hirini Taiwhanga's character and credibility, denying that there had been any breaches of the treaty since the colonial Government acquired responsibility for Māori affairs, and dismissing out of hand any possibility of Māori exercising powers of self-government, either because Māori were incapable as a people or because there were already too many settlers in the country. In our view, these responses were plainly racist and dismissive of deeply held Māori concerns.

The experiences of Taiwhanga and other petitioners highlighted the insurmountable difficulty Māori faced in seeking justice from Britain. As we noted in chapter 7, Ngāpuhi and Te Raki hapū considered that they had a direct relationship with the monarch herself through the treaty. However, whenever they appealed to the Queen for protection and redress, her imperial government referred the matter back to colonial authorities in New Zealand, as the conduct of Māori policy was regarded as a matter of internal governance. In effect, Māori were stuck with a constitutional arrangement they had not consented to, under which the Crown would protect their interests only to the extent agreed by settler representatives in a Parliament where Māori voices were swamped. Māori had signed te Tiriti on the understanding that the Crown would protect them *from* settlers, yet in effect it had handed control *to* settlers.

During these years, when the lasting significance of the establishment of the colonial Parliament and Government became clear to Te Raki Māori, they placed their faith in te Tiriti. They demanded that the New Zealand Government recognise the agreement they had entered into in 1840 and acknowledge its obligation to respect and uphold their tino rangatiratanga – and when that did not work, they demanded their rights from the Queen, on whose behalf her representative had signed te Tiriti. Te Tiriti emphasised their equal rights in governance and their authority within their own sphere. Te Tiriti had also provided for a kāwanatanga sphere, but not one that exercised authority over Māori, at least not without their consent.

Over many years, and particularly since the Northern War, Te Raki Māori had accepted the Queen as exercising an authority protective of their rights – but that authority had since been delegated, without adequate safeguards, to a settler community that was now numerically and politically dominant. We note that New Zealand was not yet legally independent of Britain (see chapter 7), and would not

become so until well into the twentieth century; the colonial Government's responsibility for Māori affairs was a matter of constitutional convention, and of convenience for both the British and New Zealand governments.

Certainly, the relationship between any national Māori assembly and the colonial Parliament would have required careful consideration and negotiation to define their respective powers and jurisdictions, and develop processes by which any overlaps between the rangatiratanga and kāwanatanga spheres could be negotiated. But these issues were far from insurmountable. The Crown had facilitated the Kohimarama Rūnanga in 1860 and had promised to establish annual assemblies; and Te Raki Māori were already meeting annually (or more often) and framing legislative proposals at the Ōrākei and Waitangi parliaments. These parliaments were confined to the rangatiratanga sphere and offered the Crown numerous opportunities to enter negotiations in order to work out the practical details by which kāwanatanga and tino rangatiratanga could coexist in the nation's legislative arrangements – but in the period from 1879 to 1887, the Crown missed or declined all of those opportunities.

Even if the Crown was reluctant to give legal recognition to a Māori parliament, it was obliged to at least engage on the underlying issue: Māori were seeking some form of institutional arrangement that protected their tino rangatiratanga from self-serving settler law-making, and instead provided for them to exercise effective authority over the rangatiratanga sphere. The Crown was obliged to provide a meaningful response, but did not.

Accordingly, we find that:

- By declining to enter negotiations over the establishment of a Māori parliament despite repeated requests by Te Raki Māori (specifically, in Hirini Taiwhanga's 1878 petition, at the Waitangi parliament in 1881, in Hirini Taiwhanga's 1882 petition, in Hōne Mohi Tāwhai's 1883 petition, and on several other occasions during the 1880s), the Crown acted inconsistently with its obligation to recognise and respect the tino rangatiratanga of Te Raki Māori, in breach of te mātāpono o te tino rangatiratanga and te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect. This was also in breach of te mātāpono o te houruatanga/the principle of partnership.
- By impugning the credibility, integrity and status of Ngāpuhi leaders who petitioned the Queen in 1882 and 1883, in order to ensure that they would not meet the Queen and in order to prevent serious inquiry by the imperial government into the treaty issues they raised, the Crown committed a serious breach of its obligation to act in good faith towards its treaty partner, in breach of te mātāpono o te houruatanga/the principle of partnership.

11.4.3.2 *Native committees*

In 1880, Hōne Mohi Tāwhai proposed a Bill to establish district native committees which would be empowered to inquire into disputes over land title, survey, and

sale.[608] In essence, the Bill would have given legal authority to Māori committees that were already undertaking this type of work in Te Raki and elsewhere, and would thereby have provided an alternative to the Native Land Court.

When the Government declined to support the Bill, Tāwhai worked with Eastern Maori member Henare Tomoana on the Native Committees Empowering Bill 1881, which provided for local self-government over minor civil disputes, liquor, and a range of other health and social order matters, and allowed native committees to conduct preliminary inquiries into land titles before the Native Land Court made final decisions. This measure had strong parliamentary support and was likely to pass, until Native Minister John Bryce intervened, opposing the land title provisions, threatening not to implement the Bill even if it passed, and orchestrating a delay so it would not pass during the 1882 session.

Bryce then introduced a competing and much weaker measure, which became the Native Committees Act 1883 – an Act that established district native committees while providing them with few meaningful powers over land title or any other matter. The Act was not a sincere effort to empower Māori but a cynical attempt by the Native Minister to prevent Parliament from establishing native committees with genuine power. It was condemned in the Legislative Council as providing 'no power whatever' to Māori,[609] and the 1891 Native Land Laws Commission reported that it 'mocked and still mocks the Natives with a semblance of authority'.[610] The Tribunal, in other reports, has agreed with this assessment, as do we.[611]

Accordingly, we find that:

- The Native Committees Empowering Bill 1881 and the Native Committees Bill 1883 presented significant opportunities for the Crown to provide for Māori autonomy and self-government at a local level. By declining to pursue these opportunities, by instead establishing committees that lacked real power or authority, and by declining Te Raki Māori requests to increase the powers of committees established under the Native Committees Act 1883, the Crown acted inconsistently with its obligation to recognise and respect the tino rangatiratanga of Te Raki Māori, in breach of te mātāpono o te tino rangatiratanga and te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect. It also breached te mātāpono o te houruatanga/the principle of partnership.

11.4.3.3 *Redress/petitions*

During the period from 1879 to 1887, Te Raki Māori sent numerous petitions and other requests to the House of Representatives, and two to the Queen, raising

608. O'Malley, 'Runanga and Komiti' (doc E31), pp 186–187.

609. WhitmoreWhitaker, 29 August 1883, NZPD, vol 46, p 341; Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pt 2, p 865.

610. 'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws', AJHR, 1891, G-1, p xvi.

611. Waitangi Tribunal, *Te Kāhui Maunga: The National Park District Inquiry Report*, Wai 1130, 3 vols (Wellington: Legislation Direct, 2013), vol 1, p 230; Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, pp 318–319.

concerns about the colonial Government's actions and seeking recognition of their rights under the treaty. Specifically, Hirini Taiwhanga and other Ngāpuhi leaders petitioned the Queen in 1882; Hōne Mohi Tāwhai and others wrote to the Aborigines' Protection Society in 1883, asking that the letter be forwarded to the imperial government; Wiremu Kātene petitioned the House of Representatives in 1884, also asking that the petition be forwarded to the imperial government; and Te Raki Māori raised treaty issues with the Government or House of Representatives on several occasions during the period from 1886 to 1888, through meetings, letters, and petitions.

Consistently, the experience of Te Raki Māori was that the imperial government refused to accept responsibility, and the colonial Government denied any treaty breach or cause for grievance, and took no other action. On rare occasions, such as the Government's response to Kātene's 1886 petition about customary fisheries, the Crown's response was delayed and inadequate.

The treaty principle of redress provides that, where the Crown has breached the treaty by assault on or sustained undermining of the tino rangatiratanga or autonomy of a tribe or hapū, and thereby causes them harm, it is obliged to provide redress; that is, to put matters right.[612] The obligation to provide redress arises from Crown's duty to act reasonably and in good faith towards its treaty partner. Any redress should restore the Crown's honour and restore the mana and status of Māori.[613] While we are not in a position to make findings about the substance of every matter raised with the Crown through the petitions, letters, and hui during the period from 1878 to 1887, it is clear that the Crown was not adequately recognising or providing for the tino rangatiratanga of Te Raki Māori, and that it ignored or rejected numerous requests to address that matter.

Accordingly, we find that:

- The Crown, by ignoring or rejecting petitions and other requests from Te Raki Māori for recognition of their tino rangatiratanga (in particular Hirini Taiwhanga's 1882 petition, the 1883 letter to the Aborigines' Protection Society, Wī Katene's 1884 petition, and further petitions and letters from 1886 to 1888), the Crown breached its duty of good faith, and te mātāpono whakatika/the principle of redress.

612. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report*, Wai 27 (Wellington: Brooker and Friend, 1992), p 272; Waitangi Tribunal, *The Ngawha Geothermal Resource Report*, Wai 304 (Wellington: Legislation Direct, 1993), p 101.

613. Waitangi Tribunal, *The Tarawera Forest Report*, Wai 411 (Wellington: Legislation Direct, 2003), p 29.

11.5 Did the Crown Recognise and Support Te Raki Māori Attempts to Establish National Institutions of Self-Government during the Period 1888–1900?

11.5.1 Introduction

From the late 1880s, Te Raki leaders worked with others around the country in pursuit of a pantribal system of Māori self-government. Ngāpuhi and other northern tribes laid the groundwork in a series of northern parliaments between 1888 and 1891, culminating in the first 'Kotahitanga' (unity) parliament at Waipatu in the Hawke's Bay in May 1892, attended by well over 1000 people. From then, Kotahitanga parliaments met annually until 1902.[614]

In the face of increasing challenge from the colonial Government and a growing settler population, the movement pursued several, inter-related objectives: abolition of the Native Land Court; preservation of remaining Māori lands; recognition of Māori community authority over land; establishment of Māori institutions to determine land ownership and manage lands; and establishment of a national parliament elected by and making laws for Māori. Kotahitanga leaders regarded these objectives as being consistent with Māori rights under te Tiriti o Waitangi, he Whakaputanga, and the New Zealand Constitution Act 1852, and Te Raki leaders saw themselves as having a particular responsibility to ensure that te Tiriti was honoured.[615]

The Kotahitanga parliaments (which we refer to as Paremata) were large, well-attended events, and the movement had broad support among Māori, except among tribes that were aligned with the Kīngitanga. More than 37,000 Māori (from an estimated population of about 45,000) were said to have signed a Kotahitanga pledge setting out the movement's key objectives.[616] Although places in the Kotahitanga Paremata were reserved for men, komiti wāhine organised and ran the Paremata, and were instrumental in advancing Kotahitanga as a mass social movement.[617]

In pursuit of their various objectives, Kotahitanga leaders sent petitions, lobbied Ministers, prepared legislation, and organised boycotts of land sales and the Native Land Court. Although they sought recognition of their right to self-government, they were careful to respect the Queen and colonial authorities, and asked the colonial Parliament to adopt their legislative proposals. Kotahitanga leaders understood that any institution for Māori self-government would require the colonial Government's recognition and support: first, so that colonial and Māori authorities could work together in an effective treaty relationship; and secondly, so that the Government and settlers would respect Māori laws and institutions.[618]

614. Te Ara, 'Story: Kotahitanga – unity movements', New Zealand Government, https://teara.govt.nz/en/kotahitanga-unity-movements/page-3, accessed 7 July 2022.

615. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), chapter 6.

616. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1280;

617. See Angela Ballara, 'Wāhine Rangatira: Māori Women of Rank and their Role in the Kotahitanga Movement of the 1890s', NZJH, 1983, vol 27, no 2, pp 129, 131.

618. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), chapter 6.

Accordingly, they appealed to the colonial Government and Parliament through meetings, petitions, and other means. In support of their case, they cited the treaty and its guarantees, and the many harmful impacts of colonial law and government on Māori communities.

The Government's responses varied. During the early-to-mid-1890s, some Ministers expressed sympathy for Kotahitanga aims and saw potential for the Government to work with the movement's leaders.[619] But the Government's greater priority was to open Māori land for settlement, and it was willing to make concessions only where it saw common ground between Kotahitanga goals and its own.[620] It therefore rejected Kotahitanga proposals for the abolition of the Court and for community control over Māori lands.[621] The Government also consistently rejected the demands for the Kotahitanga Paremata to be recognised as a law-making body: in the view of Ministers, the colony could have only one legislature, and they were not prepared to consider any option that limited the authority of the colonial Parliament.[622]

In the absence of constitutional protections for treaty rights, Kotahitanga leaders could not compel the colonial Government to recognise and respect institutions of Māori self-government. Later in the decade however, a combination of political circumstances, changing Kotahitanga tactics, and growing pressure from Kotahitanga and other Māori movements drew the Government into negotiations over Māori land and local self-government. These negotiations led to significant concessions, including a temporary halt to the Crown's land purchasing programme, and legislation to establish local Maori Councils with a range of health and social functions, and Maori Land Councils to manage Māori lands.[623]

As in other sections, we are concerned with one central issue: Did the Crown recognise and support institutions through which Te Raki Māori could exercise their rights of tino rangatiratanga, autonomy, and self-government? Within that broad issue, in this section we are concerned with several key themes:

- What was the role of Te Raki Māori in establishing the Kotahitanga movement?
- How did the colonial Government respond to the Kotahitanga Paremata during the period from 1890 to 1895?
- Why did Kotahitanga and the colonial Government negotiate for the establishment of Māori Councils during the period from 1895 to 1900, and what were the results?

619. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1290, 1304–1305; Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 205.

620. For example, the Native Land Court Act 1894 made some provision for collective management of land by incorporated owners: Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, p 366.
Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p pp 1304–1305.

621. For example, see Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1290–1291, 1305.

622. For example, see 'Pakeha and Maori: A Narrative of the Premier's Trip Through the Native Districts of the North Island', AJHR, 1895, G-1, pp 19–20.

623. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), section 6.4.

- What caused the Hokianga 'Dog Tax War' in 1898, and what was the impact in terms of authority on the ground?

11.5.2 Tribunal analysis

11.5.2.1 *What was the role of Te Raki leaders in establishing the Kotahitanga movement?*

During the period from 1888 to 1892, Te Raki leaders worked with other rangatira from around the country to prepare the way for the establishment of Kotahitanga as a pantribal movement. Northern leaders held regional parliaments, made further attempts to engage with the Kīngitanga, and continued to press Ministers to acknowledge their treaty rights and recognise and provide for Māori self-government. During these years, Ngāpuhi leaders came to see themselves as having a special responsibility to ensure that the treaty was honoured, given the tribe's status as the first people to sign te Tiriti. The various hui culminated in the first Kotahitanga Paremata, held at Waipatu (Hawke's Bay).

11.5.2.1.1 1888–89: Establishing Kotahitanga

During 1888, a series of major intertribal hui throughout the North Island laid the foundations for the establishment of Kotahitanga as a pan-iwi movement pursuing Māori self-government. The first of these hui was at Waitangi, where Pāora Tūhaere and Heta Te Haara were selected to lead proceedings. Much of the hui's focus was on the impacts of the Native Land Court on the mana and rangatiratanga of Māori communities: leaders spoke of how individualised land titles had severed ancestral relationships and broken down hapū authority, and by these means prepared land for sale. The hui was unanimous that the Native Land Court should be abolished, Crown purchasing of Māori land should cease, and the Native Land Administration Act 1886 should be amended to provide for full community control.[624]

While seeking land law reform, rangatira also sought recognition of their rights to govern themselves and make their own laws. To this end, Maihi Parāone read out he Whakaputanga, and rangatira debated te Tiriti and their rights to self-government under the 1852 New Zealand Constitution Act. Rangatira at the hui resolved to send a petition to the House of Representatives outlining their 'grievance[s]', and proposing a national Māori assembly be 'formed, sanctioned, and authorised by Government to deal with all matters connected with native affairs'. If the colonial Government would not approve of 'such reasonable requests, founded as they are on treaty rights and equity', the rangatira resolved that they would make another approach to the Queen.[625] According to Dr Orange,

624. 'Te Huihuinga a nga Tangata Maori ki Pewhairangi', *Korimako*, 16 April 1888, p 2; see also 'Native Meeting at the Bay of Islands', *New Zealand Herald*, 7 April 1888, p 6.

625. 'Native Meeting at the Bay of Islands', *New Zealand Herald*, 7 April 1888, p 6.

the proposed assembly would operate as part of the colonial Legislature, 'reviewing all proposed legislation and able to submit its own proposals to government'.[626]

Whereas the previous Ōrākei and Waitangi parliaments had been instigated by northern tribes, from this point on the leaders of those parliaments deliberately sought to broaden the movement to encompass the rest of the country.[627] After the Waitangi hui, Te Haara, Tūhaere, and other northern leaders took their proposals to major hui around the country – to Waiapu (East Cape), Ōmahu (Hawkes Bay), and Wairarapa, culminating at Pūtiki (Whanganui). Iwi from these regions had either remained neutral or fought alongside the Crown during the New Zealand Wars. According to Dr Orange, at the Pūtiki hui:

> it was finally agreed that inter-tribal differences should be overridden by all the tribes of the North Island forming kotahitanga. A national Maori parliament was to be established so that the Waitangi treaty could be properly implemented; in particular land would be controlled almost entirely by Maori. A new covenant had now been entered into, whereby chiefs and people would work towards restoring Maori welfare. Some chiefs hailed the agreement as more significant than the treaties of Waitangi or Kohimarama.[628]

The Pūtiki hui established a committee of senior rangatira – including Maihi Parāone, Tūhaere, and the Whanganui leader Te Keepa Te Rangihiwinui – to travel to Wellington during the next parliamentary session with the aim of informing themselves about and responding to any proposed legislation that would affect Māori. The hui also developed its own legislative proposals, which centred on the abolition of the Native Land Court and amendment of the Native Land Administration Act 1886 to shore up Māori collective land rights and end Crown purchasing.[629]

During 1888, Tūhaere and other leaders wrote to the Government, appealed to the Queen, and worked with Māori members of the House seeking implementation of their land proposals. The Government took no action. Rather, against vehement opposition from Māori throughout the country, the colonial Parliament enacted the Native Land Act 1888. This repealed the Native Land Administration Act 1886, which had provided for some degree of community control over land alienation, and instead allowed individual Māori owners to lease, sell, or otherwise dispose of their shares as they saw fit.[630] In effect, this was a return to individual 'free trade' in Māori land. The Government sought to justify this measure as empowering Māori owners, though it removed the previous Act's provisions

626. Orange, *The Treaty of Waitangi*, pp 221–222; see also Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1277; 'Native Meeting at the Bay of Islands', *New Zealand Herald*, 7 April 1888, p 6; 'Te Huihuinga a nga Tangata Maori ki Pewhairangi', *Korimako*, 16 April 1888, p 2.
627. Orange, *The Treaty of Waitangi*, pp 224–225.
628. Orange, The Treaty of Waitangi, p 222.
629. Orange, The Treaty of Waitangi, p 222.
630. Native Lands Act 1888, s 3.

for community decision-making.[631] Taiwhanga, in the House, was scathing about this measure: 'It is a Bill that is going to rob us of our lands and kill the Native people.'[632]

11.5.2.1.2 The 1889 Waitangi Parliament and the Kotahitanga Pledge

The March 1889 Waitangi parliament was attended by some 1,500 people.[633] Again, rangatira raised the question of self-government, with particular respect to land and local authority taxes.[634] According to Dr Orange,

> while the usual discussion of grievances took place, an important new development was the drawing up of a pledge of union under the treaty. Those who signed the pledge committed themselves to kotahitanga and recognised the mana of the treaty under which a Maori government would be set up. From Waitangi, the document was sent to all tribes for signing, following the precedent set by the treaty in 1840.[635]

The *Auckland Star* reported that the pledge was drawn up by Ngāpuhi leaders. As to its content, 'representatives of the various tribes throughout the Island promise to stand by and assist each other in their endeavours to have laws affecting the Maoris and their lands rectified in accordance with justice to both races'.[636] In the view of Armstrong and Subasic, this pledge (sometimes referred to as a deed of union) became 'the centrepiece of the Kotahitanga movement, and its initial signing at Waitangi was the movement's official birth.'[637]

Government officials and settler newspapers did not understand the significance of this hui, and their reports were dismissive. The *New Zealand Herald* claimed it showed Māori 'had but few grievances, and none of any importance', and would be 'perfectly happy and contented' if not for a handful of leaders 'who make their living . . . by agitation.'[638] The Mangonui magistrate (Bishop) wrote to the Native Minister in his habitual fashion in June 1889 saying that the hui served no purpose other than 'keeping alive political agitation' and impoverishing those who attended.[639]

11.5.2.1.3 The 1889 Ōrākei hui

The 1889 Waitangi parliament was followed weeks later by a major hui at Ōrākei, attended by 500 rangatira from throughout the North Island. According to the

631. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pt 2, pp 1323–1324; Waitangi Tribunal, *The Hauraki Report*, Wai 686, 3 vols (Wellington: Legislation Direct, 2006), vol 2, p 752.
632. Hirini Taiwhanga, 25 July 1888, NZPD, vol 62, pp 268–269.
633. 'Reports from Officers in Native Districts', AJHR, 1889, G-3, p 1.
634. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1093; Allan Ward, *A Show of Justice*, p 298. []
635. Orange, The Treaty of Waitangi, p 223.
636. 'Native Meeting', *Auckland Star*, 27 March 1889, p 5.
637. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1278.
638. 'The Native Meeting at Waitangi', *New Zealand Herald*, 14 March 1889, p 6.
639. Bishop to Native Secretary, 15 June 1889 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1095).

Te Whakakotahitanga i raro i te Mana o te Tiriti o Waitangi.

'Ko matou ko nga Rangatira o te Whakaminenga o nga Hapu o te Iwi Maori, o nga Motu e rua o Aotearoa me te Waipounamu me era atu Motu e tata ana ki enei; kua karangatia nei ko Nui Tireni, "Ka Huihui nei i runga i te Kotahitanga o matou Tinana me o matou whakaaro," i te nui hoki o to matou hiahia kia tino whakaukia te tu o tenei whakakotahitanga—

'No reira ka whakarite ka whakaae, ka whakapumau rawa i te whakakotahitanga o nga Rangatira me nga Mana; i te whenua i te tangata ki raro i te Mana o te Tiriti o Waitangi, o te ono o nga ra o Pepuere, kotahi mano e waru rau e wha tekau.

'I te mea kua oti nei to whakatuturu e nga Rangatiratanga katoa o ia Hapu o ia Hapu, e noho ana i ia wahi i ia wahi o Aotearoa me te Waipounamu, o te iwi Maori: te whakaae ki te kotahitanga o te tangata katoa, Tane Wahine o te Iwi Maori kia whakaturia he Runanga Ariki, me te Runanga Nui, e tenei whakakotahitanga kia Kowhiria i roto i nga Rangatiratanga nga Tangata matou roto i aua Runanga e rua.

'I whakaturia enei Runanga i raro i te Mana o nga Ritenga Whakaaetia e te Runanga Kaumatua, i tu ki Waitangi i te rua tekau ma waru o nga ra o Oketopa, ko tahi mano e waru rau e toru tekau ma rima, me te Mana hoki o te Tiriti o Waitangi o te ono o nga ra o Pepuere, tau kotahi mano e waru rau e wha tekau; i raro hoki i te Mana o te Ture Nui mo Nui Tireni, Rarangi 71, o te toru tekau o nga ra o Hune, kotahi mano e waru rau e rima tekau ma rua.

'I te mea e Tino Whakaaetia ana e enei Runanga e rua kia Tu,—Ka whakahaerea nga ritenga mo te Whakatu i nga Mana mo te Runanga Nui i runga i nga ritenga Pooti, haunga te Runanga Ariki. Heoi, i te Mana kua tukua nei e nga Hapu katoa o te Iwi Maori, ki nga Mema o aua Runanga – e rua i runga ite Pootita-nga,—ka taea e aua Runanga te Tino Whakatu he Kawanatanga mo te Iwi Maori, i raro i te Mana o te rarangi 71 o te Ture Nui mo Nui Tireni, o te tau kotahi mano e waru rau e rima tekau ma rima.

'Ka whakaaetia e nga Rangatiratanga katoa o ia Hapu o ia Hapu, o nga wahi katoa o nga Motu e rua, Aotearoa me te Waipounamu, kia tu he Kawanatanga mo te Iwi Maori.

'Ka whakaaetia hoki e tenei Kotahitanga kia whai mana te Kawanatanga i whakaturia nei ki te mahi Ture tiaki i nga whenua o te Iwi Maori, me era atu Mana e mahi ai taua Kawanatanga.

'Ko nga Tangata katoa, Tane, Wahine, Tamariki o nga Motu e rua Aotearoa me te Waipounamu o te Iwi Maori,—Ka Tino Whakaae i te Mana Whakahaere Tikanga o nga Whenua, i raro i nga Ture katoa e Pahitia e te Pureniata o te Iwi Maori, me ona Runanga e rua o te Kotahitanga ki te Tiriti o Waitangi.

'Na he whakapumautanga mo enei kupu i runga ake nei, koia ka tuhi matou i o matou Ingoa me o matou Tohu ki raro iho nui.'[1]

1. 'The Whakaupoko o Nga Kirihipi a te Kotahitanga', Paki o Matariki, 22 August 1895, p 3. Kotahitanga leaders brought this pledge to King Mahuta in May 1895, seeking his signature.

Unification under the Mana of the Treaty of Waitangi.

'We the leaders of the Whakaminenga of the iwi Māori, of the North and South Islands and the other islands adjoining these, which are together known as 'New Zealand', gathering together in unity of our bodies and minds, and in our earnest desire that this unification should be fully realised—

'We consent to the unification of all Rangatira and all Mana within the territories and people covered by the Authority of the Treaty of Waitangi of 6 February 1840.

'The leadership of every hapū in these islands, of all of the Maori people, have confirmed the unification of all, men and women of the Māori people, and have consented to establish an Upper House [Runanga Ariki] and Lower House [Runanga Nui], chosen from among the Māori people.

'These Assemblies are constituted under the mana of the Runanga Kaumatua [council of elders], held at Waitangi on 28 October 1835, and also the mana of the Treaty of Waitangi of 6 February 1840; and subject to the mana of section 71 of the New Zealand Constitution Act, of 30 June 1852.

'The Runanga has also agreed on the procedures for establishing the Assemblies—the Runanga Nui will be elected by the people, but not the Runanga Ariki. However, under the authority of all hapū of the Māori people, the Assemblies may establish a Government for the Māori people, under the mana of section 71 of the New Zealand Constitution Act 1852.

'The leadership of every hapū from every part of these islands recognises the mana of this Government for the Māori people.

'In accordance with this agreement to unify, they also acknowledge the power of the [Māori] Government to make laws for the protection of Māori lands, and to exercise other powers of Government.

'All Persons, all Māori men, women, and children of both Aotearoa and te Waipounamu, fully recognise the mana whakahaere tikanga [which we understand as governing and law-making authority[2]] of the lands, subject to all laws passed by the Parliament of the Māori people and its two Houses of Te Kotahitanga to te Tiriti of Waitangi.

'As a confirmation of these words, we therefore write our Names and Marks below.'

2. In *Te Mana Whatu Ahuru*, the Tribunal referred to Te Rohe Pōtae leaders' use of the term 'mana whakahaere' in a June 1883 petition to Parliament. The Tribunal described mana whakahaere as referring to 'full control and power', including rights of autonomy, self-determination, and self-government. In the particular context in which it was used, it also referred to an expectation that Māori authority would be guaranteed by statute, providing for the practical

New Zealand Herald, it was larger and more representative than the original Kohimarama Rūnanga had been. Wiremu Kātene, Mitai Tītore, and Hirini Taiwhanga all attended, while Maihi Parāone Kawiti was unable to be there. King Tāwhiao was not present but sent a letter expressing support for the hui, and also warning those assembled to be patient in the face of the Crown's opposition.[640]

According to press coverage, Pāora Tūhaere opened the hui by saying that its purpose was 'to destroy all the troubles that have arrived on this island' and 'make the natives and Europeans one people'. This, he said, was the purpose of the treaty. It protected Māori lands and rights but had been broken by the Government, with the result that Māori had lost their lands and chiefs had lost their status. The Pūtiki meeting had agreed to restore the treaty, and Tūhaere's wish was 'to make all of the native tribes one in asserting their rights against the Government'.[641]

Tūhaere explained that Māori concerns were sourced in the Crown's decision to transfer responsibility for Māori affairs to the colonial Government. Māori had not been consulted about that decision. Since then, colonial authorities had been governing Māori and enacting laws that caused them hardship. Although Māori were represented in the colonial Parliament, they received no benefit from this. Through the colonial system of government, 'the mana of the chiefs diminished'. After Tūhaere and others had spoken, the Kotahitanga pledge was handed around for signing; even before the hui, it reportedly had signatures from a 'large number' of leading rangatira and 426 others.[642]

The meeting was attended by several Ministers, members of the House, and officials. Māori leaders raised several concerns, asking whether the treaty had provided for the Native Land Court, or rating of Māori lands, or government control over the foreshore and traditional fishing grounds, which had become an increasingly pressing concern. The Native Minister, Edwin Mitchelson, and the Attorney-General, Sir Frederick Whitaker, gave speeches about the Government's policies.[643]

Whitaker agreed that the treaty was binding but he did not understand which part of the treaty had been breached. He said that the guarantee of native lands was not breached by the Native Land Court, as prior to land going before the Court, Māori were free to organise their land ownership as they pleased. He also acknowledged that the Government had proceeded with the enactment of further Native Land laws in spite of considerable opposition from Māori, but said this was because the Māori approach to land was always 'taihoa', and the colonial Parliament 'liked not only to talk but to do something'. When Hirini Taiwhanga attempted to speak, the Ministers objected and left the meeting.[644]

Settler newspapers were similarly dismissive of Māori concerns, the *New Zealand Herald* opining that these hui 'might be useful . . . if the natives would honestly set their minds to anything practical' and if, 'to begin with, they would

640. 'Native Meeting at Orakei', *New Zealand Herald*, 28 March 1889, p 6.
641. 'Native Meeting at Orakei', *New Zealand Herald*, 28 March 1889, p 6. Also see 'Native Meeting', *Auckland Star*, 27 March 1889, p 5.
642. 'The Native Meeting at Orakei', *New Zealand Herald*, 29 March 1889, p 6.
643. 'The Native Meeting at Orakei', *New Zealand Herald*, 29 March 1889, p 6.
644. 'The Native Meeting at Orakei', *New Zealand Herald*, 29 March 1889, p 6.

endeavour to devise means to improve their own social condition instead of complaining endlessly about the treaty'.[645]

11.5.2.1.4 Further attempts to align with the kīngitanga: the Pukekawa hui in May 1890

Early in 1890, Kotahitanga leaders were among 1,500 Māori who attended a Kīngitanga hui at Pukekawa, Waikato. There, Tāwhiao asked all present to acknowledge him as King and unite behind a Kīngitanga parliament, able to make its own laws, entirely independent of the colonial Parliament. This new parliament, known as Te Kauhanganui, was to meet every May. Kotahitanga and Kīngitanga leaders were aware that they could increase their influence with the Government if they united. Nonetheless, according to the *New Zealand Herald*, Tāwhiao's proposal was 'rather coldly received', at least by the northern tribes. Hirini Taiwhanga led a large Te Raki contingent who remained unwilling to unite under the King's mana, and who also differed from the King on the practical realities of establishing Māori self-government:

> Taiwhanga . . . pointed out to Tawhiao that no good could come of it unless he came under the Treaty of Waitangi. If he wanted a native Council to deal with native affairs, it must be under the law and authorised by Parliament. Tawhiao, however, refused in any way to recognise the European Parliament.[646]

On hearing this, Taiwhanga walked out of the meeting 'and was quickly followed by the other Ngapuhis'. After this, the entire meeting broke up.[647] While Tāwhiao's continued insistence that he be recognised as King was undoubtedly a factor, the two movements also envisaged different relationships with the colonial Parliament. Te Raki leaders had long since come to the view, given changes in circumstances since 1840, that Māori self-government could only be sustained with the recognition and support of the colonial authorities. Tāwhiao continued to press for a more independent course; he had petitioned the Queen in 1884, but did not acknowledge the colonial Government as having authority even to recognise his own.

11.5.2.1.5 The Kotahitanga northern committee: preparation for the first Kotahitanga Paremata

Very soon after the Pukekawa hui, northern leaders held their own meeting at Ōmanaia, where they took a critical step towards uniting all non-Kīngitanga Māori. According to Dr Orange,

645. Editorial, *New Zealand Herald*, 28 March 1889, p 6.
646. 'Native Meeting near Mercer', *New Zealand Herald*, 6 May 1890, p 5.
647. 'Native Meeting near Mercer', *New Zealand Herald*, 6 May 1890, p 5; Loveridge, evidence (doc z1(b)), p 5.

> The meeting, representative of all the north, was chaired by Hone Mohi Tawhai. Though aloof from the treaty movement in the early 1880s, Tawhai had shared with Aperahama Taonui a sense of spiritual revelation: both men had the prophetic vision of a solution [for] Maori difficulties, through he tikanga nui (a great law) to be worked out in 1890.[648]

Tāwhai's experience with the underpowered native committees might also have influenced him to align with Kotahitanga. The choice of Ōmanaia as a site for the hui was no accident: this had been a sacred location for Taonui's followers. The meeting appointed an organising committee for northern Kotahitanga. Heta Te Haara of Ngāti Rangi was named as chairman of the committee and leader of Kotahitanga in the north.[649]

Such was the mana associated with this role, claimants told us, that Te Haara's people recall him as 'he tumuaki ia no Te Tiriti o Waitangi i whakawahia ia e nga iwi e rua e Aotearoa me te Waipounamu' (which claimant Te Waiohau te Haara translated as: 'one of the founders [tumuaki] of Te Tiriti o Waitangi, he uplifted [whakawahia] all – both of the people of New Zealand and the South Island').[650] Three other leaders – Raniera Wharerau of Te Māhurehure, Hapukuku Moetara of Ngāti Korokoro, and Pene Tāui of Ngāti Rangi – were appointed to travel throughout the country gathering signatures on the Kotahitanga pledge. According to Dr Orange, this marked 'final acceptance by Ngapuhi' of their role as initiators of the treaty relationship, and therefore of their 'special responsibility to see the treaty implemented'.[651]

The first meeting of this new northern Kotahitanga committee took place at Kaikohe on 15 to 16 April 1891, with leaders of Ngāpuhi, Ngāti Whātua, Te Rarawa, and Te Aupōuri in attendance. Kaikohe was chosen because it was regarded as '"te upoko o te wheke", the belly of the octopus, whose tentacles spread throughout Ngāpuhi'. A new house was built for the occasion, aptly named Kotahitanga.[652]

At the hui, the leaders of these northern tribes agreed to 'unite as one body' under the name Whakakotahitanga.[653] According to Ngāti Rāhiri tradition, Te Tane Haratua suggested that name 'in an effort to emphasise and endorse the importance of unity as a strategy to bring attention to major issues'.[654] The hui also agreed to form a subcommittee to travel to Wellington with Northern Maori member of the House of Representatives Eparaima Kapa for the forthcoming parliamentary session. Although newspaper coverage was scant, the *Northern Advocate*

648. Orange, The Treaty of Waitangi, p 224.
649. Orange, The Treaty of Waitangi, p 224.
650. Waiohau Te Haara (doc B17), paras 27–34.
651. Orange, The Treaty of Waitangi, p 224.
652. Renata Tane of Ngāti Kawa (Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 310).
653. 'The Kaikohe Native Meeting', *Northern Advocate*, 22 April 1891, p 2.
654. Merata Kawharu (doc W10(a)), pp 15–16.

reported that the hui was 'said to be the largest meeting that has ever been held North of Auckland'.[655]

While preparations continued, Te Raki leaders also continued to engage with the colonial Government and its representatives, seeking recognition of treaty rights and freedom from damaging land laws; for example, rangatira appeared before the Native Land Laws Commission in 1891 seeking a new land title system operated by Māori komiti or rūnanga according to tikanga.[656]

After Hirini Taiwhanga's death, Eparaima Kapa was elected at a by-election in February 1891 to represent Northern Māori. In July 1891, Kapa introduced a Native Land Administration Bill to the colonial Parliament. This Bill provided for a portion of existing land to be set aside as an 'Māori Estate Fund', and for non-transferrable shares in the fund to be issued to every Māori adult and child.[657] All other Māori customary lands would be vested in an elected national Maori Council, which would be responsible for managing those lands and distributing proceeds from sale, lease, or other uses to the owners. The Bill was never debated.[658]

11.5.2.2 *How did the colonial Government respond to the Kotahitanga Paremata and Kotahitanga proposals during the period 1890–95?*

From 1892 and for the rest of the decade, the Kotahitanga movement held regular national parliaments where leaders from throughout the country gathered to debate issues of common concern. In particular, the movement's leaders continued to seek freedom from harmful laws, and recognition of Māori rights to self-government at local and national levels.

To this end, Kotahitanga petitioned the colonial Parliament in 1893; and from 1894 to 1896, the Ngāpuhi leader and Northern Maori member Hōne Heke Ngāpua introduced Bills to Parliament seeking recognition of the Kotahitanga Paremata's right to make laws for Māori. The movement built considerable support among Māori, and also sought to pressure the colonial Government by arranging for boycotts of the Court and land alienation.

The Government's primary concern at this time was opening more Māori land to a growing settler population. Although some Ministers were sympathetic to Kotahitanga aims and were willing to consider some options for local Māori self-government, there were limits to what could be achieved in a parliamentary system that offered very few safeguards for treaty rights.

655. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1280; 'The Kaikohe Native Meeting', *Northern Advocate*, 22 April 1891, p 2.

656. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1190–1191; Thomas, 'The Native Land Court in Te Paparahi o Te Raki' (doc A68), p 171.

657. Native Lands Administration Bill 1891, ss 21–25.

658. Native Lands Administration Bill 1891; 'First Readings' NZPD, 1891, vol 72, p 50; Loveridge, evidence (doc Z1(b)) pp 19–20.

11.5.2.3 *What were the objectives of the 1892 Kotahitanga Paremata?*

11.5.2.3.1 The April 1892 Waitangi hui

The first national Kotahitanga hui was scheduled for Waitangi in April 1892 and set out to make final arrangements for the inaugural national Kotahitanga Paremata at Waipatu in June. This was a major event in its own right, attended by more than 1,300 men, women, and children. The Treaty of Waitangi hall was decorated for the event: at the front was a red flag with the words 'Te Tiriti o Waitangi' in large white letters, alongside which a painting depicted a kaumātua and a rangatahi together, with the quotation 'Huihui tatau ka tu: wehiwehi tatau ka hinga' (United we stand, divided we fall).[659]

In an opening speech, Heta Te Haara of Ngāti Rangi described the hui's agenda as being he Whakaputanga, te Tiriti o Waitangi, section 71 of the Constitution Act 1852, and the desire for peace among all people of New Zealand.[660] Raniera Wharerau of Te Māhurehure chaired the event, telling those present that the Kotahitanga pledge had 20,934 signatures to date, a very substantial proportion of the Māori population, then estimated to number about 45,000.[661]

Much of the discussion at the hui concerned what the attendees considered the destructive influence of the Native Land Court on the land tenure, livelihoods, and authority of Māori communities. Rangatira raised many other grievances, including land alienation, rates, the dog tax, and the destruction of shellfish grounds. Underlying these concerns was a lack of Māori influence over law-making and government, which rangatira at the hui regarded as a breach of their rights under te Tiriti and section 71 of the New Zealand Constitution Act.[662]

The hui established an organising committee to make arrangements for Kotahitanga elections and the Waipatu Paremata. Te Raki rangatira on the committee included Iraia Kūao, Rē Te Tai, Hemi Kepa Tupe, Hōne Heke Ngāpua, and Mitai Tītore.[663] Hōne Sadler (Ngāti Moerewa) told us that Kūao 'believed vehemently that Te Tiriti empowered him to exercise his rangatiratanga and mana and determine the management and allocation of his hapū lands', and was 'aware of future consequences if [that] mana was diminished in any way'. Iraia's father and uncle had signed te Tiriti on behalf of Ngāti Rangi.[664]

The Government was represented at this hui by the Native Minister Alfred Cadman and the newly appointed Executive Council member James Carroll, of

659. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1280–1282.

660. 'Nga Korero o te Hui o te Whakakotahitanga i tu ki te Tiriti o Waitangi, Aperira 14, 1892' (Auckland: Wiremu Makura (William McCullough), 1892), p 6; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1283.

661. 'Nga Korero o te Hui o te Whakakotahitanga i tu ki te Tiriti o Waitangi, p 8. By 1898, the petition was said to have the signatures of more than 37,000 Māori. The historian Claudia Orange has questioned this figure in light of official census figures which showed a Māori population of 45,000. However, Hōne Heke in 1895 argued that the census figures underestimated the Māori population: Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1280.

662. 'Nga Korero o te Hui o te Whakakotahitanga i tu ki te Tiriti o Waitangi', p 9.

663. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1283–1287; 'Nga Korero o te Hui o te Whakakotahitanga i tu ki te Tiriti o Waitangi', p 9.

664. Hone Sadler (doc B38), pp 8–9.

Ngāti Kahungunu. Carroll spoke first, reminding those present that he was there as a member of the Executive representing the Māori people, and also as a representative of East Coast tribes. He commended the assembled rangatira for uniting in common purpose and encouraged them to develop 'practical' proposals over issues such as land, rates, and the dog tax, which could then be placed before the colonial Parliament.[665] He supported their attempts to organise nationally and spurred them to develop proposals for 'local self-government', and 'just and sensible' plans to protect their land interests. If they did so, he 'felt certain that legislation by universal consent would ratify their decision'.[666]

But he also encouraged the rangatira to focus their efforts on 'practical' policies, and discouraged them from pursuing 'unattainable' goals that would not be acceptable to the Pākehā majority.[667] By this, we presume he meant to discourage them from pursuing any plan for recognition of their assembly as a Māori parliament with law-making powers, on the grounds that settler politicians would not accept such a measure, and (in the absence of constitutional safeguards) it would therefore never come to fruition.

Cadman's speech had a different tone. He encouraged Māori to accept the colony's laws, said that Māori had difficulty with the Native Land Court because they were not willing to reach out-of-court agreements among themselves, warned that taxes on Māori must increase as settlers were paying too much, and said the dog tax must be enforced so that local authorities would have money for roads and other public works.[668] Most strikingly, he said the treaty had been 'broken years ago by both parties', the Crown by withdrawing its pre-emptive right, and Māori by selling land to settlers. This breach had become 'so wide that he did not think anything could mend it'. The *New Zealand Herald* reported that the speech was not well received.[669]

Cadman and Carroll were the Liberal Government's two Ministers with direct responsibility for Māori affairs, yet they had divergent approaches. Carroll had been a member of the Native Land Laws Commission which recommended that hapū be awarded community title to their lands and given a significant say over land administration. Cadman, who had been Native Minister for little more than a year, had rejected that advice, and was instead pursuing a course aimed at opening more Māori land for settlement. His policies included abolition of the Native Department, abolition of the roles of Māori assessors, expansion of the Court's role, and increased Crown purchasing of Māori land. The Premier John Ballance

665. 'The Native Meeting at Waitangi', *New Zealand Herald*, 21 April 1892, p 6; Loveridge, evidence (doc z1(b)) p 8.

666. 'The Native Meeting at Waitangi', *New Zealand Herald*, 28 April 1892, p 5; Loveridge, evidence (doc z1(b)) p 9.

667. 'The Native Meeting at Waitangi', *New Zealand Herald*, 21 April 1892, p 6; Loveridge, evidence (doc z1(b)) p 8.

668. 'The Native Meeting at Waitangi', *New Zealand Herald*, 23 April 1892, p 5; Armstrong and Subasic, 'Northern Land and Politics' (doc a12), p 1214.

669. 'The Native Meeting at Waitangi', *New Zealand Herald*, 23 April 1892, p 5; Armstrong and Subasic, 'Northern Land and Politics' (doc a12), p 1214.

was a former Native Minister with some sympathy for Māori aspirations over land, though like other Ministers he was not prepared to accept any challenge to the authority of the colonial Parliament. By encouraging Kotahitanga leaders to tread a cautious path, Carroll appears to have been reflecting his awareness of what was possible in the then political climate.[670]

11.5.2.3.2 The June 1892 Kotahitanga Paremata at Waipatu

Two months after the Waitangi hui, the first meeting of the Kotahitanga Paremata took place at Waipatu in the Hawke's Bay. Its full name was Te Kotahitanga o te Tiriti o Waitangi – the unity of the Treaty of Waitangi.[671] More than 1,000 Māori attended.[672] Kotahitanga adopted the same structure as the colonial Parliament, with a bicameral legislature comprising a 93-member lower house (Te Rūnanga Nui, or Te Whare o Raro) and a 50-member upper house (Te Whare Ariki). Elections had been held, by district, in the preceding week.[673]

Reflecting this district's share of the national population and prominence within the movement, 28 members of Te Rūnanga Nui and eight members of Te Whare Ariki were from 'Te Pōti o Ngāpuhi'.[674] Of the four Ministers, two were from Ngāpuhi: Raniera Wharerau and Mitai Tītore. The Hauraki leader Hamiora Mangakāhia was elected as Pirimia (Premier).[675]

Membership of Te Whare o Raro comprised leaders from much of the country outside of Waikato, Te Rohe Pōtae, and Taranaki – territories dominated by the Kīngitanga or the Parihaka spiritual movement. Representation was much greater among North Island tribes than South. The Ngāpuhi members represented a broad cross-section of hapū and territories.[676] The claimants Hineāmaru Lyndon and Louisa Collier told us that Pōmare Kīngi's appointment to Te Whare Ariki was a reflection of his mana and the depth of expectation his people placed on him. He took part 'to keep alive our tino rangatiratanga', which encompassed a right to govern and to self-determination in all things.[677]

670. Graham Butterworth, 'Cadman, Alfred Jerome', *Dictionary of New Zealand Biography*, Te Ara – the Encyclopedia of New Zealand, https://teara.govt.nz/en/biographies/2c2/cadman-alfred-jerome (accessed 14 January 2022); Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1304–1305; Tim McIvor. 'Ballance, John', Dictionary of New Zealand Biography, first published in 1993. Te Ara – the Encyclopedia of New Zealand, https://teara.govt.nz/en/biographies/2b5/ballance-john, accessed 26 March 2022. Regarding Ballance's Māori policies, see sections 11.4.2.2.4 and 11.4.2.3.5.

671. Orange, *The Treaty of Waitangi*, p 225. The parliament ran from 14 June until mid July.

672. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1288.

673. Armstrong and Subasic, 'Northlern Land and Politics' (doc A12), p 1288. Also see Orange, *The Treaty of Waitangi*, p 225; Angela Ballara, 'Wahine Rangatira; Maori Women of Rank and their Role in the Women's Kotahitanga Movement of the 1890s', NZJH, vol 27, no 2, 1993, pp 132, 316.

674. Kawharu, 'Te Tiriti and its Northern Context' (doc A20), pp 316–318; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1288; Lindsay Cox, 'Kotahitanga: The Search for Maori Political Unity' (MA thesis, Massey University, 1991), p 80.

675. Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 318; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1288; 'The Maori Parliament', *Evening Post*, 30 June 1892, p 3.

676. For a full list of members of Te Whare o Raro, see Cox, 'Kotahitanga', p 80.

677. Hinemaru Lyndon and Louisa Collier (doc J23), p 3.

Te Raki Members of Te Whare Ariki: 1892

Wiremu Kātene (Ōhaeawai, Tautoro), Hemi Kepa Tupe (Whangaroa), Pōmare Kīngi (Whatitiri), Maihi Parāone Kawiti (Waiōmio, Taumārere), Eramiha Paikea (Kaipara), Miti Kakau (Hokianga), Rē Te Tai Maunga (Te Rarawa, Hokianga), and Timoti Puhipi (Te Rarawa, Ahipara).[1]

Te Raki Members of Te Whare o Raro: 1892

Te Rarawa: Mitai Kaukau (Hokianga ki te Kauru), Taniora Moto (Mangamuka), Rē Te Tai Maunga (Hokianga), Heremia Te Wake (Hokianga, Whangapē), Peri Paraihe (Hokianga, Whangapē), Timoti Puhipi (Ahipara, Kaitara, Te Awanui).

Te Rarawa/Ngāpuhi: Muriwai Hepiki (Waihou ki te Kauru), Kaipo Hotereni (Waihou ki te Kauru), Ngakuru Pana (Waimamaku).

Ngāpuhi: Hemi Tupe (Whangaroa), Karena Kiwa (Whangaroa), Pere Riwhi (Whirinaki, Hokianga), Mohi Wikitahi (Waimā), Raniera Wharerau (Waimā), Te Paki Wihongi (Kaikohe), Mitai Tītore (Mangakāhia, Ahuahu), Wī Kātene (Ōhaeawai, Tautoro), Pene Tāui (Oromāhoe, Waimate), Maihi [Parāone] Kawiti (Waiōmio, Taumārere), Te Kaka Porowini (Te Karetū, Pēwhairangi), Kereama Papaka (Waikara), Pōmare Kīngi (Whatitiri), Riwai Taikawa (Whāngārei, Kaihou), Wiki Te Pirihi (Whāngārei, Kaihou).

Ngāti Whātua: Hemi Parata (Te Awaroa, Kaipara), Eremiha Paikea (Kaipara), Wikiriwhi Hemana (Kaipara), Netana Patuawa (Ōpanaki, Maunganui).[2]

1. Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 318; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1288.
2. Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 317.

While the upper and lower whare were reserved to male rangatira, men and women attended the Paremata in broadly equal numbers, and women were instrumental in the movement: raising funds, organising the hui, administering the movement, and building support among Māori communities. Wāhine rangatira such as Meri Te Tai Mangakāhia of northern Hokianga (Te Rarawa) also became prominent in political roles as the movement grew. This reflected a long tradition of wāhine rangatira in Te Raki and elsewhere: Meri Te Tai Mangakāhia was the daughter of Te Rarawa leader Rē Te Tai, and a great-niece of Pāpāhia who had signed te Tiriti for the tribe. Yet the prominence of women leaders also reflected other factors, including the debate within Māori and Pākehā communities about women's suffrage and equal rights, and the frustrations that Māori women felt over

the impacts of Crown policies on their communities.[678] Also significant was the nature of Māori political organisation: the Kotahitanga Paremata were mass hui attended by whole whānau, where informal discussions, sharing of experiences, and building of connections were just as important as the formal business.[679]

Meri Te Tai Mangakāhia was married to the Kotahitanga Premier, Hamiora Mangakāhia, and both played prominent roles as the movement evolved. When the Kotahitanga Paremata opened on 14 June 1892, Hamiora began proceedings with an appeal for unity, saying that the establishment of a Māori government and legislature was consistent with Māori rights under the treaty and the New Zealand Constitution Act.[680] In his view, the treaty provided a place for settlers to live in New Zealand and the Crown to govern over them. But it also guaranteed Māori 'te mana o ratou whenua' (the mana over their lands). Alluding to the Crown's attempts to govern over Māori, he added,

> Ki to tatou ritenga e kore rawa e tae atu tetahi Rangatiratanga ki te whakahaere ritenga o te taonga kei raro i te mana i whakaaetia ki tetahi Rangatiratanga.
>
> According to our custom one chieftain would never proceed to arrange conditions for the property under the mana accorded to another chieftain.[681]

The Kotahitanga Paremata passed a series of resolutions echoing those agreed at Waitangi two months earlier. They asserted that it was for the Kotahitanga Paremata to make laws for Māori people and lands, and the colonial Legislature should no longer do so. They repeated their decision to boycott the Native Land Court and called for Māori assessors to resign.[682] The Paremata debated alternatives to the Court and options for administering uncultivated Māori lands, resolving that Māori committees should be properly empowered to manage these functions. Other resolutions concerned rating of Māori lands, and policies on native schools and sanitation, among a range of matters.[683]

678. Angela Ballara, 'Wāhine Rangatira: Māori women of rank and their role in the women's Kotahitanga movement of the 1890s', NZJH, 1993, vol 27, no 2, pp 133–136; Waitangi Tribunal, *The Wairarapa ki Tararua Report*, Wai 863, 3 vols (Wellington: Legislation Direct, 2010) vol 2, p 520. For Meri Mangakāhia's descent, see Ballara, 'Mangakāhia, Meri Te Tai', *Dictionary of New Zealand Biography*, https://teara.govt.nz/en/biographies/2m30/mangakahia-meri-te-tai (accessed 26 January 2022) and Ballara, *Iwi: The Dynamics of Maori Tribal Organisation from c 1769 to c 1945* (Wellington: Victoria University Press, 1998), p 197.

679. Ballara, 'Wāhine Rangatira', p 133.

680. 'The Maori Parliament', *Evening Post*, 30 June 1892, p 3.

681. 'Nga Korero o te Hui o te Whakakotahitanga i tu ki te Tiriti o Waitangi', pp 12–13; Kawharu, 'Te Tiriti and its Northern Context' (doc A20), p 312. Translation by Jane McRae, quoted in Kawharu.

682. 'Nga Korero o te Hui o te Whakakotahitanga i tu ki te Tiriti o Waitangi, pp 24–25; 'The Maori Parliament', *Evening Post*, 25 June 1892, p 3; *Evening Post*, 25 June 1892, p 2; see also Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1289.

683. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1289–1290. Also see Loveridge, evidence (doc Z1(b)) p 11.

The Government was represented at the hui by Carroll and the Cabinet Minister Joseph Ward, who encouraged those present to believe that their proposals would be taken seriously in the colonial Parliament. Ward acknowledged that, since 1840, there had been 'many troubles . . . many injustices . . . [and] many mistakes made', which had resulted in Māori lands being unjustly taken. He suggested that at some future time a tribunal 'might be necessary to look into errors that have been committed, with a view to putting them right as far as possible'.[684] Ward also acknowledged the difficulties that Court processes had created for Māori communities and said the Government would welcome practical measures for addressing these difficulties.[685]

While acknowledging Māori grievances, he also reminded Kotahitanga leaders that settlers dominated the political system, and the Government therefore had to act in accordance with settler wishes. In practice, this might mean compelling Māori to open lands for settlement just as South Island estates were being opened. Ward therefore encouraged Kotahitanga leaders to develop a workable plan for settlement that did not create further injustice.[686] His comments would have reinforced those made by Carroll at the Waitangi hui in April; Carroll, too, had suggested that the Government might adopt Kotahitanga proposals, if those proposals were acceptable to Ministers and to the Government's settler constituency. For Kotahitanga leaders, the Government's land development objectives did not necessarily create a difficulty: Kotahitanga did not oppose settlement; they simply wanted Māori to control their own affairs.[687]

11.5.2.4 *What was the Government's response to the 1892 Kotahitanga proposals?*

After the conclusion of the Kotahitanga Paremata at Waipatu, more than 30 representatives travelled to Wellington, where they asked the colonial Government to endorse their decisions concerning Māori lands. In particular, they asked that the colonial Parliament enact no laws concerning Māori lands, impose no rates or taxes on Māori lands, and cease all Court hearings in the North Island. They met Cadman, who offered no support for their proposals and indicated that the Government intended to press ahead with its own legislation (which we discuss later).[688]

Kotahitanga leaders then approached the Premier (Ballance) in August 1892, asking that he adopt the Kotahitanga Paremata's decisions, especially those concerning the Native Land Court and native committees. Ballance undertook to

684. 'Taxing Native Lands', *New Zealand Herald*, 28 June 1892, p 5; Loveridge, evidence (doc z1(b)) pp 13–14.

685. 'Hon. J. G. Ward at Waipatu', *Poverty Bay Herald*, 28 June 1892, p 3.

686. 'Hon. J. G. Ward at Waipatu', *Poverty Bay Herald*, 28 June 1892, p 3; 'Taxing Native Lands', *New Zealand Herald*, 28 June 1892, p 5.

687. Armstrong and Subasic, 'Northern Land and Politics' (doc a12), pp 1289–1290.

688. Loveridge, evidence (doc z1(b)) pp 14–15, 17–18; 'Parliamentary News', *New Zealand Herald*, 3 August 1892, p 5; Armstrong and Subasic, 'Northern Land and Politics' (doc a12), pp 1290–1291. The delegation included Whanganui rangatira Keepa Te Rangihiwinui and former members of the House Wī Pere, Wī Parata, and Henare Tomoana.

consider their views. There is no record of his taking any further action, though this is likely because he was already ill with the cancer that would claim his life in 1893. Richard Seddon would be appointed Acting Premier after Ballance's death in April 1893.[689]

The Government members James Carroll and William Rees as well as the opposition member Sir George Grey expressed sympathy for Kotahitanga aims, and they worked on legislative proposals, though were ultimately unable to win support from a majority in the colonial Parliament. Grey met Kotahitanga leaders in August and promised to introduce legislation granting a substantial degree of hapū self-government. Under his proposal, hapū or tribes would form into municipalities or incorporations empowered to raise taxes, make bylaws, prohibit sales of liquor, determine land interests, and manage all land dealings within hapū boundaries. He did not propose to abolish the Native Land Court but expected it would rapidly become redundant under this proposed system. In Grey's view, each hapū should have 'power to manage all its own local affairs'. He also proposed the establishment of a national assembly comprising hapū representatives, who would meet annually and propose legislation to the colonial Parliament.[690]

Grey's Native Empowering Bill, as introduced on 31 August 1892, was a weaker measure than he had promised Kotahitanga leaders; Grey appears to have modified the Bill while it was being drafted, in the hope of winning Government support. As introduced, the Bill proposed to allow the Governor to establish Māori boroughs, which (at the Governor's discretion) could have some or all of the powers of a local authority, and would also be empowered to manage their own lands subject to regulations approved by the Governor. However, the Bill made no mention of a national assembly, and it proposed to reintroduce Crown pre-emption – a measure that Kotahitanga leaders were not consulted on and did not support.[691]

The Bill was introduced to the House near the end of the 1892 parliamentary session but was never debated.[692] Ballance promised to circulate the Bill for consultation over the summer and then adopt it as a government measure, but the

689. 'Parliamentary News', *New Zealand Herald*, 9 August 1892, p 5; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1290–1291. The newspaper reports suggested that the Kotahitanga delegates asked only for the Court's procedures to be simplified, and Armstrong and Subasic understood this as meaning that Kotahitanga leaders modified their position on abolition of the Court in response to the setback they had received from Cadman. It is also possible that the newspaper misunderstood their position. Regarding Ballance's illness, see Tim McIvor, 'On Ballance: A biography of John Ballance, journalist and politician, 1839–1893' (PhD thesis, Victoria University of Wellington, 1984), pp 8, 388.

690. 'Native Affairs', *New Zealand Herald*, 31 August 1892, p 5; 'Parliamentary News', *New Zealand Herald*, 12 September 1892, p 5; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1292–1293.

691. Native Empowerment Bill 1892, clauses 2, 3; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1292–1293.

692. 'Parliamentary News', *New Zealand Herald*, 1 September 1892, p 5.

Premier died before that could occur, and Grey was in poor health for much of 1893. The Bill never returned to the House.[693]

Carroll and Rees, meanwhile, worked on the Native Committees Act 1883 Amendment Bill, which proposed to empower district Māori committees to determine land titles and manage dealings in Māori lands. Rees argued that the Native Land Court system was infringing on Māori rights and delaying settlement, and that more land would be opened for settlement if Māori communities were able to manage their own affairs. While the measure won some support in the settler press, it also shed light on the significant rift within the Government over Māori land policy. Carroll introduced the Bill to Parliament in September 1892, but he did not have government support. This Bill, too, was never debated.[694] Rees, who had long worked with Tūranga leader Wī Pere to try to achieve legally recognised Māori community titles, continued to advocate publicly for hapū self-government in respect of land. In his view, it was 'astonishing' that the Crown persisted with the Native Land Court system and individual shareholding when so many politicians and judges knew how destructive the system was, and how much delay it caused in opening land for settlement.[695]

Cadman also introduced his own legislative measures during the second session of Parliament in 1891.[696] The Native Land Court Bill 1892 proposed some reforms to the Court and also aimed to strengthen the Government's control of the land market. It was considered and rejected by the Joint Committee of the House and Council, we presume because Ballance had promised to consult Māori about changes to Māori land laws.[697] The colonial Parliament did enact another measure, the Native Land Purchase Act 1892, which authorised Government borrowing for the purchase of Māori land, provided for a partial restoration of Crown preemption by authorising it to declare certain areas off limits to private purchasers, and allowed the Government to unilaterally remove any existing legal restrictions on sale.[698] Introducing this Bill, Cadman said it would allow the Government to 'relieve' Māori of 'surplus' lands, and would not impose costs on taxpaying settlers as any borrowed money would be repaid through profits from land sales.[699]

693. Ballance died on 27 April 1893, and the House resumed on 22 June 1893: NZPD, 1893, vol 79; Tim McIvor. 'Ballance, John', *Dictionary of New Zealand Biography*, Te Ara – the Encyclopedia of New Zealand, https://teara.govt.nz/en/biographies/2b5/ballance-john (accessed 14 January 2022). Grey went to England in March 1894 and did not return before his death in 1898: 'Sir George Grey', *New Zealand Herald*, 8 March 1894, p 4. Regarding Grey's health, see: 'Sir George Grey and the Native Land Question', *New Zealand Herald*, 24 January 1893, p 5.

694. 'First Readings', 16 September 1892, NZPD, vol 78, p 150.

695. 'First Readings', 16 September 1892, NZPD, vol 78, p 150; 'Important Auckland Questions', *Auckland Star*, 26 October 1892, p 2; 'Native Land Law Reform', *New Zealand Herald*, 28 November 1892, p 6.

696. Loveridge, evidence (doc z1(b)) p 17.

697. Loveridge, evidence (doc z1(b)) pp 17–20. The Native Land Court Bill 1892 was a modified version of Cadman's Native Lands Bill 1981.

698. Native Land Purchases Act 1892, ss 3–4, 14, 16; Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pt 2, pp 1313.

699. Native Land Purchases Bill, 19 August 1992, NZPD, vol 77, p 221.

The Māori members of the House objected to this legislation, which they saw as enabling further Government purchase from individual Māori at below-market prices – 'swindling', to use the word of Hoani Taipua. Epairama Kapa emphasised that Māori continued to seek community control: whenever the Government wanted land, it should go to the whole community openly instead of 'going in an underhand manner to one or two persons'.[700] The Māori members specified the clauses and provisions they objected to, and the Act passed into law with those provisions intact.

The 1892 session was therefore significant for the relationship between Kotahitanga and the colonial Parliament. Carroll and Ward had encouraged Kotahitanga leaders to make 'practical' legislative proposals to the House with a particular focus on land, and Carroll had promised to do his utmost to bring those proposals to fruition. Kotahitanga leaders had done what he suggested: they had debated numerous practical issues regarding land, rating, and other matters, and had approached the House with proposals for local land administration by Māori comunities. Carroll, Rees, and Grey had then brought forward legislation that could have gone at least some way towards meeting Kotahitanga objectives. But Māori aspirations for self-government and community control over land continued to depend on winning a majority in a settler-dominated Parliament, and that was not possible without clear Government support. Much therefore depended on Ballance's promise to consult over summer before bringing a government measure to the colonial Parliament in 1893.

The colonial Parliament also enacted one other measure of significance to Te Raki Māori, and more generally for the treaty relationship. The Oyster Fisheries Act 1892 introduced a licensing regime in response to the plundering and destruction of oyster beds by commercial interests in several parts of the country, including the Bay of Islands and Whāngārei.[701] Māori in this and other districts had for many years been raising concerns about their loss of authority over traditional shellfish grounds,[702] and Te Raki Māori had specifically raised concerns about commercial use and depletion of oyster fisheries in 1886, and again in the colonial Parliament in 1891 and at the Waitangi hui in April 1892.[703]

Introducing the Bill, Seddon told the House:

> There was Whangarei Harbour, once famous for its oysters, but now there was scarcely an oyster to be got there at all. Further north the same thing had occurred, and had been going on until recently. At Russell, not long ago, somewhere about six or seven hundred bags of oysters were shipped away. That in itself would not have been so objectionable were it not that, in the process of removing these six or seven

700. Native Land Purchases Bill, 19 August 1992, NZPD, vol 77, pp 228–231.
701. Oyster Fisheries Bill, 8 July 1892, NZPD, vol 75, p 361.
702. Waitangi Tribunal, *Muriwhenua Fishing*, Wai 22, pp xv–xvi.
703. 'W Katene and Others', 24 June 1891, NZPD, vol 71, p 220; 'The Native Meeting at Waitangi', *New Zealand Herald*, 21 April 1892, p 6.

hundred bags, as many more oysters as would perhaps fill another eight hundred bags had been ruthlessly destroyed.[704]

As introduced, the Oyster Protection Bill provided no protections for Māori customary rights. Kapa spoke briefly, making clear that Māori members had not been consulted and did not fully understand the measure, and asking that Māori rights in traditional fishing grounds be protected.[705] Although the Government had been regulating fisheries since the 1860s, previous Acts had contained general provisions recognising treaty or customary rights, whereas this Act did not. As the Tribunal found in its *Report on the Muriwhenua Fishing Claim*, the Oyster Protection Act presumed that the Crown had unrestricted authority over the foreshore and inshore fisheries; prohibited Māori customary fishing unless explicitly authorised; and provided that any residual Māori rights could be limited to specific areas and species, limited to personal (not commercial) use, and subject to Government regulation as if Māori had no systems of their own for fisheries' management. These assumptions were to remain in Māori fishing legislation throughout the following century. Furthermore, while numerous licences were subsequently issued to settler commercial interests, very few Māori reserves were ever created.[706] We will consider claims about fisheries in a later volume of this report.

11.5.2.5 *What were the objectives of the 1893 Kotahitanga Paremata?*

So far as we can determine, no consultation took place early in 1893 over Grey's Native Empowering Bill or any other legislative proposal about Māori lands. Ballance and Grey were both in declining health, and Cadman – having shepherded his Native Land Purchase Act through the colonial Parliament – had his attention on other matters, including a dispute with Māori over mining rights at Parawai and the disruption of government surveys in Te Urewera.[707]

The second Kotahitanga Paremata took place at Waipatu in April 1893, with several hundred members and observers present. The lower house was smaller, with 58 members attending, including four from Hokianga and five from the Bay of Islands.[708] Raniera Wharerau of Te Māhurehure was selected as a Minister in a newly formed Government, and Te Whatahoro of Ngāti Kahungunu replaced Hamiora Mangakāhia as Premier.[709]

704. Richard Seddon, 8 July 1892, NZPD, vol 75, p 361.

705. Oyster Fisheries Bill, 8 July 1892, NZPD, vol 75, p 364. Cadman had also inspected the Kerikeri oyster beds earlier in 1892 and was reported to have 'found wanton destruction everywhere', to a degree that would wipe out the fishery if it was not protected: 'The Native Meeting at Waitangi', *New Zealand Herald*, 25 April 1892, p 5.

706. Waitangi Tribunal, *Report on the Muriwhenua Fishing Claim*, Wai 22, pp xv–xvi, 81–82; see also Waitangi Tribunal, *Ngai Tahu Sea Fisheries*, Wai 27, pp 144–146; Jackson, 'Erosion of Māori Fishing Rights in Customary Fisheries Management', p 65.

707. 'Mr Cadman and the Ureweras', *Bay of Plenty Times*, 13 February 1893, p 2; regarding Grey's absence, see 'Telegraphic', *Bay of Plenty Times*, 17 April 1893, p 2.

708. Paremata Maori: Waipatu 1893, Proceedings of the second Kotahitanga parliament, April–May 1893 (Hastings; George and Young, 1893?), p 82.

709. Paremata Maori: Waipatu 1893, p 2.

As in 1892, the policy discussions focused on developing Kotahitanga as a vehicle for national Māori self-government, and on abolishing the Court and establishing mechanisms for local self-government with respect to land.[710] The Paremata formed a committee to examine the colony's land laws,[711] and members also discussed tactics for achieving their objectives; in particular, the steps they should take to gain recognition from the Crown and the colonial Parliament. In this, they fell into two camps.

One, with strong support from Ngāpuhi, favoured pursuing Crown recognition of a fully independent Kotahitanga Paremata and Government. The principal advocate for this position was the 24-year-old Ngāti Rāhiri leader Hōne Heke Ngāpua, a grand-nephew of the Northern War leader Hōne Heke Pōkai (see chapter 5). Heke had attended the 1892 Paremata as a government observer, and was not a member of the Paremata but was nonetheless allowed to speak. Supporters of his position viewed it as consistent with he Whakaputanga and the treaty, and believed that Kotahitanga should establish its constitutional independence before resolving more practical matters such as land administration.[712]

But Kotahitanga members were also aware that they needed recognition from the colonial Government – otherwise any Kotahitanga laws would be ignored or broken. Some members, led by the legislative councillor and former Southern Maori member Hōri Kerei Taiaroa, argued that the colonial Parliament would never accept Heke's proposal, and that Kotahitanga should therefore pursue more moderate goals that might win the favour of settler politicians.[713]

The two camps did not necessarily differ in their final objectives but rather in their tactical approaches: Taiaroa preferred an incremental approach that might win some gains in the short term; Heke preferred to begin with the principle of Kotahitanga self-government lest it otherwise become compromised. This, in our view, was the distinction that Carroll had been referring to when he warned Kotahitanga in 1892 to take a 'practical' approach and not pursue what was 'unattainable'. This same debate would continue among Kotahitanga leaders – and Māori leaders more generally – throughout the decade.[714]

Taiaroa's Bill was titled Te Ture Huinga Whakamana Kotahitanga o Nga Iwi Maori, which was translated at the time as The Federated Maori Assembly Empowering Bill. The Bill was mainly focused on Māori self-determination in respect of land. Under its provisions, the Kotahitanga Paremata would establish district committees to determine land ownership and manage land dealings on behalf of Māori owners. The Paremata would make regulations to guide these

710. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1293–1295.

711. 'Hastings', *Daily Telegraph*, 22 April 1893, p 3.

712. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1293–1295. At the time, Heke was employed as a clerk for the Native Land Court in Wellington. Although he was not a member of the Paremata, he was a member of the Kotahitanga organising committee.

713. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1293–1295; *Paremata Maori: Waipatu 1893*, pp 5, 8–12.

714. 'The Native Meeting at Waitangi', *New Zealand Herald*, 21 April 1892, p 6; Loveridge, evidence (doc Z1(b)), p 8.

activities and would hear any appeals from the district committees. The Governor would ratify any land title decisions, and once title was determined, Māori would be placed on the same footing as Europeans in terms of land dealings ('Ko te mana hoko o nga Maori kia rite tonu ko nga Pakeha').[715]

In constitutional terms, the Bill acknowledged the authority of the Governor and therefore the Crown, but bypassed colonial institutions: the Court would be abolished, and colonial Ministers and Parliament would no longer exercise any authority over Māori land. Several Kotahitanga members objected to the provision placing Māori land on equal footing with that of Europeans, fearing that this would open the way to more land sales. The former Kotahitanga Premier Hamiora Mangakāhia argued that this provision breached the treaty. Taiaroa's intention seems to have been that district committees would administer Māori lands and would be free to sell, lease, mortgage, or develop them, as Europeans were. Mangakāhia and others might have interpreted the provision as transferring mana from hapū to committees, or as authorising individuals to sell.[716]

Several members of the Paremata, and the Ngāpuhi representatives in particular, objected to the Governor having any authority under the Bill, seeing this as undermining their authority as rangatira. Hōne Makoare said, 'Ko Kaikohe me Tautoro kei raro tonu i a maua ko taku tuakana ko Kuao. E kore rawa ahau e pai kia riro mai aku whenua ki raro i enei ture.' (We translate this as: 'Kaikohe and Tautoro are under my mana and that of my brother Kuao. I do not consent to my lands being placed under these laws.') Raniera Wharerau asked that the Bill be deferred to 1894, to allow for consultation with Māori communities. He said his people would oppose the Bill: 'ko tenei pire e mahia atu ana hei patu ia ratou.' ('this bill is being made to kill them').[717] Nonetheless, the Kotahitanga Paremata voted narrowly (25 to 22) to send the Bill to the colonial Parliament, alongside a petition setting out broader Kotahitanga objectives.[718] We will consider the Government's response in section 11.5.2.4.

The 1893 Paremata took place at a time of widespread public debate about women's suffrage in the colony's political system. This was also an issue within Kotahitanga, which had followed the colonial system by restricting the vote to men. During the 1893 Paremata, Meri Te Tai Mangakāhia proposed that women should have voting rights and be able to stand as candidates for the Kotahitanga Paremata. On 18 May, she spoke in the Paremata's lower house, the first woman to do so.[719]

Mangakāhia and other wāhine rangatira shared many of the same concerns as the male Kotahitanga leaders, including those about the harmful impacts of the Court, land alienation, rates, and other elements of colonial law and authority.[720]

715. Federated Maori Assembly of New Zealand (Petition of the), AJHR, 1893, J-1, pp 3, 5; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1294.
716. Paremata Maori: Waipatu 1893, pp 67–68.
717. Paremata Maori: Waipatu 1893, pp 67–68.
718. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1294–1295.
719. Ballara, 'Wahine Rangatira', p 133.
720. Angela Ballara, 'Wahine Rangatira', pp 133–134.

Wāhine rangatira also had other concerns. Many possessed mana over property and resources, and had significant resource management responsibilities, yet were excluded from decision-making in the colonial and Kotahitanga Paremata alike. Furthermore, they were frustrated at the limited impact that male rangatira were having within the colonial system, and felt they might be more effective. As Mangakāhia explained to the Paremata:

> He nui nga tane Rangatira o te motu nei kua inoi ki te kuini, mo nga mate e pa ara kia tatou, a kaore tonu tatou i pa ki te ora i runga i ta ratou inoitanga. Na reira ka inoi ahau ki tenei whare kia tu he mema wahine.
>
> Ma tenei pea e tika ai, a tera ka tika ki te tuku inoi nga mema wahine ki te kuini, mo nga mate kua pa nei kia tatou me o tatou whenua, a tera pea e whakaae mai a te kuini ki te inoi a ona hoa Wahine Maori i te mea he wahine ano hoki a te kuini.[721]

> There have been many male leaders who have petitioned the Queen concerning the many issues that affect us all, however, we have not yet been adequately compensated according to those petitions. Therefore I pray to this gathering that women members be appointed.
>
> Perhaps by this course of action we may be satisfied [that it is correct for women members of Kotahitanga to petition the Queen] concerning the many issues affecting us and our land. Perhaps the Queen may listen to the petitions if they are presented by her Māori sisters, since she is a woman as well.[722]

Members of the Paremata expressed sympathy for the proposal that the Kotahitanga franchise should be extended to Māori women. However, the Paremata made no decision and instead moved on to other business. Mangakāhia and others went on to found a network of komiti wāhine which operated nationally and at tribal and marae levels – though we have found no specific evidence of their operation in this district. At a national level, the komiti operated with the same formality as the Kotahitanga Paremata and debated many of the same issues. From 1894, the Paremata routinely sought input from women leaders before making decisions. The 1894 Paremata also revisited the question of female enfranchisement, and the question was raised again in subsequent years before the 1897 Paremata finally granted wāhine the vote.[723]

11.5.2.6 *What was the Government's response to the 1893 Kotahitanga petition?*

After the 1893 Kotahitanga Paremata ended, the movement's leaders sent a petition to the colonial Parliament. While the Paremata had adopted Taiaroa's Bill, the petition also sought recognition for the Paremata's authority as a law-making

721. Paremata Maori, Waipatu 1893, pp 62–63.

722. Translation by Charles Royal, in Charlotte Macdonald, Merimeri Penfold, and Bridget Williams (eds), *The Book of New Zealand Women/Ko Kui ma te Kaupapa* (Wellington: Bridget Williams Books, 1991), p 413.

723. Ballara, 'Wahine Rangatira', pp 136–138.

body. Dated 27 May 1893, and signed by Te Keepa Te Rangihiwinui and 55 others, the petition opened with a declaration:

> Ko o koutou kai inoi, me nga tamariki, me nga uri o te iwi Maori nui tonu i ata koropiko, i ata rere marie ki raro i te mana o te Karauna o Ingarangi i noho mai i te tau 1835, me te tau 1840, I runga I te Tiriti o Waitangi, ka whakaurua nga Maori o Niu Tireni, ki roto ki te mana me te Rangatiratanga o Ingarangi o te ao katoa.[724]

In the official translation, this was rendered as a statement that Māori had 'acknowledged and bowed to the authority of the Crown of England since 1835', and in 1840 'by virtue of the Treaty of Waitangi' had been 'declared to the whole world as British subjects'.[725] However, the word for 'acknowledged' (ata koropiko), does not necessarily indicate subservience or that Māori 'bowed to the authority of the Crown', and nor does the term 'whakaurua' (which can be translated as inclusion or aligning with). Furthermore, as discussed earlier, Te Raki Māori clearly acknowledged the Queen's protective authority, but they saw this as distinct from the colonial Government's executive authority. In our view, it is significant that the petitioners so explicitly linked he Whakaputanga and te Tiriti, and their statement can be understood as meaning that Māori had acknowledged and aligned with the Queen of England's mana and imperial power in 1835 (consistent with their requests for protection from foreign threat) and had affirmed that alliance in 1840.

The petitioners went on to explain that they had always sought to live in peace with settlers, and through those connections to acquire knowledge and prosperity. The petitioners viewed the establishment of the colonial Parliament in 1854 as a source of trouble between Māori and the Crown: Māori had not understood that decision, they said, and had feared its consequences.[726] Petitioners reminded the Government that many of them had fought alongside the Crown during the 1860s, and without that support the Crown would have lost its authority ('kua mutu te mana o te Karauna') and been forced from New Zealand. Yet, since the wars, the colonial Parliament had established the Native Land Court and enacted laws that had caused great trouble and suffering ('nga rarururu me nga mate') to Māori.[727]

The petitioners said that Māori sought only the right to manage their own lands, in order to advance their prosperity as settlers were able to do. Year after year, they had sought just laws, with no response: 'ko nga karanga me nga inoi a matou, kia whakaorangia matou e rite ana ki te reo tangata, e wawaro ana, ano he hau.' (This was translated as: 'our prayers only sound as from afar, and are treated as the murmuring of the wind.')[728]

The Kotahitanga leaders therefore asked the House:

724. 'Petition of the Federated Maori Assembly of New Zealand', AJHR, 1893, J-1, p 3.
725. 'Petition of the Federated Maori Assembly of New Zealand', AJHR, 1893, J-1, p 1; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1295.
726. 'Petition of the Federated Maori Assembly of New Zealand', AJHR, 1893, J-1, p 1.
727. 'Petition of the Federated Maori Assembly of New Zealand', AJHR, 1893, J-1, p 1.
728. 'Petition of the Federated Maori Assembly of New Zealand', AJHR, 1893, J-1, p 2.

(1) He whakahoki mai ki nga iwi Maori te mana whakahaere i o ratou whenua me o ratou rawa katoa, me te mana whakahaere i to ratou tikanga hei oranga mo te iwi Maori me te rangimarietanga me te pai mo enei motu katoa.
(2) Me tuku mai te mana kite Runanga e kiia ana Te Huinga Whakamana Kotahitanga Maori o Niu Tireni, hei Kawanatanga mo ratou ake ano.
(3) Kia rua nga Runanga, kia kotahi te Runanga Ariki, ko aua Ariki he mea whiri-whiri i nga tino Rangatira toto heke iho, he mea ata karanga ratou mo taua Runanga.
(4) Kia kotahi Runanga he tangata Maori he mea kowhiri mai ratou e nga iwi me nga hapu hei reo mo te iwi mo roto i taua Whare Runanga.
(5) Ma taua Runanga Kotahitanga e tuku he mana, ki nga Komiti Takiwa, o ia Takiwa, o ia Takiwa, ko aua Komiti he tangata Maori, ta ratou mahi he rapu i nga take whenua, me nga wehewehenga whenua me nga mea katoa e mahia ana e ratou i runga i te pono me te tika.

In the official record, these clauses were translated:

(1) That the right to manage our own property be given back to us, so that peace and happiness may reign throughout these islands.
(2) That the power to govern the Natives be delegated to the Federated Maori Assembly of New Zealand.
(3) That the said Assembly consist of an Upper and a Lower House. The Upper to consist of the chiefs by birth.
(4) And the Lower House shall consist of Natives who shall be elected by the different tribes to represent them in the Assembly.
(5) The said Federated Assembly to have power to appoint District Committees comprised of Maoris, who shall investigate titles to Native Lands, and subdivide the same, according to the rules of equity and good conscience.

The petitioners also enclosed Taiaroa's Bill, asking that it be enacted – an outcome that Taiaroa was confident of achieving on grounds that his Bills were similar to those put forward by Grey and Carroll in 1892.[729] The petition was sent to both Houses of the colonial Parliament, and to the Governor.[730] At a meeting in Wellington in August, three of the four Māori members of the House undertook to support the petition; the Southern Maori member Tame Parata declined on grounds that his constituents had not taken part in the Waipatu hui.[731]

The Legislative Council's Native Affairs Committee, which considered the petition in August, concluded that it was of a 'grave constitutional character' and referred it to the Government without a recommendation.[732] In September, the

729. 'Petition of the Federated Maori Assembly of New Zealand', AJHR, 1893, J-1, pp 1–2; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1295. Regarding Taiaroa and his supporters being confident of winning support, see *Paremata Maori: Waipatu 1893*, pp 22, 67–68.
730. Eparaima Kapa, 5 September 1893, NZPD, vol 81, p 637.
731. 'Parliamentary Notes', *New Zealand Herald*, 2 August 1893, p 5.
732. AJLC, 1893, no 6, p 1 (Loveridge, evidence (doc Z1(b)) pp 31–33).

Northern Maori member Eparaima Kapa told the House that Māori were still waiting for a definite response from the Government. He said Kotahitanga leaders were seeking a direct yes or no: would the Government implement the petition or not? Yet, Kapa said, the Government's only response so far had been that it would consider 'practical' suggestions. In Kapa's view this meant nothing.[733]

Kapa said that Te Raki and Kotahitanga leaders had tried on several occasions to introduce legislation providing for Māori self-government: Hirini Taiwhanga in the late 1880s, Kapa himself in 1891, and then through Grey and Carroll in 1892. In Kapa's view, the petition was yet another occasion on which Māori had asked the colonial Parliament to enact a law providing for Māori self-government, as Māori were entitled to under the treaty, and the colonial Government had taken no action.[734]

Carroll, in response, said the Government's view was clear: it would take no action on the petition. He repeated the Government's position that it would consider any 'practical' proposals that Māori might make, but it did not accept that the treaty provided any rights that Māori did not already enjoy: 'The Treaty of Waitangi, so far as it went, guaranteed to them their lands. The Maoris at the present time owned their lands. They got their titles from the Crown.' In return for that, Māori had granted the Crown power to govern. The only departure from the treaty, Carroll said, was the Crown waiving its pre-emptive right. Carroll said that Grey's Bill was 'incomprehensible', and Taiwhanga's Bills in the late 1880s did not deliver what Māori really wanted.[735]

Carroll now appeared less sympathetic to Kotahitanga objectives than he had been the previous year, when he had given an encouraging speech at the Waitangi hui and then drafted and introduced a Bill aiming to provide for local Māori control over land titling and administration. As an Executive Councillor speaking in Parliament, Carroll was obliged to express a Government view, and the Government now appeared less willing to entertain Māori aspirations for self-government. Ballance's death was likely a factor in this, as was the determination of the new Premier, Richard Seddon, to step up the Liberal Government's land purchasing activities.[736] The Kotahitanga Paremata's stance against the Court and land sales was therefore a direct threat to the Government's objectives.[737] Carroll's comments on the treaty also suggest he was following a Government line which – despite persistent protest from Māori over many decades about their understanding of the treaty – relied entirely on the English text.

These events once again highlighted the lack of safeguards for Māori interests and treaty rights within the country's constitution and political system. Kotahitanga leaders had brought proposals to the colonial Parliament in 1892 and had been told to wait so that consultation could take place. When that consultation

733. Eparaima Kapa, 5 September 1893, NZPD, vol 81, pp 637–638.
734. Eparaima Kapa, 5 September 1893, NZPD, vol 81, p 638.
735. James Carroll, 5 November 1893, NZPD, vol 81, p 638.
736. Brooking, *King of God's Own*, kindle edition, p 148.
737. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1304–1305.

did not occur, Kotahitanga leaders had returned to Parliament in 1893 with detailed proposals that were grounded in the treaty and had broad popular support among Māori, yet the Government simply declined to engage; and, with just four representatives in a 74-member Legislature, Māori could do little to compel that engagement. Rather, Māori were dependent on the sympathies of the settler majority, and in particular on the views of government leaders.

Certainly, there were practical matters that would have required negotiation. If the colonial Parliament was to engage seriously with the proposal to delegate law-making and governing powers to the Paremata Maori, there were significant questions to be worked through about the relationship between colonial and Māori authority in circumstances where Māori and settler interests overlapped.

But the Federated Maori Assembly Empowering Bill did not require full delegation of law-making powers: it sought only to empower Māori committees, overseen by the Paremata Maori, to take responsibility for land titling. This was not dissimilar in principle to what Ballance had promised Māori during the 1880s,[738] what the Native Land Laws Commission had recommended in 1891 (section 11.4.5), what Carroll and Rees had proposed in their Native Committees Act 1883 Amendment Bill (section 11.5.2.2), and what Ballance had promised to consult on during the 1892-to-1893 recess. The Government did not engage on this proposal, and nor did it engage on the underlying issues raised in the petition: the destructive effects of the Native Land Court and land alienation, and the rights of Māori to self-government.

11.5.2.7 *How did Te Raki leaders respond to the Government's rejection of the 1893 petition?*

At the Kotahitanga Paremata at Waipatu in April 1893, some Te Raki rangatira had advocated for Māori to withdraw from the House of Representatives. Pene Tāui of Ngāti Rangi had suggested that Kotahitanga leaders petition the colonial Parliament asking for the repeal of the Maori Representation Act, while other Te Raki rangatira suggested a temporary boycott.[739]

Their reasoning was that the Crown regarded four members as sufficient to protect Māori interests, and would never change its view so long as Māori continued to participate in the law-making process. Other rangatira argued that it was better for Māori members to remain, since the colonial Parliament would continue to legislate for Māori whether they were present or not. The Kotahitanga Paremata did not come to a final resolution, but did agree that any future Māori members of the House should represent Kotahitanga.[740]

Kotahitanga leaders renewed their criticisms of the colonial Parliament in August 1893 when the Native Land Purchase and Acquisition Bill was introduced. This Bill was aimed at opening up the remaining seven million acres of North Island Māori land and proposed an element of compulsion: specifically, under the

738. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pt 2, p 983.
739. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1297–1298.
740. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1297–1298.

Bill's provisions, the Government could select areas of land it wanted to open for settlement and require Māori landowners to sell or lease.[741]

Kotahitanga leaders expressed their opposition to the Bill in a petition to the colonial Parliament.[742] They also sent a deputation to meet the Governor, the Earl of Glasgow. Seddon, who had recently appointed himself Native Minister, also attended at the Governor's request. As was often the case, Te Raki rangatira were prominent in the meeting, where they argued that this and other Bills affecting Māori land were being rushed through Parliament without proper consultation.[743]

Eparaima Kapa (who represented Te Raki Māori in the colonial Parliament and Te Aupōuri in the Kotahitanga Paremata) said it was 'quite useless for native members to raise their voices in the House', because they were consistently outvoted. He and Western Maori member Hoani Taipua had therefore resolved to boycott the consideration of this and other Māori land Bills by the Native Affairs Committee 'lest their own countrymen should accuse them of assisting to pass the Bills they were powerless to improve'.[744]

At the same meeting, Kotahitanga leaders once again framed their concerns in constitutional terms. The former member of the House Wī Parata argued that Governor Hobson's 1839 instructions, as well as the treaty and the Constitution Act, had provided for Māori self-government. Yet the Crown's policies since the establishment of the colonial Parliament in 1854 had been 'a total departure' from those earlier policies.[745] Although Governor Glasgow said his powers were now 'nominal', he undertook to inform the Secretary of State in London and suggested that the colonial Government might also listen to the concerns of Kotahitanga leaders.[746] As discussed in chapter 7, the Governor did retain some residual power to reject Ministers' advice, but those powers could only be used in rare circumstances; the Colonial Office had updated its instructions to Glasgow in September 1892 to clarify this point.[747]

741. Native Land Purchase and Acquisition Bill 1893, No 90–1, Preamble, clauses 7, 8. Seddon had spoken in June about introducing some form of compulsory purchase, similar to the Government's plans for the vast South Island rural estates: Donald Loveridge, '"In Accordance with the Will of Parliament": The Crown, the Four Tribes and the Aotea Block, 1885–1899', report for the Crown Law Office, 2011 (Wai 898, doc A68), pp 163–164.

742. Reports of the Native Affairs Committee, AJHR, 1893, I-3, p 11; 'Today's Parliament', *Evening Post*, 9 August 1893, p 3.

743. 'Native Affairs', *New Zealand Herald*, 12 September 1893, p 5; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1297. Seddon attended at the Governor's invitation. Alfred Cadman had stepped down as Native Minister in June, and Seddon formally took over the portfolio in early September.

744. 'Native Affairs', *New Zealand Herald*, 12 September 1893, p 5; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1297.

745. 'Native Affairs', *New Zealand Herald*, 12 September 1893, p 5.

746. 'Native Affairs', *New Zealand Herald*, 12 September 1893, p 5.

747. Ripon to Glasgow, 26 September 1892, in AJHR, 1893, A-2, p 27. After Glasgow had rejected some of the Government's Legislative Council appointments, the Colonial Office instructed him to follow ministerial advice except where imperial interests were affected, or he was certain that the Ministers were advising a course that the Legislature and constituency would not accept (in which case he should dismiss the Ministers and attempt to form a new Government).

Kapa asked the Premier to visit the north and hear Māori views first-hand before making any decisions,[748] but the Government pressed ahead. The Native Affairs Committee did make some amendments to the Native Land Purchase and Acquisition Bill – by replacing compulsory sale or lease with compulsory negotiation. While this was a significant change, a simple majority of owners could opt to sell, irrespective of the wishes of remaining owners.[749] The Act was mainly aimed at other districts but nonetheless was significant given that it came so soon after Kotahitanga had raised concerns about land retention.[750]

In response to these developments, leading rangatira from the Bay of Islands, Hokianga, Whangaroa, and Kaitāia met in October 1893, resolving that they would not stand a candidate at the next election due to the unfairness of the colonial political system. They decided 'that the Treaty of Waitangi is now null, for it is clearly mentioned in that treaty that the natives were to have full control of their lands whereas at present the Government have [control]'. One rangatira said the Queen had 'two hands – the right for the Europeans and the left for Maori', symbolising that the colony's laws and political system discriminated unfairly against Māori.[751]

It is not clear what changed between that meeting and the election in December, but three Kotahitanga-aligned candidates stood for Northern Maori at the election. Notably, they were from neighbouring tribes. Heke of Ngāpuhi, then aged 26, won the electorate from Poata Uruamo (Ngāti Whātua) and the incumbent, Kapa of Te Aupōuri.[752] This was the first Northern Maori election in which women could vote. According to newspaper coverage, women attended candidate meetings throughout the Bay of Islands, Hokianga, and Kaipara, and whole families visited polling booths on election day. Of 59 votes cast at one Auckland booth, 25 were by women.[753]

Members of the Kotahitanga upper house were also elected to Eastern and Western Maori.[754] The Kotahitanga Paremata continued to debate the role of the

748. Brooking, *King of God's Own*, p 264.

749. Regarding the final Act, see Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pt 2, pp 1347–1348. Also see Waitangi Tribunal, *Wairarapa ki Tararua*, Wai 863, vol 2, p 474; Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 585; Brooking, '"Busting Up" the Greatest Estate of All', pp 85–86. Regarding the amendments, see Eparaima Kapa, 3 October 1893, NZPD, vol 82, p 941; 'Late Political', *Daily Telegraph*, 13 September 1893, p 3; Native Land Purchase and Acquisition Bill 1893, 90–1 and 90–3, section 7.

750. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898, pt 2, pp 1347–1348.

751. 'Dissatisfied Maoris', *New Zealand Herald*, 21 October 1887, p 6; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1296.

752. Freda Rankin Kawharu, 'Ngāpua, Hōne Heke', Dictionary of New Zealand Biography, first published in 1993. Te Ara – the Encyclopedia of New Zealand, https://teara.govt.nz/en/biographies/2n12/ngapua-hone-heke (accessed 18 January 2022).

753. 'Maori Elections: Northern District', *New Zealand Herald*, 21 December 1893, p 5; Untitled, *New Zealand Herald*, 14 December 1893, p 4.

754. Wī Pere was elected in Eastern Maori and retained his seat until 1905, when he was defeated by Apirana Ngata. Ropata Te Ao was elected in Western Maori and retained the seat until the next election, when he was defeated by the Kīngitanga candidate Henare Kaihau. Tame Parata, who held Southern Maori from 1885 to 1911, was not aligned with either movement though he was sympathetic to their causes. Carroll chose to stand aside from Eastern Maori and contest a general electorate.

Māori members of the House of Representatives. Although there was a further call in 1895 to boycott the House, the Paremata resolved to keep sending representatives until such time as its own authority was recognised.[755]

11.5.2.8 *What was the purpose of the Premier's visit to the north in 1894?*

The strength of opposition to the 1893 land laws convinced Seddon that he needed a better understanding of Māori perspectives before his Government could press ahead with its land settlement plans. For this reason, he and Carroll embarked on a tour of the North Island Māori communities during March and April.[756]

According to the official record, the Government aimed to 'push civilisation and settlement' into remaining territories where Māori retained significant lands – but it also sought to do so fairly, in a manner that would overcome Māori resistance and bring Māori and settlers closer together. To this end, the Premier visited Māori communities along the Whanganui River; in Te Rohe Pōtae, Waikato, and neighbouring Ngāti Tūwharetoa territories; and in parts of this district.[757] According to Seddon's biographer, Tom Brooking, the Premier left Wellington as a 'bullying colonialist' who regarded Māori as a dying race in possession of vast, unused estates, and returned with his views somewhat modified – though his Government nonetheless subsequently pushed ahead with a large-scale land purchasing programme.[758]

In this district, Seddon held meetings at Porotī, Waiōmio, Waimate, and Waimā. Rangatira at these hui questioned Seddon about local authority representation, taxes, land disputes about surplus lands and old land claims, the Native Land Court, the Native Land Purchase and Acquisition Act 1893 (see chapter 10, section 10.3.2), and the constitutional relationship between Māori and the colonial Government.[759] As he did in other districts, Seddon encouraged Te Raki Māori to make lands available for settlement. He told the Porotī hui that the growing settler population made it 'imperative' that Maori offer lands for sale or lease. He said that Māori might either deal with lands through tribal committees or individually, so long as the lands were opened up.[760] At Waimā, he said that pressure from settlers was building so quickly that Māori must give way, or else 'disaster will be bound to follow', and Māori would be responsible. The Government, he said, was 'following on the lines of the Treaty of Waitangi in a colonising spirit, when we say that the title to the land must be ascertained, and that the land must be utilised'.[761] Seddon's emphasis on the importance of using land would become a common Liberal refrain.

755. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1298–1299.
756. Brooking, *King of God's Own*, p 265.
757. 'Pakeha and Maori', AJHR, 1895, G-1, p 2.
758. Brooking, King of God's Own, p 265.
759. 'Pakeha and Maori', AJHR, 1895, G-1, pp 17–34; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1218.
760. 'The Premier in the North', *New Zealand Herald*, 16 March 1894, p 6.
761. 'Pakeha and Maori', AJHR, 1895, G-1, p 28.

At Waiōmio, Wiremu Pōmare, Maihi Parāone Kawiti, and other rangatira invited Seddon to attend the next Kotahitanga Paremata at Pākirikiri (East Coast), where they would lay out their grievances and proposed solutions. Seddon responded by referring to the Kotahitanga Paremata as 'absolutely powerless', on the basis that it could pass no laws and give no redress for Māori grievances:

> There can only be one Parliament, and we can recognise only the representatives elected to that Parliament. I may read what takes place at this native meeting in Gisborne, but what will weigh with me more will be the utterances of your members in Parliament in respect to questions affecting the Native race . . . If you rely upon your representatives in Gisborne to grant you redress you will be relying on a broken reed . . . they will do their best, but the responsibility for governing the country must rest with the Parliament.[762]

He also told the hui there was 'one Queen . . . one sovereignty, the sovereignty which your forefathers agreed to accept when the Treaty of Waitangi was signed', and 'one law, which is just as binding on the Maori as upon the pakeha'.[763] He did not shrink from taunting the Ngāpuhi leaders, saying they had fallen so far that other tribes now had to speak for them, and their refusal to raise specific grievances during the hui forced him to conclude that they must be 'a contented, well-satisfied and happy people'. Pōmare, in response, said it was well known that Te Raki Māori had grievances, but they would express them through Kotahitanga.[764]

At Waimā, after subjecting the Premier to detailed questioning about the Native Land Purchasing and Acquisition Act,[765] rangatira explained that the Kotahitanga Paremata would develop and submit new legislative proposals for adoption by the colonial Parliament.[766] According to the official record, Rē Te Tai said he had a 'prayer' to Seddon and Carroll, asking them to sanction any Bill to which the Kotahitanga Paremata unanimously agreed.[767]

Seddon encouraged Kotahitanga leaders to meet and then place their proposals before the colonial authorities, but warned that the Kotahitanga Paremata should not ask for law-making powers. He said that the colonial Parliament was '[as] open to the Native race as it is open to the pakeha', and in order to 'obtain justice', Māori needed only to agree among themselves and then make 'respectful' submissions through their own elected members.[768] He continued:

> This is what the pakehas do – they hold their meetings, they have their associations, they discuss each question affecting both races, they come to conclusions, and the members are the mouthpieces of the pakeha and those who have held those meetings.

762. 'Pakeha and Maori', AJHR, 1895, G-1, pp 19–20.
763. 'Pakeha and Maori', AJHR, 1895, G-1, pp 19–20.
764. 'Pakeha and Maori', AJHR, 1895, G-1, pp 19–21.
765. 'Pakeha and Maori', AJHR, 1895, G-1, pp 26–31.
766. 'Pakeha and Maori', AJHR, 1895, G-1, p 34.
767. 'Pakeha and Maori', AJHR, 1895, G-1, p 34.
768. 'Pakeha and Maori', AJHR, 1895, G-1, pp 20, 24–25.

> It is with that object in view that I am here in person. I want to remove the false impression that has gained ground here year by year that there was no redress for the Natives from the New Zealand Parliament. I want them to believe that the Parliament is their friend if they go the right way to work . . .[769]

Any Bill that was 'respectfully worded' would be introduced and given a first reading; any that improved on existing laws would receive due consideration and would be likely to pass; but any that did not benefit the colony or was 'unconstitutional' would be thrown out. By this, we understand Seddon to mean that he would not accept any proposal that undermined the authority of the Crown or the ability of the colonial Parliament to exercise authority over Māori. This was consistent with the Liberals' view of the treaty as a land guarantee, but not with the Te Raki Māori understanding of the treaty as an agreement that provided for Crown and Māori spheres of authority. In this regard, the Premier said:

> If in your Bill you ask to have a Parliament of your own – to ignore the present Parliament and to set aside the authority of the Queen – I tell you now at once it would not be allowed to be introduced. There can only be one Parliament and one authority in this country and that is the authority of Her Most Gracious Majesty Queen Victoria. Your forefathers ceded this, it was in your interests, and it is in the interest of us all to maintain that position.[770]

Having made this point, Seddon repeated that the colonial Parliament was open to Māori and was their only possible source of redress, though they must accept the will of the majority. If that Parliament did not accept what Kotahitanga leaders wanted, then 'as loyal subjects of the Queen and as colonists you must submit with good taste, and believe it was all done for the best'.[771]

While the Premier did not see the treaty as Te Raki Māori did, his experiences at the hui did leave some impression. Seddon now had first-hand experience of Māori communities and knowledge of the range of issues they faced. He was impressed by the rangatira he met and their detailed knowledge of the colony's land laws. The northern hui reinforced the strength of Ngāpuhi and Te Rarawa determination to work collectively with other tribes through the Kotahitanga Paremata, while also reassuring the Premier that they would seek approval from the colonial Parliament for any legislative proposals. Seddon's subsequent experiences, particularly in Te Urewera, further reinforced the determination of Māori leaders to retain their autonomy and rights of self-government. Although the Government would soon press ahead with its land purchasing plans, Seddon's experiences during this tour also began to open him to the possibility of Māori self-government, at least at a local level under the Government's authority.[772]

769. 'Pakeha and Maori', AJHR, 1895, G-1, p 34.
770. 'Pakeha and Maori', AJHR, 1895, G-1, p 34.
771. 'Pakeha and Maori', AJHR, 1895, G-1, p 34.
772. Brooking, *King of God's Own*, pp 271, 277.

11.5.2.9 *What was the Government's response to the Native Rights Bill 1894?*

On their way back to Wellington, Seddon and Carroll passed through Gisborne, where Kotahitanga leaders were preparing for the next Kotahitanga Paremata. While we are not aware of any formal meeting, the leaders did attend a banquet together. The *Poverty Bay Herald*, seemingly relying on an official briefing, repeated Seddon's warning that he and his Government would never grant legislative powers to the Kotahitanga Paremata. The newspaper did however report favourably on Kotahitanga proposals to amend the colony's land laws, and it suggested that the colonial Parliament might be willing to adopt those proposals.[773]

Kotahitanga leaders were not deterred by Seddon's warnings. Meeting at Pākirikiri on the East Coast, they strongly endorsed Hōne Heke Ngāpua's Native Rights Bill which sought to grant the Kotahitanga Paremata authority to make laws for Māori people.[774] Heke subsequently introduced his Bill to the colonial Parliament. In its preamble, the Bill said that many laws affecting Māori were 'inadequate and unjust', retarding development of the colony and causing great loss among Māori, and for that reason settlers and Māori alike would benefit if Māori were able to make their own laws. The Bill therefore contained two substantive clauses.[775] They read:

> **2.** A Constitution shall be granted to all the persons of the Maori race, and to all persons born of either father or mother of the Maori race who are or shall be resident in New Zealand, providing for the enactment of laws by a Parliament elected by such persons.
>
> **3.** Such laws shall relate to and exclusively deal with the personal rights and with the lands and all other property of the aboriginal native inhabitants of New Zealand.[776]

Whereas the House had not debated Hōri Kerei Taiaroa's 1893 Bill, it did allow an introductory debate for Heke's. Submitting his legislation, Heke said it had widespread support among Māori; more than 7,000 had signed petitions asking that it be adopted. He read the full texts (in English) of the 1835 Declaration of Independence and the Treaty, both of which, in his view, justified a right of Māori self-government. He also read an 1886 letter from King Tāwhiao to then Native Minister Ballance, seeking powers similar to those Heke now claimed for all Māori.[777]

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773. 'The Premier and the Maori Parliament', *Poverty Bay Herald*, 11 April 1894, p 2.

774. Native Rights Bill 1894, preamble; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1298–1299.

775. Native Rights Bill 1894, preamble; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1298–1299.

776. Ko te Pukapuka Nama 5 o te Perehitanga. Tuunga. Tuawha o te Paremata o te Kotahitanga o te Iwi Maori o Nui Tirene o te 7 o Maehe, 1895 (Auckland: Wiremu Makara, 1895), p 48 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1299).

777. Hōne Heke Ngāpua, 10 September 1894, NZPD, vol 85, pp 551–553.

Heke told the House that rangatira who had signed te Tiriti had made it clear that they had no wish to be 'harassed by any other Power, or have their own power trodden down by a foreign Power'. They had consented only after his uncle Hōne Heke signed, and only on the basis that no law would ever be passed that contravened the treaty.[778] According to the *New Zealand Parliamentary Debates*, Heke said,

> Section 2 of that Treaty gave the Natives full right to the soil of New Zealand, and . . . it was only natural for the Natives to suppose that they ought not to be harassed by any laws passed by the House in respect of their lands. In fact, the Natives, as far as he knew, were under the impression that their lands were not to be disturbed in any shape or form.[779]

Yet, Heke said, the colonial Parliament had persisted for many years in enacting laws that impinged on these rights. Māori leaders, he asserted, had consistently sought to have their treaty rights recognised and upheld, but to no avail. Although Britain had given assurances that the treaty remained in force, Heke continued, settlers and their political representatives in New Zealand took the view 'that the Treaty was nothing at all'.[780]

In his assessment, Parliament had either deliberately or negligently enacted law after law that brought disaster to Māori, and it was therefore only reasonable that Māori be granted sole rights to enact laws for themselves. Section 71 of the Constitution Act had recognised exactly that right when it provided for districts in which Māori would govern themselves according to their own laws and customs. Heke assured the House that the Bill had widespread support from Māori, and would, if enacted, resolve 'the Native question' – a term that settler politicians frequently used as shorthand for tensions between Māori and the colonial Government, and in particular tensions over land settlement. If the Bill was not enacted, Heke said, Māori would 'make their last effort to go to England' to appeal for justice.[781]

Seddon did not join the evening debate, and it seems that very few government representatives were present.[782] It was left to James Carroll to present the Government's view. Carroll rejected the Bill and all of Heke's arguments. He repeated the government line that the treaty did no more than make Māori into British subjects and guarantee them possession of land. At no time, he said, had Parliament legislated to remove those rights, except by removing the Crown's right of pre-emption, which had then necessitated the establishment of the Native Land Court. Echoing comments that Seddon had made during his visit to the north, Carroll said that the colonial Parliament had passed laws aimed at Māori advance-

778. Hōne Heke Ngāpua, 10 September 1894, NZPD, vol 85, pp 551–553.
779. Hōne Heke Ngāpua, 10 September 1894, NZPD, vol 85, p 553.
780. Hōne Heke Ngāpua, 10 September 1894, NZPD, vol 85, p 553.
781. Hōne Heke Ngāpua, 10 September 1894, NZPD, vol 85, p 553.
782. Hōne Heke Ngāpua, 10 September 1894, NZPD, vol 85, p 555.

ment and progress, but Māori 'took up a negative position, and did not appreciate anything done by the Legislature, or anything done by the Europeans, or by those who represented them in Parliament'.[783] Heke's proposals, he said, were 'vague, indefinite, and outside of practical politics'; it was best if Māori were freed from the 'delusion' that they might obtain a right to legislate for themselves.[784]

As we have noted elsewhere, the Liberals' view of the treaty differed markedly from that of Kotahitanga leaders, and that of Te Raki Māori leaders throughout the years since 1840. Te Raki leaders had made plain their understanding of the treaty at hui over many decades in letters, protests, petitions, and by other means, and Heke in his speech to Parliament had continued in this tradition, carefully explaining that rangatira who signed te Tiriti did so in order to protect their lands and authority from external threat, in the belief that their autonomy would not be threatened, and they would not be subject to foreign laws. Carroll's views reflected the political reality of 1890s New Zealand: a Pākehā-dominated Parliament would not accept any challenge to its own authority as the colony's Legislature, and nor would the Government of which Carroll was a part.

Among other members of the House, the opposition leader Robert Stout said that the treaty had been regularly violated, and while he supported some degree of local self-government for Māori over their lands, he did not believe it was possible to have two national law-making bodies or to establish autonomous Māori districts when the populations were increasingly intermingled.[785]

Other members likewise rejected Heke's proposals. Some believed that Māori should have greater community control over their lands, while others supported rapid assimilation of Māori into settler society, mainly through the continued individualisation of Māori land interests. The Clutha member Thomas McKenzie was a rare exception, offering to vote for the Bill because 'the Maoris could not possibly make a worse mess of their own affairs than had been made of them by the several European administrations of the colony'.[786]

After a fairly brief debate (nine members spoke), the House adjourned for supper. Only a handful of members returned, leaving the House without a quorum, ending the debate and killing the Bill.[787]

In our view, the introduction of the Native Rights Bill provided a significant opportunity for the colonial Government to engage with Kotahitanga leaders about their treaty rights, and in particular their rights to autonomy and self-government. Certainly, the Bill raised practical and constitutional questions that would have required further discussion. Although the proposed law-making authority was restricted to 'personal rights . . . lands and all other property', the Bill did not explain how that power might operate where the Māori and colonial spheres overlapped, as they inevitably would; for example, over rating of Māori lands, control

783. James Carroll, 10 September 1894, NZPD, vol 85, pp 554–555.
784. James Carroll, 10 September 1894, NZPD, vol 85, pp 554–555.
785. Stout to James Carroll, 10 September 1894, NZPD, vol 85, pp 554–555.
786. Thomas McKenzie, 10 September 1894, NZPD, vol 85, p 560.
787. 'Parliament', *New Zealand Herald*, 11 September 1894, p 6.

over public works, management of shellfish beds and fishing grounds, and resolution of intercommunity disputes. Resolving these issues would have been complex in this district and elsewhere, but with good faith on both sides, in our view the issues were not insurmountable.

Seddon, in his northern meetings, had asked that Kotahitanga leaders be respectful of the Crown's authority and that of the colonial Parliament, and he had warned that the Government would not support any measure in which the Kotahitanga Paremata sought 'a Parliament of your own' in which they would 'ignore the present Parliament and . . . set aside the authority of the Queen'.[788] We consider that the Native Rights Bill was sensitive to these terms. It did not directly challenge the authority of the Queen or the colonial Parliament, and was therefore respectful of the kāwanatanga sphere. In fact, it sought from the colonial Parliament a delegated authority under which the Crown would recognise the Paremata's right to legislate on Māori affairs. The Bill was certainly consistent with article 2 of the treaty, which provided for Māori autonomy and self-government under institutions of their choosing.

The Bill also reflected the wishes of Māori from this district, as Seddon later acknowledged when he told the House in October that northern Māori were 'home rulers' who wanted 'to establish Native rights, to have a Parliament of their own, to govern themselves'.[789] This was a reference to the Irish Home Rule movement, which sought self-government and a national parliament for Ireland during this period. In the *He Maunga Rongo* report, the Tribunal described the movement as 'a very significant model of political and national pluralism'. The Irish Home Rule Movement was widely discussed, and many New Zealand politicians were sympathetic to it aspirations. The Tribunal noted that in the New Zealand context, Home Rule 'applied to a distinct people living under their own customs and laws, rather than a separate geographical territory or "state" such as Ireland'.[790] Through proposals such as Heke's Native Rights Bill, the language of Home Rule that was 'so acceptable to [the] New Zealand government in the 1890s, was adopted by Maori and thrown back in the faces of settler politicians'.[791] Yet the colonial Government did not seriously engage in discussion about the Native Rights Bill or the underlying Kotahitanga ambitions. On the contrary, Seddon insisted that Māori recognise the authority of the colonial Parliament over them, even though that was not and never had been part of the treaty agreement.

Although Heke's Bill sought a broad law-making authority for the Kotahitanga Paremata, he and other Kotahitanga leaders were mainly concerned with Māori community authority over Māori lands. To this end, at its April meeting the Kotahitanga Paremata had approved another Bill, drafted by Wī Pere, the Eastern Maori member of the House and a member of Te Whare Ariki. Pere's Native Lands Administration Bill 1894 was considerably more modest than Heke's. It

788. 'Pakeha and Maori', AJHR, 1895, G-1, p 34.
789. Richard Seddon, NZPD, 1894, vol 86, p 371;
790. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, pp 205, 373.
791. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, pp, 372–374.

proposed to enable district native committees, already empowered by the Native Committees Act 1883, to determine relative interests in Māori land. Then, elected block committees would farm, lease, or sell the lands in accordance with owners' wishes.[792]

The most novel feature of Pere's Bill was that it specifically addressed the constitutional relationship between colonial and Kotahitanga spheres of authority. It provided that the colonial Parliament could enact future amendments to the Bill only with the support of Kotahitanga.[793] In this way, the colonial Parliament would have retained constitutional supremacy while delegating to Māori the practical authority over Māori lands. Pere introduced his Bill to the colonial Parliament in July 1894, but it was never debated.[794] This, too, was a point at which the Crown rejected an opportunity to engage in dialogue with Kotahitanga leaders over Māori self-government and the protection of Māori lands. By October, according to the Western Maori member Ropata Te Ao, more than 10,000 Māori had petitioned Parliament seeking the enactment of the two Kotahitanga Bills.[795] Te Ao urged the Government to adopt the Kotahitanga Bills in preference to its own, but it chose not to. In short, as the historian Dr Grant Phillipson has written, 'the government was not yet ready to consider an accommodation with Kotahitanga'.[796]

While the colonial Parliament did not seriously engage with the two Kotahitanga Bills, in October 1894 it did enact the Native Land Court Act. Among other things, that Act restored Crown pre-emption over Māori lands throughout New Zealand, providing support for the Government's land purchasing ambitions (see chapter 10, section 10.3). Seddon vowed at this time to 'break the annual record for Maori land purchase'.[797] More than 6,000 Māori signed a petition opposing this measure, which Heke described as 'nothing other than legalised robbery' because it removed private competition from the land market and therefore would allow the Crown to acquire Māori lands at below-market price. He argued in Parliament that the Crown could not restore pre-emption without Māori consent, and urged

792. Native Lands Administration Bill 1894, ps III, IV, V. In many respects, this Bill resembled Ballance's Native Lands Administration Act 1886, as well as more recent proposals such as Carroll's Native Committees Act 1883 Amendment Bill 1892. Ballance's Native Lands Administration Act 1886 had in turn borrowed some concepts from Pere's Native Lands Act Amendment Bill 1884, though Ballance's did not go as far towards giving effect to Māori rights. For a commentary on the Bill and its proposed impact on the Native Land Court, see Grant Phillipson, 'An Appeal from Fenton to Fenton: The Right of Appeal and the Origins of the Native Appellate Court', NZJH, 2011, vol 45, no 2, p 181. Also see Waitangi Tribunal, *Te Mana Whatu Ahuru*, pt 2, pp 956, 971, 983–984, 991.

793. Native Lands Administration Bill 1894, clause 45.

794. 'First Readings', NZPD, 1894, vol 84, p 192; Wī Pere, NZPD, 1894, vol 86, pp 375–376; Ropata Te Ao, NZPD, 1894, vol 86, pp 384, 478. Also see Grant Phillipson, '"An Apppeal from Fenton to Fenton": The Right of Appeal and the Origins of the Native Appellate Act', NZJH, 2011, vol 45, no 2, p 181.

795. Ropata Te Ao, NZPD, 1894, vol 86, p 478.

796. Phillipson, 'An Appeal from Fenton to Fenton', p 181.

797. Seddon to McKenzie, 29 October 1894, as quoted in Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 559.

it to instead reconsider Pere's Bill.[798] Carroll, having opposed pre-emption as a member of the 1891 Native Land Laws Commission, now argued in favour, presenting it as an alternative to individual free trade.[799]

The Native Land Court Act also provided for Māori landowners to form incorporations in order to sell or manage their lands. This might, at least in principle, have been consistent with the Kotahitanga objective that Māori should have collective authority to manage their territories. However, the measure did not fully empower owners to do so and seems rather to have been aimed at streamlining the alienation of Māori lands. Indeed, by this time many settler newspapers viewed purchases from incorporations as more efficient than purchase from individual owners.[800]

During the period from 1 April 1894 to 31 March 1898, the Government acquired nearly 2.3 million acres of North Island Māori land – about one-third of what had remained in Māori possession.[801] In this district, a boycott of the Native Land Court and organised resistance to land sales (discussed in chapters 7, 9 and 10) meant that the impact was significantly less. The historian Dr Barry Rigby recorded Crown purchases in this district totalling 38,083 acres during the period 1 April 1894 to 31 March 1898, amounting to about 1.8 per cent of the inquiry district. More than half of that was in the Mangakāhia taiwhenua, where a few large purchases accounted for the bulk of the land sold.[802]

After Tāwhiao died in August 1894, Kotahitanga made overtures to his successor King Mahuta. Raniera Wharerau and Pene Tāui were among a delegation of Kotahitanga leaders who visited the Kīngitanga Parliament, Te Kauhanganui, in May 1895, seeking Mahuta's signature on the Kotahitanga Pledge and his commitment to work together in common cause. The Kotahitanga leaders were careful to convey that the pledge did not affect the King's mana: he stood as King in the tradition of Te Wherowhero and Tāwhiao. The Kotahitanga leaders said that Mahuta's signature was being sought in order to unite all Māori so they could reclaim their 'mana motuhake' (which we translate as their independent authority). Mahuta's view was that, in the spirit of unity, Kotahitanga could as easily align behind him – and so the two movements continued to pursue their goals separately.[803]

798. Hōne Heke Ngāpua, 21 September 1894, NZPD, vol 86, p 231; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1146.

799. James Carroll, NZPD, 1896, vol 86, pp 230–231; Hōne Heke Ngāpua, NZPD, 1896, vol 86, pp 232–232, 353.

800. Waitangi Tribunal, *Te Mana Whatu Ahuru*, pt 2, pp 1230–1231. For an example of settler newspaper views on incorporation, see 'Native Land Legislation', *Poverty Bay Herald*, 6 June 1894, p 2.

801. Boast, *Buying the Land*, kindle edition, location 6130 . The data relate to the financial years ending 31 March 1895. Also see Brooking, '"Busting Up" the Greatest Estate of All', pp 78–81.

The Government estimated that about seven million acres of North Island land remained in Māori possession in 1893: Native Land Purchase and Acquisition Act 1893, Preamble.

802. Dr Barry Rigby, 'Validation review: Crown purchases 1866–1900' (doc A56).

803. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1310–1311; Ranginui Walker, *Ka Whawhai Tonu Matou: Struggle Without End* (Auckland: Penguin Books, 2004); 'Te Pipoata a te Kotahitanga', *Paki o Matariki*, 22 August 1895, p 2.

11.5.2.10 *What were the Government's responses to Heke's Native Rights Bill in 1895 and 1896?*

The Paremata met at Ōhinemutu in 1895 and agreed to send Heke's Native Rights Bill back to the colonial Parliament for further consideration. Kotahitanga leaders were aware that Parliament was unlikely to pass the Bill: Wī Pere said the Bill would not be enacted until all Māori land was alienated, by which time there would be no territory left for it to apply to. Nonetheless, Kotahitanga leaders sought to test the Government's resolve. Heke spoke with newspapers in an attempt to win settler support.[804] The Native Rights Bill was reintroduced in October 1895 but was never debated.[805]

In June 1896, Heke tried a third time. Reintroducing the Native Rights Bill, he told the House that every Act of Parliament affecting Māori lands was harmful to Māori and, by its nature, was in violation of the treaty.[806] The Bill expressed the views of the Kotahitanga parliament, which represented the vast majority of Māori in both islands.[807] By this time, more than 6,000 Māori had petitioned the House in support of the Bill.[808]

Māori electorate members spoke in favour, but other members were opposed.[809] As had been the case in the preceding two years, the principal argument against the Bill was that it was impracticable, on grounds that the country could not have two parliaments.[810] Seddon asked Heke to withdraw the Bill without debate, since it would inevitably be defeated and that would inflame Māori opposition to the Crown. The Premier said that a Māori parliament could not possibly serve Māori interests, and argued that the colonial Government 'must take up a firm attitude' that 'the mana of the Queen must reign supreme from one end of the colony to the other'.[811]

While Seddon rejected Heke's proposal, he hinted that some form of local self-government might be possible, if only to provide 'something for the Natives to do', as he put it.[812] Seddon evidently meant an arrangement similar to the Urewera District Native Reserve Bill, which was then before Parliament.[813] As finally enacted in October 1896, this Act established a 'Native reserve' of some 656,000 acres, a commission with a majority of Tūhoe members to determine land titles within it, committees to manage hapū lands, and a general committee to provide local self-government for the Urewera district. Although the Act did not specify the general committee's powers, this being left to the Governor in Council, Seddon explained

804. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1302–1303.
805. 'Bills Discharged', 2 October 1895, NZPD, 1895, vol 91, p 15.
806. Hōne Heke Ngāpua, 24 June 1896, NZPD, 1896, vol 92, pp 304–305.
807. Hōne Heke Ngāpua, 24 June 1896, NZPD, 1896, vol 92, p 319.
808. Rōpata Te Ao, 24 June 1896, NZPD, 1896, vol 92, p 306.
809. 'Native Rights Bill', 24 June 1896, NZPD, 1896, vol 92, pp 304–321.
810. Loveridge, evidence (doc Z1(b)) pp 64–67.
811. Richard Seddon, 24 June 1896, NZPD, 1896, vol 92, pp 312, 320.
812. Richard Seddon, 24 June 1896, NZPD, 1896, vol 92, pp 311–312.
813. See Richard Seddon, 24 June 1896, NZPD, 1896, vol 92, p 312; Waitangi Tribunal, *Te Urewera*, Wai 894, vol 2, pp 990–993.

that the Act was intended to leave Tūhoe 'to manage their own affairs'. By 'seeing they are not interfered with and no European allowed in their midst, they can govern themselves in accordance with their own traditions'.[814]

The Act had its origins in Seddon's visit to Te Urewera in 1894, when Tūhoe leaders asked the Premier to exclude the Native Land Court from their core territories and instead to recognise the mana of their organising committee, Te Whitu Tekau. Seddon promised to negotiate over these matters, but before any negotiations had taken place, the Government initiated trig and road surveys through Tūhoe lands, provoking Tūhoe leaders to defend their authority by disrupting the surveys.[815] In April and again in May 1895, the Government sent police and troops into the district to prevent any further disruption.[816] Tensions escalated, and war was only narrowly averted after Carroll is believed to have promised to set aside Te Urewera as a reserve under Māori authority, and to have acknowledged that the time had come for the long-delayed Te Urewera delegation to go to Wellington.[817] For the Government, this conflict highlighted the risks arising from its Māori land policies and opened Ministers up to the possibility of a compromise arrangement in which Māori would exercise local self-government under Crown authority.

During 1895, Seddon and Carroll negotiated with Urewera leaders, reaching agreement that the district would be established as an inalienable reserve governed by Māori through a district committee.[818] Seddon had entered these negotiations viewing Te Urewera as a special case: a district that had almost no settlement, was essentially self-governing, and above all, it seemed to him not to be a region where there would be Pākehā settlement. Acknowledging the reality of local self-government, in his view, was a means towards obtaining recognition of the Crown's overarching authority.[819] Furthermore, in Seddon's judgement, the Act would not impede settlement, as it applied to lands that settlers would not want.[820] Tūhoe leaders, like those of Kotahitanga, reasoned that recognition of the Crown's authority was a necessary step towards protecting and securing their rights of self-government. In following this strategy, Tūhoe leaders followed advice they had received from Te Kooti: 'It takes the law to put the law right.'[821]

814. Seddon, 25 September 1896, NZPD, vol 96, pp 166–167; Waitangi Tribunal, *Te Urewera*, Wai 894, vol 2, pp 975–976.

815. Te Urewera Māori became concerned over these surveys as a result of the confused messages they had received from Crown officials that had led them to believe that the land was being surveyed for a Native Land Court hearing. For a further discussion of the timing and basis for these surveys, see Waitangi Tribunal, *Te Urewera*, Wai 894, vol 2, pp 890–924.

816. Waitangi Tribunal, *Te Urewera*, Wai 894, vol 2, pp 922–924.

817. Waitangi Tribunal, *Te Urewera*, Wai 894, vol 2, pp 880–881. Also see Judith Binney, 'Te Mana Tuatoru: The Rohe Potae of Tuhoe', NZJH, vol 31, no 1 (April 1997), pp 117–131.

818. Waitangi Tribunal, *Te Urewera*, Wai 894, vol 2, pp 990–993.

819. Waitangi Tribunal, *Te Urewera*, Wai 894, vol 2, pp 990–993, 1002.

820. Seddon, 25 September 1896, NZPD, vol 96, pp 166–167; Waitangi Tribunal, *Te Urewera*, Wai 894, vol 2, pp 891, 975–976. Carroll also emphasised this point, telling the House that the land was fit for no one other than Tūhoe, not suitable for settlement, and 'it is their ardent wish that this land should be preserved to them'.

821. Waitangi Tribunal, *Te Urewera*, Wai 894, vol 2, pp 929.

The content of Seddon's speech on Heke's Native Rights Bill 1896 – his concern about inflaming Māori views, his willingness to consider local self-government outside of Te Urewera, and his attempt to calm settler members by making light of the powers that would be granted to Māori – all suggest that Kotahitanga pressure was beginning to influence the Government's views.

Heke declined to withdraw the Native Rights Bill, on the grounds that it had been framed by the Kotahitanga assembly, which sought an answer. The Bill was defeated by a margin of 31 to seven.[822] The Crown's failure to seriously engage with the Native Rights Bill, or at least its objectives, was a deliberate rejection of the opportunity to provide for an effective Māori voice in the making of the colony's laws. The Kotahitanga assembly had already been operating for several years and had shown itself capable of developing legislative proposals. What remained to be worked out was the relationship between Māori and colonial assemblies, including questions about their respective jurisdictions and how any differences would be resolved. In our view, these were matters that were entirely possible to resolve. However, the Crown did not attempt to negotiate. Instead, it rejected the proposal for recognition of the Kotahitanga Paremata out of hand, maintaining barriers to the exercise of tino rangatiratanga.

11.5.2.11 *Why did Kotahitanga and the colonial Government negotiate for the establishment of Maori Councils and Land Councils during the period 1896–1900, and what were the results?*

From the mid-1890s, there were noticeable changes in Kotahitanga priorities and in the Government's attitude to Māori self-government. The colonial Parliament enacted legislation in 1896 providing for a form of local self-government in Te Urewera, and from 1897 until the end of the century, the Government negotiated with Kotahitanga and other Māori leaders over legislation for the rest of the country.

Several factors combined to influence the Government towards this change of course and to make it politically acceptable to the Government's settler constituency. By 1895, the scale of Māori support for Kotahitanga and Kīngitanga,[823] the success of the Native Land Court boycott, and escalation in the Urewera survey dispute all created pressure for the Government to accommodate Māori views. From 1896, some leaders within Kotahitanga led a move to moderate their objectives, with a focus on land retention and local self-government within the colonial system. This shift made a political accommodation more palatable for the Government and its settler constituents.

At the same time, Māori influence on Government policy was increasing. The closeness of the 1896 election left Māori members of the House with more leverage than they had previously experienced.[824] In 1898, Carroll was appointed Native

822. 'Native Rights Bill', 24 June 1896, NZPD, 1896, vol 92, p 321.

823. More than 35,000 Māori had signed the Kotahitanga pledge by May 1895, according to the *New Zealand Herald*: Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1305.

824. Loveridge, evidence (doc Z1(b)) pp 138, 152.

Minister, and he influenced the Government towards a 'taihoa' policy aimed at supporting Māori to retain and develop their remaining lands. Over the following years, the Young Maori Party, a group of young professional men who worked for social and economic reforms, alongside a commitment to the continuation of Māori language and culture, would increasingly influence both government and Kotahitanga policies.[825]

By the late 1890s, the Government had largely achieved its land purchasing objectives.[826] Increasingly concerned about landless Māori, the Government temporarily halted its purchasing of Māori lands in 1899. In 1900, the colonial Parliament enacted the Maori Councils Act, which provided for local self-government over health and social matters; and the Maori Lands Administration Act, which handed control over land titling and alienation to district Maori Land Councils.

These institutions were not what Kotahitanga or the Kīngitanga sought in terms of Māori self-government, nor what they believed they were entitled to under the treaty. Nonetheless, the two Acts marked a concession that allowed Māori some degree of control over their lands and affairs – and they reflected a compromise between Māori aspirations and what was acceptable to the colonial Government. We turn next to consider how this compromise came about.

11.5.2.11.1 How did negotiations between the Government and Kotahitanga leaders develop between 1896 and 1897?

While the Government was not willing to recognise the Kotahitanga Paremata, its experience in Te Urewera had made it open to exploring options for a form of local self-government elsewhere. Through their many protests and acts of resistance, Māori leaders had persuaded the Government that their concerns needed to be taken seriously; failing to do so, Ministers understood, could undermine the Government's land purchasing objectives and create risks of conflict. Seddon and other colonial leaders reasoned that it was better to recognise local Māori authorities within the colony's system of government than have a powerful, autonomous Māori parliament operating outside colonial law. As in Te Urewera, they offered concessions partly to provide for Māori self-government and partly to contain it.[827]

In August 1896, while the Urewera legislation was before the House, the Government convened a conference of Māori leaders in Wellington. Some 200 attended from all parts of the country. The conference passed a resolution

825. Though never a formal political organisation, the Young Maori Party, as they were often known, was a group of ex-pupils of Te Aute College who formed the Te Aute Students Association in 1897. Officially, they called themselves Te Kotahitanga o Te Aute, or Te Kotahitanga Hou. Their leaders included Āpirana Ngata, Te Rangi Hiroa, and Maui Pomare: Judith Binney, Vincent O'Malley, and Alan Ward 'Te Ao Hou: The New World, 1820–1920', *Tangata Whenua: An Illustrated History*, pt 2 (Bridget Williams Books: Auckland, 2018), pp 147–148.

826. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1309, 1317.

827. Williams, *Politics of the New Zealand Maori, politics and cooperation, 1891–1909* (Oxford: Oxford University Press, 1969), p 91; Waitangi Tribunal, *Wairarapa ki Tararua*, Wai 863, vol 2, pp 525, 528.

asking that block committees be empowered to manage Māori lands, and Seddon expressed support, saying that the time had arrived when Māori should govern themselves 'under certain circumstances', including the management of land. Past Governments had made mistakes, he said, by not granting Māori the responsibility that was warranted.[828]

This was a significant step, and heralded the beginning of a series of negotiations between the Government and Māori leaders which would continue until legislation was passed in 1900. As we will see, these negotiations would escalate tensions within Kotahitanga and ultimately divide the movement. Whereas some Kotahitanga leaders remained resolute in their determination to achieve full autonomy from the colonial Government, others were more willing to compromise in order to secure an agreement and protect their remaining lands.[829] During this period, Te Raki leaders and delegates, including Heke, continued to advocate for the recognition of a Māori parliament.[830]

These divisions were evident among the Māori members of the House, who gave the Urewera District Native Reserve Act a mixed reception. The Eastern Maori member Wī Pere described it as 'the first time on record in New Zealand' that the colonial Parliament had adopted a Bill under which 'the Maori owners of the soil are allowed to manage their own affairs'.[831] In Heke's view however, the Act did not provide sufficient protection for article 2 treaty rights. While he agreed with Seddon that Tūhoe had a right to govern themselves, the Act was 'a sham' and 'simply a shadow' which did not guarantee any right of self-government, but left it to the Governor in Council to make final decisions about the extent to which Te Urewera would be self-governing. Seddon had promised Tūhoe 'the full rights conferred upon them by the Treaty of Waitangi', but the Act did not confer those rights. Rather, Heke said it was intended to 'entrap' Tūhoe, to bring them 'a certain distance' towards acceptance of Crown authority before imposing on them the colony's laws, taxes, and rates.[832] In *Te Urewera* (2015), the Tribunal found that this legislation was consistent with the treaty and provided a basis for Māori self-government under Crown protection, though the Crown later 'totally failed' to honour its promises or protect Tūhoe mana motuhake.[833]

The tensions within Kotahitanga were again evident by 1897, a year that also marked 60 years since Queen Victoria's coronation. The historian Dr Donald Loveridge described the first session of the colonial Parliament as 'unusual', in that it was largely concerned with New Zealand representation at the Queen's Jubilee celebrations in London later in the year.[834] For Māori, who continued to view the

828. 'Native Meeting', 29 August 1896, in Native Meetings at Wellington 1896 (Christchurch: Kiwi Publishers, 2003), p 16; Loveridge, evidence (doc z1(b)) p 79.

829. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1306–1313. Also see Waitangi Tribunal, *Wairarapa ki Tararua*, Wai 863, vol 2, pp 526–529.

830. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1310–1311.

831. Wī Pere, 25 September 1896, NZPD, 1896, vol 96, p 192.

832. Hōne Heke, 25 September 1896, NZPD, 1896, vol 96, p 188.

833. Waitangi Tribunal, *Te Urewera*, Wai 894, vol 2, p 1002 and vol 4, p 1658.

834. Loveridge, evidence (doc z1(b)), p 82.

treaty in personal terms, this was a significant milestone. During the debate on 'Congratulations &c on the Queen's 60th Year of Reign', Heke and other Māori members offered their own congratulations to Queen Victoria on the significant occasion. Speaking in English, Heke expressed 'every feeling of loyalty' towards the Queen, and explicitly recognised that 'by the articles of the Treaty of Waitangi we have recognised her sovereignty'. The treaty, 'the contract made between Her Majesty's representative and the Native chiefs . . . in 1840', lay at the heart of his kōrero. He drew a clear distinction between the Queen and her Governments – and indeed, between the Queen and the Crown. Referring to the Northern War, he said that his grand-uncle Hōne Heke Pōkai fought for reasons that 'were those of a patriotic man who felt a wrong had been committed against his people'. The feeling of 'disloyalty' amongst the Natives who opposed Her Majesty's troops in the early days was on account of the departure from the contract made in the treaty. Those Māori who took up arms recognised that 'some of the articles of the treaty had been broken by the rulers in New Zealand, representing the British Crown', and they had the right to protest. Europeans, however, had not understoood this. The Māori view was that the treaty was sacred and must be honoured, but '[i]t was broken, and that was the cause of the wars'.[835]

The speech is significant for its stated recognition of the Queen's sovereignty: the first time, as far as we are aware, that a Ngāpuhi leader had used the English term 'sovereignty', as opposed to 'mana'. But he referred more often to the feelings of 'loyalty' of himself and his people to the Queen; that is, to the kind of relationship they felt they had with the monarch.

In April 1897, the Paremata met at Pāpāwai in Wairarapa. Responding to the Government's rejection of the Native Rights Bill, Kotahitanga leaders considered a proposal to send Heke to London early the following year, in a last attempt to persuade British authorities to intervene.[836] They also approved an address for the Queen, drafted by Heke, to be sent to London for the Jubilee celebrations in June 1897.[837] However, it appears the message was altered before it was sent, possibly by Wī Pere.[838] The final message, after acknowledging the Queen's 'mana' and protection, asked her to approve a law prohibiting sale of Māori lands. They requested that 'the land remaining to your Maori people could be reserved to them forever as a perennial source of life'. Having lost so much land, the message said, Māori now wanted to cultivate what they had, or lease any excess to settlers.[839]

835. Hone Heke, NZPD, 8 April 1897, vol 97, pp 55–56.

836. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1305–1307.

837. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1305–1307.

838. In a despatch to the Governor, the Secretary of State declared that he had received 'for presentation to the Queen, an address from Mr Wi Pere, member of the House of Representatives, and other representative Māori': Chamberlain to Earl of Ranfurly, 9 July 1897, AJHR, 1898, A2, p 10; Loveridge commented that only one version of the message had ever been uncovered, and that 'on the limited evidence available it would appear that the changes were made by [Wi] Pere': Loveridge, evidence (doc Z1(b), p 84; Brooking suggests that the message was drafted by Pere, Hāmuera Mahupuku, and Hoani Tūnuiārangi, with Carroll's knowledge: Brooking, *King of God's Own*, p 217.

839. Brooking, *King of God's Own*, pp 217–218–297; Loveridge, evidence (doc Z1(b), pp 83–84; Armstrong and Subasic, 'Northern Land and Politic' (doc A12), p 1307.

One of the Wairarapa leaders, Hoani Paraone Tūnūirangi, was part of the official delegation to the Jubilee celebrations in June. He met with the Secretary of State to discuss the petition. While the British government followed its usual course by declining to intervene, Tūnūirangi's actions achieved their objective, which was to increase pressure on the New Zealand Government to cease land purchasing. Loveridge observed that the request for Māori lands to be reserved from sale was well received in the New Zealand press.[840] The message also created division within Kotahitanga. On one hand, many leaders, including Heke, saw it as inappropriate for such a significant ceremonial occasion; on the other, the message had pre-empted the proposed delegation to London in 1898 and had publicly committed Kotahitanga leaders to a policy based on land law reform, when many in the movement also sought constitutional change.[841]

Seddon arrived back in New Zealand in September 1897.[842] That October, Kotahitanga leaders met again at Pāpāwai, before sending a delegation to Wellington to meet Seddon and Carroll. There, Seddon promised to address Māori concerns about land. He urged Māori not to sell their lands and explained that the Government did not wish to buy if it would leave Māori landless; rather, it intended to legislate to ensure that Māori retained sufficient lands for their needs. In this, Seddon was influenced by the Government's experiences in the South Island where it had recently set aside 65,000 acres for landless Māori. The Premier also said that the work of the Native Land Court would soon be completed (some reports said the Government would abolish it, and others that the Court had little left to do as most Māori land titles had already been determined). Responding to Tūnūirangi's actions, Seddon reiterated that the imperial government could not intervene, and he urged Māori to work with colonial authorities, saying that no redress could come from anywhere else.[843]

From about this time, the Kotahitanga movement was increasingly influenced by 'moderate' leaders whose priorities were more acceptable to the Government. But some Kotahitanga leaders continued to hope for constitutional reform, as did Kīngitanga leaders. Under King Mahuta, the Kīngitanga began to pursue this agenda by working through the colonial authorities, in a similar manner to Kotahitanga. Mahuta's advisor, Henare Kaihau, stood for the Western Maori electorate in 1896, defeating several Kotahitanga-aligned rangatira. In November 1897, Kaihau introduced a Bill aimed at establishing a system of Māori self-government: the Maori Council Constitution Bill, which provided for the establishment of a national Maori Council with full authority over Māori lands and fisheries, and

840. Loveridge, evidence (doc z1(b), pp 84–85; see 'The New Zealand Herald and Daily Southern Cross', *New Zealand Herald*, 3 May 1897, p 4.

841. Brooking, *King of God's Own*, pp 217218; Loveridge, evidence (doc z1(b)) pp 83–84; Armstrong and Subasic, 'Northern Land and Politics' (doc a12), p 1307; Waitangi Tribunal, *Wairarapa ki Tararua*, Wai 863, vol 2, p 521. Also see 'Our London Letter', *Evening Star*, 6 September 1897, p 3; 'Wellington Notes', *Press*, 11 May 1897, p 5;

'The Maori Address to the Queen', *New Zealand Herald*, 11 May 1897, p 5.

842. 'Return of the Premier: Welcome in Wellington', *Otago Daily Times*, 9 September 1897, p 3.

843. 'The Maori Parliament: Deputation to the Premier', *Evening Post*, 26 October 1897, p 2.

power to levy taxes, create laws, and appoint magistrates.[844] The Bill acknowledged the Queen's mana while bypassing her colonial authorities. This was the same distinction as Heke had drawn in his speech for the Queen's Jubilee.[845]

In November 1897, Seddon held a series of meetings with Kotahitanga and Kīngitanga leaders. He rejected Kaihau's proposal for a national Maori Council. In a letter to the Chair of Te Kotahitanga, he warned that they should 'not be led away into thinking that Parliament will give up control of the Maori people and the Maori lands'. The colonial Parliament must retain mana over all New Zealand lands and would never agree 'that any persons in the Colony [should] be wholly independent of it'.[846] But he said the Government might accept other elements of the Bill, and expressed willingness to consider it again during 1898 session if Kaihau arranged for copies to be circulated around the country.[847]

Seddon also outlined his own tentative plan for Māori land administration, which would go on to form the basis of the Maori Lands Administration Act 1900. Under his plan, district land boards would be established with responsibility for land titling and administration. Among other things, the boards would set aside reserves for Māori landowners and lease any remaining lands to settlers. The Land Court would be abolished, and sales of Māori land would cease. The proposal bore significant resemblance to the many proposals Māori members of the House had brought forward since the early 1880s, except that the land boards would have government and Māori members, because Seddon reasoned that some government involvement was needed to protect Māori interests. The Premier agreed to meet Māori leaders in 1898 to flesh out his proposal, and he urged Kīngitanga and Kotahitanga leaders to reach an agreed position.[848] He insisted that Māori movements come to a joint position since, in his view, 'One party wants one way and one party wants some other.'[849]

In fact, the goals of Kīngitanga and Kotahitanga leaders had much common ground, not least regarding the principles of Māori self-government and protection of land. The differences between Māori and the Government were far greater. Nonetheless, Kotahitanga and Kīngitanga leadership took his comments seriously. During December, they formed a joint council to work on their response

844. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1309–1310.

845. Loveridge, evidence (doc Z1(b)) pp 85–86; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1309–1310.

846. Seddon to Timi Waata Rimini, 26 November 1897 (Armstrong and Subasic, supporting papers (doc A12(a), vol 13), p 6:36a); see also Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1308.

847. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1308; Loveridge, evidence (doc Z1(b)) pp 88, 90–91.

848. Loveridge, evidence (doc Z1(b)) pp 89–91; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1310.

849. Seddon to Timi Waatana Rimini, 26 November 1897; Armstrong and Subasic document bank, doc A12(a), vol 13, p 6:36a; see also Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1310.

– a highly significant occurrence given the movements' previous difficulties in working together.[850]

This council, with Heke among the Ngāpuhi representatives, met in Wellington for several weeks. One newspaper noted that wāhine rangatira attended and played active roles in the meeting. While the leaders in attendance agreed with Seddon on some points concerning land law, they favoured Kaihau's Maori Council proposal – which provided for national Māori self-government – over Seddon's limited and paternalistic land board plan. The prospect of a national Maori Council was said to have support from Ngāpuhi and other Kotahitanga tribes, and from Kīngitanga iwi such as Ngāti Maniapoto.[851]

By the end of 1897, then, the Kotahitanga and Kīngitanga movements were working together, and the Government was offering some concessions to Māori self-government, albeit far less than either Māori movement sought. With Kotahitanga continuing to pursue the dual strategy of seeking self-government while saving the land, much would depend on the promised 1898 discussions.

11.5.2.11.2 What was the outcome of the Government's 1898 negotiations with Kotahitanga and Kīngitanga leaders?

During 1898, Kīngitanga and Kotahitanga leaders continued to collaborate in the hope of achieving their common goals. The two movements agreed on the principle that Māori should govern themselves and on many of the details of how such a system might work. They also agreed on abolition of the Land Court and on preservation of remaining Māori lands. At a major hui on Mahuta's territory at Waahi in April, the leaders of the two movements continued to negotiate those details. Kotahitanga leaders were willing to use Kaihau's Bill as a basis for further discussion and to adopt many of its proposals. Accordingly, a large committee was formed with representatives from Ngāpuhi and all other tribes at the hui. The key point of contention naturally arose from Mahuta's insistence that any Māori government be established under his mana, whereas Kotahitanga leaders believed it should be established under the mana of the Paremata Maori.[852]

Carroll and Seddon also attended this hui, distributing copies of a Native Land Protection and Administration Bill, which added further detail to their plans for Māori land. Mahuta, Kaihau, and the Kīngitanga leader Tana Taingākawa all asked that the Government approve a Maori Council with full powers of self-government, in accordance with the treaty. Seddon refused, saying it would be 'impossible . . . to get through Parliament', a statement that was undoubtedly true, given Heke's experiences with the Native Rights Bill.[853]

The Ministers said they could respond to Māori aspirations, but could only go so far. Their Bill proposed to end almost all land sales, set aside reserves for Māori

850. Loveridge, evidence (doc z1(b)) p 91.
851. Loveridge, evidence (doc z1(b)) p 91.
852. Loveridge, evidence (doc z1(b)) pp 93–94.
853. 'The Premier', Auckland Star, 5 April 1898, p 2; Loveridge, evidence (doc z1(b)) pp 95–97. Also see Armstrong and Subasic, 'Northern Land and Politics' (doc a12), pp 1308, 1311–1313.

occupation, provide for land boards to lease remaining Māori lands on behalf of the owners, and provide assistance for Māori to develop their lands. In broad terms, these policies reflected what Te Raki and Kotahitanga leaders had been seeking. The critical differences concerned authority. Māori sought a system of land administration operating under the authority of a Maori legislature and run by Māori; the Government sought a system operating under the colony's authority, with substantial government representation on the land boards. The Ministers were not willing to give way on either point.[854] In Carroll's view, the Government's proposal achieved the same object as Kaihau's. Both Ministers urged Māori leaders to reach agreement quickly so that legislation could be passed. Seddon said the Government would not force the system on Māori – but they otherwise risked losing their lands and therefore their existence as a people.[855]

The Waahi meeting was one of a series Seddon and Carroll attended early in 1898. They had visited Waituhi in March, and after Waahi, travelled to Ōtorohanga, Rotorua, and Pūtiki before attending the Paremata Maori at Pāpāwai in May. The Government's land administration plans divided Māori and inflamed Pākehā. Settler newspapers, during this period, were filled with objections to the proposal that sales of Māori land should cease. Māori leaders, on the other hand, sought far greater powers of self-government than Seddon was willing to offer, but were divided on how to achieve this in the face of the Government's negotiating position.[856]

Seddon did not visit this district during his tour. Rather, as discussed in section 11.5.2.12.2, he sent troops in response to a Hokianga protest against the collection of dog taxes. Open warfare was averted only because of the actions of Heke and other rangatira, who mediated between the protestors and the Government. For much of 1898, Heke was required in the north to ease tensions and prevent any further outbreaks of armed resistance. More importantly, having told Māori that they would lose their lands if they did not reach terms with the Government, the Premier had also demonstrated the lengths he would go to in order to assert the Government's authority.

The Pāpāwai hui occurred soon after the Hokianga conflict. Mahuta had been invited to continue the joint discussions but did not attend, and nor did Henare Kaihau.[857] At the Paremata, Kotahitanga supporters were split over their response to the Government's plan. Some – mainly those from the North Island's eastern and southern coasts – wanted to adopt Seddon's Bill and negotiate for its improvement. This 'moderate' group wanted greater powers of self-government than Seddon was offering, but was prepared to make some concessions in order to

854. 'The Native Meeting at Huntly', New Zealand Herald, 30 March 1898, p 5; 'The Premier', *Auckland Star*, 5 April 1898, p 2; Loveridge, evidence (doc z1(b)) p 94. Also see Brooking, *King of God's Own*, kindle edition, pp 300–301.

855. 'The Native Meeting at Huntly', New Zealand Herald, 30 March 1898, p 5; 'The Premier', *Auckland Star*, 5 April 1898, p 2; Loveridge, evidence (doc z1(b)) p 94. Also see Brooking, *King of God's Own*, kindle edition, pp 300–301.

856. Loveridge, evidence (doc z1(b)) pp 99–105;

857. Armstrong and Subasic, 'Northern Land and Politics' (doc a12), pp 1310–1311.

secure an end to land purchasing. Its leaders redrafted Seddon's Bill, proposing much stronger protections for Māori landowners while also suggesting that the Paremata be recognised as an advisory body able to review and propose legislation to the colonial Parliament.[858]

Others at the Paremata, including leaders from this district and many senior leaders of the Kotahitanga government, asked Seddon to delay his Bill so they could consult their people. This 'home rule' group continued to press for adoption of Heke's Native Rights Bill providing for a fully autonomous Māori parliament.[859] In the months after the Pāpāwai hui, both Kotahitanga factions lobbied the Government independently, as did the Kīngitanga which continued to push for adoption of Kaihau's Bill. Māori sent numerous petitions, both for and against Seddon's proposals.[860] When the Government introduced its Native Lands Settlement and Administration Bill in September 1898, Seddon included none of the amendments proposed at Pāpāwai.[861]

In select committee hearings, the Hokianga rangatira Herepete Rapihana (attending in Heke's absence) asked that the Government prohibit sales of Māori land and otherwise defer any consideration of Māori land law until after the 1899 meeting at Waitangi. Rapihana emphasised that Māori in the north had not yet seen the Bill, let alone been consulted about it.[862] Ngāpuhi leaders also wrote to the Premier asking him to end land sales.[863]

'Moderate' Kotahitanga leaders expressed a preference for their own legislation but nonetheless said they would support the Bill in order to prevent further land sales. Underlying their position was an acceptance of Seddon's view that Māori could seek protection only by applying to the colonial Parliament.[864] Heke was absent from Wellington for the entire debate, instead remaining in the north, apparently to ensure that there would be no repeat of the Dog Tax War, and to raise money around the North Island for legal fees and fines that Hokianga Māori had incurred from failing to pay the tax.[865] In the end, the Bill was deferred for further consideration the following year, and Kaihau's Bill was never debated.[866]

By the end of 1898, Māori were divided into at least three broad camps: the 'moderate' and 'home rule' sections of Kotahitanga, and the Kīngitanga, each

858. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1311–1313; Loveridge, evidence (doc Z1(b)) pp 100–102. Also see Williams, Politics of the New Zealand Maori, pp 99–103; Seddon, King of God's Own, pp 300–302; Waitangi Tribunal, *Wairarapa ki Tararua*, Wai 863, vol 2, pp 518–523. Among other things, this group proposed that the land boards would have Māori majorities, owners would be able to retain some of the lands for their own use rather than vesting title in the boards, the Court would be abolished, and most Māori lands would be free of rates and taxes.

859. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1311–1313; Loveridge, evidence (doc Z1(b)) pp 100–102.

860. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1311–1314, 1317.

861. Loveridge, evidence (doc Z1(b)) pp 107–108, 110–115.

862. Loveridge, evidence (doc Z1(b)) p 111.

863. Loveridge, evidence (doc Z1(b)) p 117.

864. Loveridge, evidence (doc Z1(b)) pp 112–115.

865. Loveridge, evidence (doc Z1(b)) p 117, Moon, *Ngapua*, pp 188–192.

866. Loveridge, evidence (doc Z1(b)) p 116.

engaging distinct policies and tactics in pursuit of their people's welfare. The Government was pursuing a fourth track: one that offered less in terms of self-government that any Māori wanted, but because of its promise that land sales would end, was nonetheless sufficient to win support from a significant portion of the Māori leaderhship.

The Government's actions can be viewed through two lenses. On the one hand, Seddon and Carroll engaged extensively with Māori during the year, brought draft legislation to Kīngitanga and Kotahitanga meetings, and made significant concessions over Māori land. That this occurred was a reflection of the considerable influence exerted by Kotahitanga, Kīngitanga, and other Māori leaders throughout the country. On the other hand, the Government gravely limited the scope of the consultation. It was willing to concede ground on land but not on political authority. Ministers were unwilling to consider recognition of a Māori parliament in any form, even as an advisory body. They were also unwilling to consider land boards that did not include government representatives. In *The Wairarapa ki Tararua Report* (2010), the Tribunal found, and we agree, that the Government managed the 1898 negotiations with the deliberate aim of marginalising more 'radical' leaders such as Heke, who had sought recognition for an autonomous Māori parliament.[867]

That the Government was able to do this to some degree reflected the political skill shown by Seddon and Carroll, and in particular their cultivation of relationships with 'moderate' Kotahitanga leaders. But, more broadly, the Government was able to determine the scope of the negotiations because the power now rested with it. Kotahitanga leaders could build pressure but exert very little leverage. That was due to the population imbalance in the country by this time; the significant threat that government policies and actions posed to Māori land and political authority; and (as mentioned on several occasions earlier) the lack of safeguards for treaty rights.

11.5.2.11.3 The origins of the Maori Councils Act 1900 and the Maori Lands Administration Act 1900: the outcomes of the 1899–1900 negotiations

By March 1899, when the Kotahitanga Paremata was held at Waitangi, the momentum had all but gone from the 'home rule' debate. More than 1,000 people turned out to greet Seddon and the Governor, Uchter Knox (the 5th Earl of Ranfurly). Ranfurly, in a particularly patronising speech, urged Māori to set aside past grievances and abandon their 'useless' meetings. Seddon met with Heke and other leaders, where the discussion focused on the previous year's 'Dog Tax War' and taxes and rates of local authorities. Seddon acknowledged Māori grievances and suggested that collection of dog taxes might be handed to Māori authorities. He also arranged for the Governor to pardon the Hokianga leaders who had been imprisoned after that conflict.[868]

867. Waitangi Tribunal, *Wairarapa ki Tararua*, Wai 863, vol 2, pp 528–529.

868. 'The Governor's Tour', *New Zealand Herald*, 16 March 1899, p 6; 'The Premier and the Maoris', *New Zealand Herald*, 17 March 1899, p 6; Brooking, King of God's Own, kindle edition, pp 312–313.

After Seddon had left, Kotahitanga leaders met among themselves. Previous divisions had not healed, and attendance, at 300, was less than organisers had expected. Plans for a deputation to England were briefly revived and then shelved for lack of funding, and Heke, Te Heuheu Tūkino, and Hamiora Mangakāhia were appointed to travel around New Zealand in a bid to heal divisions and restore support for the movement.[869] Soon afterwards, Seddon and Carroll met Kīngitanga leaders in Auckland, who continued to press for the Maori Council Constitution Bill. Seddon refused to support the Bill but encouraged Kīngitanga leaders to work with the colonial Parliament and offered Mahuta a place in the Legislative Council.[870]

By the time Parliament reconvened in June, the focus for all of the various Māori movements was on the shape of any future land legislation. Since 1894, Māori members of the House had been introducing 'home rule' Bills to Parliament, but in 1899 they did not. Instead, Parliament considered numerous petitions about Seddon's proposals, most seeking amendments. Before the Native Affairs Committee, all of the Māori members said they and their constituents were willing to support legislation that would protect remaining Māori lands.[871] As Heke told the Committee, his constituents wanted far more than the Government was offering, but Seddon's Bill at least provided an opportunity to make some progress and bring to an end the system of Crown pre-emption and purchasing that had been in place since 1894.[872]

The various Māori movements agreed on the broad principles of land legislation but differed significantly on some details, such as the relative powers of land councils and block committees. The Government and Māori members negotiated intensively before Seddon introduced a series of legislative proposals to the House in early October, and continued to negotiate while the legislation was debated. Although the Māori members regarded it as a compromise, they all agreed that the legislation represented some progress and should pass in order to protect the remaining Māori lands from purchase.[873] Seddon's willingness to negotiate in detail during this period in part reflects his determination to reach agreement with Māori, but it also appears to have been influenced by political considerations. While these negotiations were occurring, the Government faced two no confidence votes in the House and was kept in office by the Māori members.[874]

869. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1315–1316; Loveridg, evidence (doc Z1(b)) pp 120–121; Brooking, *King of God's Own*, kindle edition, pp 313–314.

870. Loveridge, evidence (doc Z1(b)) pp 121–122.

871. Loveridge, evidence (doc Z1(b)) pp 126–135.

872. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1318–1320; Loveridge, evidence (doc Z1(b)) pp 130–132; 'Political Notes', *Evening Post*, 6 October 1899, p 6; editorial, *New Zealand Herald*, 5 October 1899, p 4.

873. Loveridge describes these events in detail: evidence (doc Z1(b)) pp 138–150. Heke objected to the land boards taking over Native Land Court functions without corresponding funding, but was willing to vote for the legislation.

874. Loveridge, evidence (doc Z1(b)) pp 138, 152.

Whereas Māori members wanted the legislation passed, most Pākehā members either disagreed with the principle or were unwilling to pass such a significant measure late in the parliamentary session. As a holding measure, the House enacted legislation ending all new sales of Māori land to the Crown until a new system could be agreed.[875]

An election was held in December, and Seddon's Liberal Government was returned with an increased majority. The 'home rule' section of Kotahitanga stood against Kaihau and Pere, but both retained their seats. Immediately after the election, Seddon appointed Carroll Native Minister – the first Māori to hold the position.[876] During the first six months of 1900, there were further rounds of negotiations between the Government, Kīngitanga, and Kotahitanga. Again, these focused on details of the land council legislation rather than on any further 'home rule' proposal.[877]

At the Kotahitanga Paremata in March 1900, Heke worked with Pere and an increasingly influential Āpirana Ngata to develop an agreed Kotahitanga position, which they then took to a Kīngitanga hui.[878] Describing his motivation at the time, Heke said it was 'useless to oppose the Government policy', so Kotahitanga had adopted it and proposed some amendments.[879] Kīngitanga leaders thought the Kotahitanga proposal was too favourable to the Government and settlers.[880]

Carroll, meanwhile, developed his own counter-proposal while also working with Ngata and some of the 'moderate' Kotahitanga leaders on a measure to establish Maori Councils with responsibilities for some health and social issues. The Minister visited marae in various parts of the country (though not including Te Raki) to explain these measures, and consulted with Kotahitanga and Kīngitanga leaders before introducing draft legislation to Parliament in September. There was further negotiation, disagreement between Kīngitanga and Kotahitanga representatives, and considerable redrafting before the Maori Lands Administration Act 1900 was finally passed in October.[881]

The Act divided the North Island into Maori Land Districts, each with a Maori Land Council that would have majority Māori membership, and provided new

875. Native Land Laws Amendment Act 1899, section 3. The Crown might in certain circumstances complete purchases already under way. The Act was to remain in force 'only until ten days after the last day of the next session of Parliament', s 5. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1318–1319; Loveridge, evidence (doc Z1(b)) pp 150–153; 'Political Notes', *Evening Post*, 6 October 1899, p 6; editorial, *New Zealand Herald*, 5 October 1899, p 4.

876. Loveridge, evidence (doc Z1(b)) pp 156–157.

877. Loveridge describes these negotiations in detail: evidence (doc Z1(b)) pp 156–165.

878. Loveridge, evidence (doc Z1(b)) pp 156–162.

879. 'Native Politics', Auckland Star, 26 June 1900, p 8.

880. Loveridge, evidence (doc Z1(b)) pp 160–165.

881. Loveridge describes these events in detail: evidence (doc Z1(b)) pp 167–188; see also Brooking, *King of God's Own*, Kindle ed, pp 324–329.

safeguards to protect Māori lands from sale.[882] The Maori Land Councils were to perform some of the functions of the Native Land Court and had additional powers to set aside papakāinga and mahinga kai (cultivation) lands as inalienable reserves. Māori landowners could voluntarily vest their lands in trust with the councils, which were empowered to raise finance and lease the vested lands.[883] Thus the Act provided for some degree of hapū control over decisions to offer land for lease, although that control was lost once the land was handed over to a council for administration.[884] Heke told the House that the Bill was 'a compromise', and not one of which he particularly approved; Kotahitanga leaders had succeeded in modifying it but had not got all they wanted.[885] He would have preferred that the House acknowledge that it could not pass good law for Māori, and instead hand the power to Māori so they could prepare their own law.[886] Nonetheless, he supported the Bill since it provided some opportunity for Māori owners to manage their lands. The Bill passed and came into force on 20 October 1900.

Two days earlier, the Maori Councils Act 1900 had also come into force. This Act aimed 'to confer a Limited Measure of Local Self-government' on Māori communities. It provided that the Governor could declare 'any district a Maori district' where a Maori Council would be elected by Māori, and empowered to make bylaws about health, sanitation, liquor, animal control, and a range of other matters concerning the welfare of Māori communities.[887] There was also provision for a general conference of delegates from the councils to be held annually, where it was envisaged that they would have policy input at a national level.[888]

In the House, Carroll described this legislation as more important than any land law and as 'the first real effort' to give Māori any degree of local self-government with respect to social well-being.[889] Ngata had worked with Carroll to develop the legislation, which Heke endorsed, saying it was 'desired by the Maori people'

882. Terry Hearn, 'Social and Economic Change in Northland c1900 to c1945: the Role of the Crown and the Place of Maori' (commissioned research report, Wellington: Crown Forestry Rental Trust (doc A3), 2006). pp 99–100; Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1 p 381; see Maori Lands Administration Act, sections 22–25.

883. Hearn, 'Social and Economic Change in Northland' (doc A3), p 100; see Maori Lands Administration Act, section 29(1); Paul Hamer and Paul Meredith, '"The Power to Settle the Title"? The Operation of Papatupu Block Committees in the Te Paparahi o Te Raki Inquiry District, 1900–1909' (commissioned research report, Wellington: Waitangi Tribunal (doc A62), 2016), p 28.

884. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1405; Waitangi Tribunal, *Te Mana Whatu Ahuru*, Wai 898 (Wellington: Legislation Direct, 2019), pt 3, pp 25–27; Waitangi Tribunal, *The Whanganui River Report*, Wai 167 (Wellington: GP Publications, 1999), p 163.

885. Hōne Heke, 12 October 1900, NZPD, 1900, vol 115, pp 188–189; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1321.

886. Hōne Heke, 3 October 1900, NZPD, 1900, vol 114, p 501; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1320.

887. Hearn, 'Social and Economic Change in Northland' (doc A3), p 758; Maori Councils Act 1900, sections 3, 15–16.

888. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1 p 381; see Maori Councils Act 1900, section 29.

889. James Carroll, 12 October 1900, NZPD, 1900, vol 115, p 203 (Loveridge, evidence (doc Z1(b), p 183).

and would add legal weight to decisions made by rangatira, empowering them to deal with issues arising in their communities.[890] We discuss the provisions and operation of the Maori Land Administration Act 1900 and the Maori Councils Act 1900 further in a subsequent volume of our report.

Armstrong and Subasic saw the Maori Councils Act as an attempt to revive the rūnanga model which the Crown had abandoned three-and-a-half decades earlier.[891] And the Central North Island Tribunal regarded it as a well-intentioned but a 'somewhat pale shadow' of what the Kotahitanga movement had sought.[892] The Crown in this inquiry submitted that these Acts had resulted from compromise between Kotahitanga, Kīngitanga, and the Government, and we agree. The Crown also submitted that all of the parties supported this compromise, and on that we do not agree.[893] Rather, the Māori position reflected a final reluctant acceptance of what was possible within a settler-dominated political system that almost entirely disregarded their continued appeals for their tino rangatiratanga to be recognised and supported. The Māori position also reflected the fact that the available alternative – continued Government land purchasing – was worse.

Taken together, then, the Maori Councils Act and Maori Lands Administration Act reflected major concessions on the part of Te Kotahitanga and the Kīngitanga, reluctantly made in the face of sustained, high-level government pressure. The establishment of the Maori Councils and Maori Land Councils provided for some degree of local self-government over matters such as health and animal control, but did not secure full Māori control over their lands and resources; nor did they provide for an autonomous Māori assembly capable of enacting or at least influencing legislation while protecting tino rangatiratanga against the encroachments of the colonial Legislature.[894] In the words of the Tribunal in *The Whanganui River Report* (1999), 'This legislation . . . fell far short of providing for Maori self-government.'[895] We will consider these laws and their impacts in detail in later chapters.

11.5.2.12 *What caused the Hokianga 'Dog Tax War' in 1898, and what was the impact in terms of authority on the ground?*

Having considered the national context in which Te Raki Māori leaders sought provision for their tino rangatiratanga, we now return to an important episode in Hokianga in the final decade of the nineteenth century to shed light on the struggle between kāwanatanga and rangatira for authority in the district. While leaders such as Heke and Herepete Rapihana were negotiating with the Government, many other rangatira were attempting to maintain authority on the ground. While they had some success, such as with local komiti and the Native Land Court

890. Hōne Heke, 12 October 1900, NZPD, 1900, vol 115, p 203 (Loveridge, evidence (doc z1(b), p 184).
891. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1405.
892. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, p 277; see also p 396.
893. Crown closing submissions (#3.3.402), p 171.
894. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, pp 368, 396–397.
895. Waitangi Tribunal, *The Whanganui River Report*, Wai 167, p 163.

boycott, they also faced significant pressures. By 1891, the settler population had surpassed that of Māori in all of the district's taiwhenua except Hokianga, which tipped in the settlers' favour between 1891 and 1896 (see appendix 11.11).

Many northern Māori were facing significant economic hardship, reflecting a range of factors which included the depletion of gumfields and declining access to traditional food sources.[896] Local officials were increasingly able to assert authority over Māori; for instance, by arresting and charging them for rare breaches of colonial law (see the example of Rēmana Hi at section 11.4.2.4).[897] And the northern county councils were increasingly attempting to assert their authority over Māori lands and communities by charging rates and taxes, though Māori owners frequently refused to pay.[898]

One of the means by which local officials and authorities sought to assert their control over Māori communities was through an annual dog registration tax. Officials gathered the tax throughout the north from the early 1890s, imposing a significant burden on already impoverished Māori communities. Many communities initially refused to pay, regarding the tax as one of many unwarranted intrusions in their affairs, alongside the Court, rates, other taxes, and controls on hunting native birds; but by the middle of the decade, faced with threats of fines or imprisonment, most reluctantly complied.[899]

In 1898, Te Huihui, a Hokianga group with links to Te Whiti, were determined to resist the tax and government authority more generally. Faced with threats of arrest and imprisonment, they agreed to use force if necessary to protect themselves. In response to this show of Māori resistance, Seddon sent in troops – the Crown's first military incursion into Ngāpuhi territories since the Northern War. Just as armed conflict was about to break out, Heke and other rangatira intervened, brokering an agreement that ended the so-called 'Dog Tax War'. Te Huihui leaders were then arrested and imprisoned, and Te Huihui agreed to comply with the law.[900]

Ihu Absolum of Te Māhurehure told us that the dog tax was part of a broad suite of government policies that impoverished Māori communities and separated them from food sources, as part of a deliberate and systematic attempt to assert authority.[901] Haami Piripi saw the conflict as 'a response to pākehā control over

896. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 92–93, 94–96.

897. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1102–1103. In May 1898, Clendon noted that there was very little 'crime' among Māori communities: 'The Native Disturbance at Hokianga', *New Zealand Herald*, 3 May 1898, p 4.

898. Bruce Stirling, 'Eating Away at the Land, Eating Away at the People' (doc A15), pp 19–21.

899. Armstrong and Subasic describe these events in detail: 'Northern Land and Politics' (doc A12), pp 1326–1397. Also see Richard Hill, *The Iron Hand in the Velvet Glove: The modernisation of policing in New Zealand* (Palmerston North: Dunmore Press, 1995), pp 135–137; Angela Ballara, 'Hōne Riiwi Tōia', Dictionary of New Zealand Biography, http://teara.govt.nz/en/biographies/2145/toia-hone-riiwi, accessed 9 February 2022.

900. Armstrong and Subasic describe the conflict in detail: 'Northern Land and Politics' (doc A12), pp 1359–1397.

901. Ipu Absolum (doc X53), p 9; and transcript 4.1.25, Tauteihihi Marae, p 595. Also see Haami Piripi (doc Q11), p [13]67.

Māori rangatiratanga', which ended in 'a stand-off between a growing Crown authority and a waning network of rangatira with mana whenua.'[902]

Many historians have expressed similar views. Armstrong and Subasic saw the conflict as '[t]he most direct manifestation of the struggle for authority between the Northland hapu and the Government during the last two decades of the nineteenth century.'[903] Other historians, such as James Belich, Richard Hill, and Adrienne Puckey, saw it as the decisive event in the Crown's attempts to establish de facto sovereignty in this district.[904] We consider below the origins and purpose of the tax, the events of the 'war', and the implications for Crown and Māori authority.

11.5.2.12.1 How did Te Raki Māori respond to the dog tax?

The Dog Registration Act 1880 replaced numerous provincial ordinances relating to dog attacks on livestock.[905] The Act required all dog owners to register their dogs annually with the county council or other local authority and to pay a registration fee, which was initially set at 10 shillings per dog but later reduced to a minimum of 2s 6d. Upon registration, the council was required to issue a collar for the dog and record details of the dog and its owner. Section 13 provided that dogs without collars could 'be deemed to be unregistered, and any person or his agent upon whose land such dog may be found, or any person duly authorized by the local authority, may destroy any such dog'. This was later amended to allow police or local authorities to seize unregistered dogs and to sell any that were not claimed within a week.[906]

11.5.2.12.1.1 *How did Te Raki Māori initially respond to the tax?*

From the beginning, Māori in this district and throughout the country opposed the tax, regarding it as part of a broader pattern of unwarranted Crown and local authority interference in their lands and communities.[907] During the early 1880s, local magistrates recommended that the Act not be applied in northern counties where Māori outnumbered settlers, as most Māori would refuse to pay, and any attempt at enforcement would lead to trouble. Accordingly, most Te Raki counties initially chose not to enforce the tax either against Māori or settler communities.[908]

902. Haami Piripi (doc Q11), p [13].

903. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1326.

904. James Belich, Making Peoples: a History of the New Zealanders from Polynesian Settlement to the end of the Nineteenth century (Auckland: Penguin Press, 1996), p 268; Hill, The Iron Hand in the Velvet Glove, p 137; Adrienne Puckey, 'The Substance of the Shadow: Maori and Pakeha Economic Relationships 1860–1940: a northern case study' (doctoral thesis, University of Auckland, 2006), p 177.

905. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1327; 'Injuries by dogs', 24 June 1880, NZP*D*, vol 35, 1880, p 477.

906. Dog Registration Ammendment Act 1882, s 5; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1327–1328.

907. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1334–1335. Also see 'The Maoris and the Dog Tax', *New Zealand Herald*, 28 September 1888, p 6.

908. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1330–1331.

Mangonui and Hobson were the only counties in this district to attempt to gather the tax from Māori communities during the early 1880s. While the Act required dog owners to pay for registration at the county office or face penalties, the Mangonui County Council appointed a native constable to proactively visit Māori communities and enforce the tax. Several Māori from Parapara and Taipa refused to pay and were prosecuted. According to press reports, the resident magistrate (Bishop) imposed 'a nominal fine', which they also refused to pay. Two constables went to Taipa with a warrant. When they attempted to take one of the settlement's horses away in lieu of payment, a group of Māori set upon them, knocking both down and kicking one of them. A local rangatira – apparently a member of the Mangonui Native Committee – intervened, allowing the constables to go free so long as they left the horse.[909] Five Māori were then charged with assault and fined a combined total of £30.[910]

Soon afterwards, Mangonui Rewa petitioned the House of Representatives asking that the tax only be enforced in towns, not in Māori communities, and that councils not send police into Māori communities or the bush to search for unregistered dogs. The petitioners noted that the incident had been resolved only because members of the Native Committee had intervened to keep the peace. The Government undertook to consider exempting Mangonui County from the tax but took no immediate action.[911]

In 1884, the Mangonui County Council decided against strict enforcement of the Act within Māori communities. The Hobson County Council also abandoned its attempts after Māori consistently refused to pay. These incidents demonstrate the uneasy balance between government and Māori authority on the ground at this time, and the fact that Māori retained numerical supremacy outside the main settlements. In the Mangonui incident, the Government was ultimately able to enforce compliance, but not without considerable trouble, and then only with the aid of Māori leaders.[912]

The tax was also a significant issue at the Waitangi and Ōrākei parliaments during the early 1880s – and indeed was one of the catalysts for Te Raki leaders to decide to pursue self-government. At the 1881 Waitangi Parliament, Rewa predicted that the Government would soon begin taxing 'horses, cows and fowls', and gave this as a a reason for establishing a Māori parliament.[913]

In this district and elsewhere, the tax was one of many Crown initiatives that Māori perceived as either actually or potentially undermining their livelihoods and interfering with their community authority. In 1882, the Crown and Native Lands Rating Act provided that rates could be charged on Māori lands within five miles of a road.[914] Waitangi and Ōrākei parliaments also discussed numer-

909. 'Mangonui', *New Zealand Herald*, 15 June 1883, p 6.
910. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1330–1331.
911. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1331–1332.
912. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1332–1333.
913. 'The Native Meeting at Waitangi', *New Zealand Herald*, 25 March 1881, p 6; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1122; see also pp 1094, 1193–1194.
914. Stirling, 'Eating Away at the Land, Eating Away at the People' (doc A15), pp 19–20.

ous other policies, including sheep taxes, fencing laws, and controls on hunting, which together interfered with Māori autonomy and undermined access to food sources.[915]

As discussed in section 11.4.3.3, in 1884 Te Komiti o te Tiriti o Waitangi prepared a petition seeking Māori self-government, including 'freedom from European laws, and especially . . . rates and taxes', a freedom that tribal leaders regarded as their right under the treaty.[916] Māori members of the House also raised the dog tax in the colonial Parliament. Te Raki leaders emphasised the considerable value that Māori placed on dogs, especially because they were necessary for pig hunting, which remained a vital food source.[917]

11.5.2.12.1.2 *How did Te Raki Māori respond after the Bay of Islands County Council resumed enforcement in 1888?*

For nearly five years, none of the northern councils attempted to gather the tax. That changed in 1888, when the Bay of Islands and Rodney County Councils resumed enforcement of the Act for both Māori and Europeans. In Rodney, a county that covered southern Kaipara and Mahurangi, the council took this decision in response to a complaint from a Pākehā sheep farmer.[918] We have no details of the Bay of Islands council's reasons.[919]

While a small number of Māori willingly registered their dogs, most did not. The council issued summonses against some from Ngāti Hine including their leader, Maihi Parāone Kawiti, and this sparked a round of negotiation between Māori and the Government. In particular, Maihi Parāone raised the issue with Pāora Tūhaere and other leaders of the nascent Kotahitanga movement, who were then in Wellington promoting a Bill to reform Māori land law and abolish the dog tax in Māori districts. The Kotahitanga leaders approached the Native Minister, Edwin Mitchelson, asking for time to allow Māori to debate their response. Although the court case went ahead, Mitchelson (with Seddon's knowledge) arranged that no enforcement action would be taken until after the next annual hui at Waitangi.[920]

At the court hearing in September 1888, Maihi Parāone told the Mangonui magistrate Bishop that Māori law overrode any local bylaw or tax, and since the tax was an infringement against the treaty, he and his people were justified in ignoring

915. Armstrong and Subasic, 'Northernd Land and Politics' (doc A12), p 1122; Angela Ballara, 'Hōne Riiwi Tōia'.

916. 'Another Maori Mission to England', *New Zealand Herald*, 18 November 1884 (Armstrong and Subasic, supporting papers (doc A12(a), vol 11), pp 398; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1119.

917. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1340; 'The Native Scare in the North', *New Zealand Herald*, 3 May 1898, p 5. Also see Ballara, 'Hōne Riiwi Tōia'; Hill, *The Iron Hand in the Velvet Glove*, p 134.

918. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1335; 'Council Meetings', *New Zealand Herald*, 18 October 1888, p 3. In this report, the Hobson County Council also discussed police action against dog tax defaulters, but it was not clear whether these were Māori or non-Māori.

919. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1334–1335.

920. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1335.

it entirely. Bishop repudiated these arguments, saying his role was to administer the same laws for Māori and Europeans alike, and that any resistance would cause 'serious trouble'. If Maihi Parāone did not like the law, he could appeal to Parliament, but he must nonetheless 'suffer the penalties' for evasion of the law. Although Bishop ruled against Maihi Parāone, newspaper reports do not record any sentence being imposed.[921]

Following this judgment, the Bay of Islands Native Committee wrote to the county council, which resolved that it would not enforce the tax against anyone, Māori or settler, until it had received further instructions from the Government. The council took this course in part to preserve equality of Māori and settlers before the law, and partly to encourage Māori compliance, since (councillors reasoned) Māori would be equally harmed by any reduction in spending on the roads.[922]

Hirini Taiwhanga and other leaders then raised the issue at the Waitangi hui in March 1889, and again at the Ōrākei hui later that month. The Government was represented at Waitangi by Attorney-General Frederick Whitaker. His comments were not recorded at the time, and Māori and county officials later disputed what he had said. Rangatira, and some settlers, recalled him as promising to lighten or suspend the impact of the tax on them, and they had understood this to mean that the tax would not be enforced. But county officials recalled Whitaker as saying that enforcement was a matter for them. Whitaker addressed the issue again at Ōrākei a few weeks later, offering sympathy to Māori but making no promises.[923]

In the end, so far as we can determine, Whitaker took no action at a national level. The Bay of Islands County Council, sensing that it had little support from the Government and that any further attempt at enforcement would 'risk a breach of the peace', decided not to gather the tax for the time being, nor to enforce any penalties against Maihi Parāone and his people.[924]

11.5.2.12.1.3 *How did Te Raki Māori respond after all northern counties resumed enforcement in 1892?*

For 18 months, no further attempts were made to collect the tax in Northland. Then, between December 1890 and October 1891, the Whāngārei, Whangaroa, Hokianga, and Bay of Islands councils all decided to resume collection. Whāngārei was first to move and was followed in June 1891 by Whangaroa and Hokianga,

921. 'The Maoris and the Dog Tax', *New Zealand Herald*, 28 September 1888, p 6; Untitled, *Auckland Star*, 28 September 1888, p 2; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1335.

922. 'Bay of Islands County Council', *New Zealand Herald*, 28 September 1888, p 3.

923. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1338–1339; 'Sheep Owners and Maori Dogs', *New Zealand Herald*, 21 October 1891, p 6. The Minister might have referred to section 3 of the Act, which allowed the Governor to suspend the Act's operation in parts of the country.

924. County chairman to Native Minister, 3 December 1891 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1337–1339).

which promised to cooperate on collection and enforcement activities, while the Bay of Islands followed suit in October, passing a resolution to resume collection.[925]

The decision was part of a broader (and coordinated) attempt by councils to assert authority over Māori, and more particularly to transfer a greater portion of the land tax (rates) burden onto Māori communities. Also in 1891, both the Bay of Islands and Hokianga councils wrote to the Government arguing that settlers were bearing an unfair share of the costs of roading and other public works. Growth in the settler population no doubt influenced this thinking and might have given the councils greater confidence that they could successfully enforce the tax.[926]

From this time and throughout the rest of the decade, the district's local authorities were determined to enforce the tax irrespective of Māori opposition. They regarded this as a point of principle – a means of forcing Māori to share the cost of local infrastructure, even though Māori communities typically lacked the financial resources to do so, and notwithstanding their contributions to roading in other ways, such as offering land and labour. At a public meeting at Waimate in October 1891, Bay of Islands county clerk J W Williams threatened to use force against Māori who did not comply. The issue, in his view, was that 'the old chiefs considered it derogatory to their dignity to contribute to county revenue'.[927]

In response, Hōne Peeti said that Māori would not get rid of their dogs, which were needed for hunting, and nor would they pay the tax. Since Māori owned much of the county's land, and settler sheep farmers only a small portion, Māori were entitled to keep their dogs, and if any harmed a sheep there were other legal remedies.[928] Hare Matenga informed the Native Department that '[a]ll the Natives north of Auckland are quite determined that they will not pay the tax to the end'.[929]

Although the Bay of Islands County Council was determined to enforce the tax, it felt unable to do so without the support of central Government. Accordingly, the council wrote to Alfred Cadman, Native Minister in the newly formed Liberal Government, asking him to visit the district and encourage Māori to comply with the law.[930]

Cadman duly attended the Waitangi parliament in April 1892. There, he acknowledged that the previous Government had asked local authorities not to enforce the tax, but that circumstances had since changed. He said that local councils now needed the money to fund roads and other public works which would

925. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1339–1340.

926. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1120, 1193–1194. Regarding coordination between councils, see 'Due North: A Trip to Hokianga', *New Zealand Herald*, 19 March 1892, p 1 (supplement). Between 1882 and 1888, the Government had paid rates on Māori land directly to local authorities and then recovered the funds through stamp duties charged on any alienation. From 1888, the Government no longer provided direct funding, leaving local authorities to gather rates directly from Māori: Tom Bennion, 'Maori and Rating Law', Waitangi Tribunal Rangahaua Whanui Series, 2007, pp 24–25.

927. 'Sheep Owners and Maori Dogs', *New Zealand Herald*, 21 October 1891, p 6.

928. 'Sheep Owners and Maori Dogs', *New Zealand Herald*, 21 October 1891, p 6.

929. Matenga to Native Under-Secretary, 15 October 1891 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1340).

930. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1340–1342.

benefit Māori and settlers alike, and were therefore 'determined not to allow the natives to escape payment any longer'. Instead of resisting the law, Māori 'should be grateful for having been allowed to escape the payment [for] so long'. He could not support any system of taxation that 'imposed heavy burdens on the pakeha and allowed the Maori to escape altogether'.[931]

11.5.2.12.1.4 *Initial resistance and eventual compliance, 1892–94*

Most Te Raki leaders regarded this as a breach of Whitaker's 1889 promise to lighten the burden from the tax. In July 1892, Hōne Mohi Tāwhai wrote to the Minister, asking him to 'show pity for the sorrow of Ngapuhi caused by the dog tax and to act as Sir Frederick Whitaker . . . did'.[932] Rangatira held a series of meetings in Kaikohe, Whangaroa, and Whāngārei, resolving not to pay the tax, and some wrote to the Bay of Islands County Council asking it not to impose the tax until Parliament had considered the matter. In August, the Waiōmio komiti Māori published a notice in the *Northern Luminary* saying that Māori would not pay the tax and had rights over their own territories under the Constitution Act 1852. The notice asked the Bay of Islands registrar of dogs to deal with the komiti instead of approaching individual Māori.[933]

Nonetheless, the northern councils resolved to collect the tax and take enforcement action against any Māori who did not pay. Although Tāwhai opposed the tax, he encouraged other Hokianga Māori to comply with the law. When some refused, the local constable issued summonses, targeting leading rangatira in order to encourage compliance among others. The *New Zealand Herald* reported that the court was well attended by Māori and Pākehā, all of whom saw the significance of Māori being brought into the colony's tax system. The court imposed the legal minimum fine of one shilling but imposed heavy court costs, creating a deterrent to any further resistance. According to the *Herald*, there was 'no disobedience of summons; no plea of exemption upon racial grounds; and . . . the fines were promptly paid'.[934] By August, most Hokianga communities were paying the tax.[935]

Elsewhere in the district, Māori were determined to resist. In response to the Waiōmio komiti's notice, Cadman instructed the Mangonui magistrate (Bishop) to 'point out to the Natives the trouble they are likely to bring upon themselves in refusing to pay'.[936] Bishop duly followed these instructions, imposing fines ranging from £2 to £4 on nine Māori at Kawakawa and two at Kerikeri for refusal to

931. 'The Native Meeting at Waitangi', *New Zealand Herald*, 23 April 1892, p 5. Regarding local authority funding, see 'Due North: A Trip to Hokianga', *New Zealand Herald*, 19 March 1892, p 1 (supplement).

932. Hone Mohi Tāwhai to Native Mnister, 26 July 1892, as quoted in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1342–1343.

933. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1345–1347.

934. 'The Maoris and the Dog Tax', *New Zealand Herald*, 11 July 1892, p 5.

935. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1345.

936. Cadman minute, 5 September 1892 (Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1347).

comply.[937] When the fines were not paid, Constable Haslett of Kawakawa seized horses from two Waiōmio rangatira. The horses were then sold to cover the fines. In December, Haslett targeted several more non-payers, imprisoning one at the Kawakawa jailhouse until he paid and threatening others with prison terms. On one occasion, shots were exchanged, but no one was hurt. Haslett's actions, particularly the threat of imprisonment, persuaded Bay of Islands leaders that the costs of non-compliance were too high. Enforcement activities also resulted in very reluctant compliance in Whāngārei and Whangaroa by early 1893.[938]

Kaikohe Māori held out for longer. In September 1892, they wrote to the Government about summonses issued against their leaders, warning, 'Stop it lest trouble should arise.' And more than a year later, in October 1893 they were still holding out, notifying the magistrate James Stephenson Clendon that they would refuse to pay, in accordance with their rights under section 71 of the New Zealand Constitution Act. Clendon wrote back, saying the only authority in the district was the law that he was charged with enforcing. Heke sought a compromise, asking the Bay of Islands County Council to halve the tax in return for compliance; the county clerk, H W Williams, refused. The issue dragged on, and in April 1894 Clendon asked the Government for a greater police presence so arrests could be made.[939]

By May 1894, Kaikohe Māori had also erected a pā at Iringa and were threatening to fire on constables or any other trespassers. That month, Clendon imposed fines on eight Kaikohe Māori. Six appeared in court and were charged the minimum one shilling fine, but another two refused to appear and were fined £5 each. Kaikohe leaders visited other communities seeking support, but this was not forthcoming, and by mid-May 1894 the Kaikohe community also abandoned their efforts to resist.[940]

During the next two years, Te Raki leaders made occasional appeals or protests to the council or central Government, but to no avail. In 1894, the House of Representatives rejected a petition from Wī Hongi and his supporters, who asked for their district to be excluded from the Act in accordance with their rights under the treaty and the New Zealand Constitution Act.[941] During his visit in 1895, Seddon told Māori to shoot their dogs if they wanted to pay less tax: 'I do not like seeing so many dogs about the Native pas. I would rather see children.'[942]

In 1896, the Bay of Islands County Council rejected an offer from Bay of Islands Māori to provide labour in lieu of rates and dog tax payments.[943] In 1897, Taipari Heihei of Mangamuka wrote to the Government offering to withdraw his hapū from Kotahitanga in return for relief from the dog tax and rates. He also petitioned Parliament, asking that 'certain taxes may not be imposed in the Mangamuka dis-

937. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1347.
938. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1347–1350.
939. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1352.
940. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1353–1354.
941. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1355–1356.
942. 'Pakeha and Maori', AJHR, 1895, G-1, p 32.
943. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1355–1356.

trict, in order that his tribe may be kept loyal to the Government of New Zealand'. Such actions provide an insight into the desperation of Māori communities to be spared the financial burden arising from these charges.[944] Even in June 1898, after the Dog Tax War (discussed in the following section), Kaikohe leaders continued to seek a compromise, writing to the council to ask for remission of the tax because they had built a road. The council's consistent stance was that it would collect the tax from settlers and Māori alike.[945]

11.5.2.12.2 The Dog Tax War

The final conflict in this contest for authority occurred in May 1898, when the Government sent troops to arrest members of Te Huihui, the Hokianga spiritual community that was refusing to pay the dog tax and more broadly rejected the Crown's authority to impose rates, taxes, and laws over Māori. The leader of Te Huihui was Hōne Riiwi Tōia of Te Māhurehure, the grandson of Arama Karaka Pī.[946] Te Huihui had been trained (by Taonui) in the teachings of the Hokianga prophet Papahurihia,[947] and also had links with Te Whiti o Rongomai's pacifist community at Parihaka. Politically, Te Huihui shared the aspirations of Te Kotahitanga and many Te Raki Māori communities to have freedom from the yoke of Crown authority.[948]

11.5.2.12.2.1 *How did the Government respond to Te Huihui's initial opposition to the dog tax?*

Te Huihui had their main settlement at Hauturu in the southern Hokianga hills, where they were largely able to remain aloof from Crown authority. But in February 1896, a group of 250 followers set up a camp at the Mangatoa gumfield, a few kilometres west of Kaikohe. The group's combination of religious observance and resistance to Crown authority made it appear threatening to local settlers and officials. Some saw it as an attempt to establish another Parihaka: one constable reported that it would need to be suppressed in a similar manner with a 'considerable and properly appointed force'.[949]

Officials also suspected, without conclusive evidence, that Te Huihui had hostile intentions and was stockpiling firearms and powder. Constables searched the camp in March 1896 but found no weapons, and Te Huihui leaders insisted they had peaceful intentions. Nonetheless, rumours continued to mount among settlers and officials. On 20 March, the resident magistrate Clendon ordered Te Huihui to disperse within a week. Premier Richard Seddon was notified, and he instructed the police to take immediate steps to disarm Te Huihui, who 'have joined the

944. Report on Petition of Taipari Heihei, AJHR, 1897, I-3, p 3.
945. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1355–1356.
946. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1360; Haami Piripi (doc Q11), p [5]. Arama Karaka Pī's half-brother Te Mokaraka was another leader of Te Huihui.
947. Ipu Absolum (doc X53), pp 4, 6.
948. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1360.
949. Constable Gordon to Inspector of Police, Auckland, 21 March 1896, as quoted in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1367.

fanatics'.[950] On 27 March, Clendon relented, allowing Te Huihui to remain in their camp so long as they relinquished their firearms. Te Huihui duly handed over 14 muskets, and Clendon reported that the matter was at an end, Te Huihui's 'ulterior intentions' having been 'completely crushed'.[951]

Soon afterwards, Toia made several attempts to reach an accommodation with the Government. In early April, he and 171 others wrote to Seddon asking for £300, and that the Premier respond to 'this application of your humble servant, for these money's which should reach my hands for my means of subsistence have failed me'.[952] According to Armstrong and Subasic, Te Huihui had accumulated debts while in camp at Mangatoa, which the depleted gumfield had not been sufficient to cover.[953] In return, Toia offered 'a part of [his] regard in the days that are to come, let this be a regulation between you and me and my people under your "mana"', under which the Government would have the 'care' of Toia's lands, both under customary and Crown title: 'Your might and mine will be upon these lands I will give the management of these lands for us and our descendants.'[954]

Crown officials read this letter as implying that Toia was offering land for sale, though the meaning is not altogether clear. The references to Seddon's mana and to preservation of land for future generations under the might of both Te Māhurehure and the Crown suggest a different motive, in which Toia was offering to cooperate with the Government in return for relief from impoverishment and an assurance that his people's lands would be protected. The Government does not appear to have responded directly; rather, it passed the letter to Clendon and to land purchasing officials, who decided to wait for an approach from Te Huihui.[955]

Toia then attempted to raise a £500 loan from the Bank of New Zealand using some of his lands as security. When the bank turned him down, he approached the Government again in early May asking for it to intervene on his behalf 'so that the money may be forthcoming'.[956] He repeated this request later in May, and again in June, but the Government did not respond.[957] Toia then wrote to the Government in July, seeking 'stringent laws' for the Native Land Court. While his meaning is not clear, Armstrong and Subasic suggested he was seeking an amendment to the

950. Seddon to Commissioner of Police, 25 March 1896 (Armstrong and Subasic document bank, doc A12(a), vol 14, p 7:333); Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1367.

951. Clendon to Justice Secretary, 30 March 1896, as quoted in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1368.

952. Toia to the Government, 8 April 1896, as quoted in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1368–1369.

953. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1369–1370, 1372–1373.

954. Toia to the Government, 8 April 1896, as quoted in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1369.

955. Armstrong and Subasic thought that Toia was specifically asking for an assurance that the Government would not take land in lieu of any unpaid rates and taxes: 'Northern Land and Politics' (doc A12), pp 1369–1370.

956. Toia to the Government, 7 May 1896, as quoted in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1371.

957. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1371.

law to allow him to obtain Crown title while acting as a trustee for his people, and by this means raise funds by borrowing against the land.[958]

In September, he wrote again, asking for a response 'lest trouble arise amongst us because of your way of doing things'.[959] He said he remained well disposed towards the Government, while also asking that it return the muskets confiscated in May. The Government asked Clendon, who advised against returning the weapons; he reported that Toia was still holding monthly meetings agitating against the payment of rates and taxes, including the dog tax.[960] The Justice Secretary wrote, telling Toia to refrain 'from disturbing the people's minds, by telling them that they should not fulfil the requirements of the law. This is a very foolish proceeding on your part.' The Justice Secretary also advised Toia to contact a land purchase officer if he wanted to sell land.[961] Te Huihui was clearly impoverished, and this appears to have been a major factor in the community's opposition to taxes. It is significant, then, that after six letters from Toia and his people, the Government offered no solution other than Te Huihui selling its lands.

At some point, Te Huihui returned to their lands at Hauturu, distant from any Pākehā settlement. Nonetheless, Hokianga county officials, determined to assert their authority and encouraged by the Government's stance on compliance with the law, continued to pursue Te Huihui for payment of dog taxes. Te Huihui adopted a course of passive resistance, refusing to pay the taxes, or local rates, or place any lands before the Native Land Court. In May 1897, Hokianga police arrested 13 Te Huihui supporters for repeated non-payment of the tax. Three who did not pay their fines were sentenced to one-month prison terms, which they served at Mount Eden after refusing offers to have the fines paid on their behalf.[962] To this point, the police had enforced the tax on unregistered dogs. In June, the council asked Harry Menzies, the county's newly appointed dog registrar, to proactively collect the tax. Menzies was given four sub-collectors, three Māori and one Pākehā, and was paid one shilling for every dog registered.[963]

In August 1897, Toia wrote to the Government again, asking that Hokianga be exempt from the dog tax. There is no record of a response, and a note on the letter indicates that Government officials wanted the law enforced. In September, the police arrested two more rangatira for non-payment of fines. They were also imprisoned. These enforcement actions, taken without apparent regard for Te Huihui's inability to pay, reinforced the determination of Te Huihui leaders and members to avoid or resist the tax. The Hokianga County Council told the police that 50 more Te Huihui supporters were waiting to be arrested, as imprisonment

958. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1371–1372.
959. Hone Toia to the Government, 22 September 1896, as quoted in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1372.
960. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1372.
961. Justice Secretary to Toia, 21 October 1896, as quoted in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1372.
962. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1373, fn 3311.
963. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1375.

made them heroes among their community.[964] Similarly, we note, Taranaki men had willingly been arrested for fencing or ploughing up land the Crown claimed as confiscated, 20 years earlier.

11.5.2.12.2.2 *Why did the Government send troops into Hokianga?*

Although the situation calmed towards the end of the year, the Crown's actions made Toia and his followers increasingly determined to resist further demands for the dog tax. In the first few months of 1898, Menzies visited Hauturu, collecting the names of 51 dog owners and issuing new dog tax demands (at two shillings sixpence per dog).[965] Rangatira told Menzies they would not pay, and Menzie issued notices for them to appear in court for non-payment. The court adjourned the cases at Toia's request, and he arranged for county officials and Te Huihui to meet at Pukerimu on 28 April.[966]

In the lead-up to the trial, which was now scheduled for early May, Menzies and possibly other county officials told the defendants they would be sent 'to a cold country [where] their bones would crack'.[967] This provocation raised the stakes in an already tense situation. Aware of the Crown's treatment of Te Whiti and Te Kooti in preceding decades, Te Huihui supporters took the threat at face value and genuinely feared they would be sent to prison in the South Island if they did not pay the tax. Women and children took to sleeping in the bush outside the camp so they would not be caught.[968]

On 28 April, Toia and a large group of supporters met as planned with county officials at Pukemiru, swearing that they would not pay the dog taxes, and nor would they stop shooting kererū out of season or comply with any other European laws. Nor would they accept imprisonment if that meant being sent to a cold climate for life; rather, they would fight to the death.[969] Toia informed local officials that his people were determined to travel to Rāwene carrying arms. They would forcibly resist any attempt to enforce the law but would not harm settlers. He supported this with a telegram underlining that any arrest attempt would lead to bloodshed.[970]

964. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1374.

965. Judge's notes (Ipu Absolum document bank (doc X53(a), p 7); the taxation rate is noted in 'The Maori Rising', *New Zealand Herald*, 9 July 1998, p 3.

966. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1376; Armstrong and Subasic, supporting papers (doc A12(a), vol 14), pp [168]–[169].

967. Armstrong and Subasic, supporting papers (doc A12(a), vol 14), pp [168]–[169]; Judge's notes (Absolum, supporting papers (doc X53(a)), p 7); see also 'The Maori Rising', *New Zealand Herald*, 9 July 1898, p 3. Most witnesses at the subsequent court hearing believed it was Menzies who made this statement; others attributed it to Hokianga councillors Alfred Andrews or William Burr. The court records indicate the statement was made more than once, possibly by Menzies and other officials.

968. 'The Maori Rising', *New Zealand Herald*, 9 July 1898, p 3; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1377–1378.

969. 'The Maori Affair at Rawene', *New Zealand Herald*, 16 May 1898, p 6; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1379–1380, 1381.

970. 'The Maori Affair at Rawene', *New Zealand Herald*, 16 May 1898, p 6; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1378.

Hokianga officials called for reinforcements, and the Government, determined to quash the resistance and conclusively assert its authority, sent a sizeable military force with instructions to arrest Toia and his supporters.[971] When an advance party of seven police from Auckland arrived in Rāwene on 1 May, a group of Toia's men visited the town to investigate, but left after assuring local clergy and settlers that they would not initiate any conflict.[972] The advance party was followed on 2 and 3 May by a military force comprising 120 soldiers – most of the colony's infantry – with various armaments including two cannon and two machine guns.[973] Seddon and other Ministers gathered on the wharf in Wellington to farewell the *Hinemoa*, which carried the bulk of these troops.[974] The *New Zealand Herald* thought the force something of an overreaction, while acknowledging that its size would be likely to deter resistance.[975]

The troops' arrival further escalated tensions. Several neutral rangatira (Pene Tāui, Heremia Te Wake, Hōri Hare, Hapakuku Moetara, and Rē Te Tai)[976] intervened and sought time to diffuse the situation. Toia retreated to Otātara (near Waimā), and relatives, including reinforcements from Te Rarawa, and from Kaikohe and Whirinaki, began to join him. Toia agreed not to take any aggressive action, but sought immunity from prosecution for himself and his people. The commanding officer of the military forces, Lieutenant Colonel Stewart Newall, insisted on unconditional surrender, and on 5 May ordered his troops inland towards Waimā.[977]

Early that afternoon, the troops reached as far as Ōmanaia, where the neutral rangatira again met Newall, this time carrying a letter from Toia who asked that no hostilities begin until he had spoken with the Northern Maori member of the House Hōne Heke, who was due to arrive that night. Newall offered an apparent compromise, agreeing to spend the night at the Waikarami schoolhouse and not advance to Otātara until noon on 6 May. In reality, however, he knew the troops had no chance of reaching Waimā that night, difficulty transporting the machine guns having slowed their progress earlier that day.[978] Nevertheless, this delay in the troops' advance appears to have prevented significant casualties on both sides. Te Huihui had set up ambush positions along the road from Ōmanaia to Waimā, and according to one Hokianga constable, 'could have slaughtered our men without being seen'. Instead, a message from Toia reached his sentries just in time to

971. Hill, *The Iron Hand in the Velvet Glove*, p 137; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1381–1382.

972. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1381–1382.

973. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1383–1384; Brooking, King of God's Own, kindle edition, p 304.

974. 'Despatch of Troops', *Evening Post*, 2 May 1898, p 5.

975. 'The Native Disturbance at Hokianga', *New Zealand Herald*, 3 May 1898, p 4.

976. 'The Maori Affair at Rawene', *New Zealand Herald*, 16 May 1898, p 6. Rē Te Tai was the father of Meri Te Tai Mangakāhia, who is discussed in section 11.5.2.

977. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1385–1387.

978. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1386–1387.

avoid hostilities. Only two shots were fired: by some accounts, these were warning shots; by others, they narrowly missed one of the army officers.[979]

Heke arrived at Kawakawa on the afternoon of 5 May and rode straight for Otātara, where he attempted to persuade Toia and his followers to surrender – the alternative being Crown–Māori warfare in Ngāpuhi territory. Te Huihui agreed to consider what Heke said and meet again in the morning. Heke then went to Newall's camp, where the Lieutenant Colonel repeated his promise to wait until midday before advancing. In the morning, Heke and several of the neutral rangatira met Toia and his supporters once more. According to the report in the *New Zealand Herald*, Toia 'rose and said that he and his followers had decided not to defy the law'. They would give up their arms and 'submit and be peaceful'.[980]

Heke then telegraphed the Premier, who in turn telegraphed Newall, ordering him to remain in position until further notice. This message arrived at 11am, an hour before the planned advance. At 11.30 am, Heke walked into the soldiers' camp with Toia and four other Te Huihui leaders: Hōne Mete, Romana te Paehangi, Rakene Pehi, and Makara. Heke explained that they were surrendering unconditionally. Toia and his supporters then handed over 14 guns with ammunition and the five Te Huihui leaders were arrested.[981]

Over the next few days, 11 more Te Huihui leaders were arrested, and Te Huihui supporters handed in 25 more firearms. Seddon and other Ministers insisted on the relinquishment of the weapons, believing that Te Huihui were more heavily armed than in fact they were. One of the arrested men was Hōhepa Tāwhai, whose father Hōne Mohi Tāwhai had done much to find accommodation between Māori and Crown systems of law, and whose grandfather Mohi Tāwhai had aided the Crown during the Northern War.[982] These arrests ended the so-called 'Dog Tax War', this district's final act of armed Māori resistance against the Crown, and one of the last anywhere in New Zealand.[983]

11.5.2.12.2.3 *What was the impact of this conflict on the Crown's relationship with Te Raki Māori?*

The 'Dog Tax War' was the first occasion since the Northern War in which the Government had sent armed forces with hostile intent into Ngāpuhi territories. As settler newspapers pointed out in the aftermath, this action was not about collecting a tax: the revenues involved were minor, and the tax's impact 'trivial'.[984] Rather,

979. Belich, *Making Peoples*, p 268; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1386–1387; 'The Rawene Native Difficulty', *New Zealand Herald*, 7 May 1898, p 5.

980. 'The Rawene Native Difficulty', *New Zealand Herald*, 7 May 1898, p 5; see also Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1387–1388.

981. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1387–1390.

982. 'The Maori Rising', *New Zealand Herald*, 9 July 1898, p 3; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1391. Regarding Hōhepa Tāwhai, see Judge's notes (Absolum document bank (doc X53(a)), p 26).

983. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1392–1393; Hill, *The Iron Hand in the Velvet Glove*, p 89.

984. For example, see 'The Native Disturbance at Hokianga', *New Zealand Herald*, 3 May 1898, p 4.

this action was about asserting the Crown's authority over Māori and discouraging other Māori from resistance or the pursuit of independence. It was, as Seddon wrote to Heke as the conflict was unfolding, about the Government's determination to ensure that its laws were enforced, and that Māori complied with the same laws as Pākehā.[985]

In this, it was effective. Many historians have seen this as a pivotal and perhaps decisive event in the Crown's assertion of substantive sovereignty within this district.[986] That is also our view. From this point, although Te Raki Māori might at times disagree with the Crown, and although some Māori land remained under customary authority (largely centered in Te Rohe Pōtae o Ngāti Hine, with some further land around the Hokianga harbour, south-eastern Bay of Islands and Whangaroa),[987] there was little realistic prospect of Māori resisting the Government's enforcement of its laws.

If, as many scholars have argued, state monopoly on use of force is the fundamental test of substantive sovereignty, through its actions the Crown did effectively assert its authority over Te Raki Māori.[988] We have no doubt that Te Huihui sentries could have inflicted significant harm on the government force, and (as Heke observed at the time) the outcome of any initial battle was not a foregone conclusion. But Heke's intervention and Toia's surrender both reflected an underlying reality that Ngāpuhi could not bear the devastating cost of war with the Crown – so submission became the only viable course.[989]

Seddon's biographer Tom Brooking has argued that the Premier was also aiming to discourage Kotahitanga leaders from any further pursuit of 'home rule'.[990] As we have seen, Kotahitanga objectives did indeed change course from about this time: leaders including Heke no longer pressed the Government to recognise the Paremata Maori or allow Māori to determine their own laws; rather, Kotahitanga pursued accommodation with the Crown aimed at providing for limited and local forms of self-government under Crown control. At a district level, immediately after the conflict Heke and other leaders undertook to dissuade their people – many of whom sympathised with Te Huihui – from any further resistance to the colony's laws.[991]

985. 'The Rawene Native Difficulty', *New Zealand Herald*, 9 May 1898, p 5.

986. For example: Belich, *Making Peoples*, p 268; Hill, *The Iron Hand in the Velvet Glove*, p 137; Adrienne Puckey, 'The Substance of the Shadow' (doctoral thesis, University of Auckland, 2006), p 177; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1326.

987. Paul Hamer and Paul Meredith, 'The Power to Settle the Title?: The operation of papatupu block committees in Te Paparahi District 1900–1909 (Doc A62), p 51; Thomas, 'The Native Land Court in Te Paparahi o Te Raki' (doc A68), p 234.

988. Belich, *Making Peoples*, p 268.

989. Hill, *The Iron Hand in the Velvet Glove*, p 135; Belich, *Making Peoples*, p 268; 'The Rawene Native Difficulty', *New Zealand Herald*, 7 May 1898, p 5.

990. Brooking, King of God's Own, kindle edition, p 306. Brooking also said that Seddon, mindful of his Government's narrow majority, shored up Pākehā votes in the north before the 1899 election. There is also evidence that Seddon was concerned about how the dog tax conflict might be perceived in Britain: see *New Zealand Herald*, 9 May 1898, p 5; Observer, 14 May 1898, p 2.

991. 'The Rawene Native Difficulty', *New Zealand Herald*, 10 May 1898, p 6.

After their arrests, the Te Huihui prisoners were taken to Auckland and charged with 'conspiracy to levy war against the Queen in order to force her to change her measures, and conspiring by force to prevent the collection of taxes'. Some were also charged with unlawful assembly and assault. The charge of the conspiracy to levy war was dropped after the defendants pleaded guilty on the other charges.[992] At their trial in the Supreme Court in July, their lawyer (Fred Earl) attempted to persuade the judge (Justice Edward Connolly) that Te Huihui's actions were a legitimate protest under the treaty, reflecting Māori understanding that they were to be left in undisturbed possession of their lands and personal property, and therefore free of the colony's laws and taxes.[993] Judge Connolly rejected these arguments, convicting all 15 defendants, sentencing Toia and three other leaders to 18 months' hard labour, and imposing £10 fines and good behaviour bonds on the others, who were imprisoned until they paid.[994]

After this trial, the Hokianga County Council went ahead with proceedings against 38 other Te Huihui supporters, seeking payment of the dog taxes. The magistrate (Clendon) fined each of the defendants five shillings. With court costs, the total amount demanded of Te Huihui exceeded £90. After protests by Ngāpuhi rangatira, the fines were remitted on condition that Te Huihui stay out of 'trouble', but costs of about £50 were still imposed.[995] Each of these convictions represents a clear assertion of Government authority over a Māori community.

In March 1899, after deputations from Pene Tāui and other Hokianga leaders, the Governor, acting on Seddon's advice, used his power of clemency to release Hōne Toia and other imprisoned Te Huihui leaders. As discussed in section 11.5.3.5, Seddon announced this decision at the 1899 Kotahitanga Paremata, where he was seeking the support of Te Raki leaders for his Māori land proposals.[996] Seddon also conceded that the Hokianga County Council 'had not acted wisely or judiciously' in its dog tax enforcement, and had cost the colony far more than it could raise through the tax.[997]

In evidence to this inquiry, Ihu Absolum of Te Māhurehure said the dog tax must be seen alongside land taxes, wheel taxes (on carts and wagons), prohibitions on hunting, and confiscation of firearms used in hunting, as 'part of an overall system that impoverished our people while separating them from the resources that sustained them'. Trials, fines, and imprisonment of Te Māhurehure men further impoverished the hapū, taking them from their mahinga kai and other work

992. Judge's notes (Absolum document bank (doc x53(a)), p 2); 'The Maoris and the Dog tax', *New Zealand Herald*, 5 July 1898, p 3; 'The Maori Rising', New Zealand Herald, 9 July 1888, p 4; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1396.

993. 'The Maori Rising', *New Zealand Herald*, 9 July 1898, p 3; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1326, 1372–1373. The *Auckland Star* similarly explained that Te Huihui had banded together 'to insist on the right of the Maoris to govern themselves and their lands under the provisions of the Treaty of Waitangi': 'The Maori Trouble', *Auckland Star*, 16 May 1898, p 2.

994. Judge's notes (Absolum document bank (doc x53(a)), p 32).

995. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1397–1399.

996. 'The Governor's Tour', *New Zealand Herald*, 16 March 1899, p 6; Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1396.

997. 'The Premier and the Maoris', *New Zealand Herald*, 17 March 1899, p 6.

that provided for the well-being of their whānau. The Government's enforcement action was not only an assertion of its authority over that of rangatira but also forced Te Māhurehure into the colony's cash economy, making them 'a dependent people' and denying them their independence[998] Patu Hohepa (Te Māhurehure) said the Crown's invasion of Waimā and imprisonment of Te Huihui leaders 'was raupatu in the worst possible sense because it almost drove our people to starvation'.[999] We agree with claimants that the Government used the dog tax and the threat of force to assert authority over Māori communities.

There was one further confrontation in the district between a rangatira and his followers and a posse of armed police. Five years after the 'Dog Tax War', a dispute erupted between owners of the Tautoro land block, which was part of the former Rohe Pōtae o Ngāti Hine. The rangatira Iraia Kūao had arranged to partition this block, with the intention that his portion remain as customary land. Other owners wanted to place the whole block before the Tokerau Maori Land Council for title determination, but Kūao threatened to shoot anyone who pursued this course.[1000]

When attempts to negotiate a resolution failed, Kūao and a group of followers began to prepare for an armed response. A contingent of 20 armed police travelled from Auckland in September 1903, entering Kūao's settlement with warrants to arrest the rangatira and his supporters on charges of threatening to kill. Instead, Kūao and his supporters surrendered themselves and handed over their firearms. They were issued fines (ranging from £200 for Kūao to £50 for others) and released on condition that they keep the peace. While in custody, Kūao gave an assurance that he would allow the Land Council to adjudicate on the disputed land.[1001] Although no shots were fired, this appears to have been the last incident in which Te Raki Māori considered armed resistance against Government authority.[1002] In Belich's view, it was also the moment at which the Crown's sovereignty conclusively arrived in the north. We will consider that point in the next volume of our report.[1003]

11.5.3 Conclusions and treaty analysis

11.5.3.1 *The Kotahitanga parliaments*

From the late 1880s through to the mid-1890s, the Kotahitanga movement, in which Te Raki rangatira played a central role, developed numerous proposals for Māori autonomy and self-government at local and national levels, all of which the Crown rejected or ignored. Specifically:

- Following the 1889 Ōrākei parliament, Pāora Tūhaere proposed the establishment of a national Māori assembly which would propose laws to the

998. Absolum (doc x53), pp 4, 9.
999. Patu Hohepa, transcript 4.1.18, p 43.
1000. 'The Land Dispute at Kaikohe', *New Zealand Herald*, 25 April 1903, p 3. Peter Clayworth describes these events in detail in 'A History of the Motatau Blocks c 1880–c 1980' (doc A65), pp 85–97. Also see Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1434–1436.
1001. Clayworth, 'A History of the Motatau Blocks c 1880–c 1980' (doc A65), pp 94–97, 100–102.
1002. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1439.
1003. Belich, *Making Peoples*, p 269.

colonial assembly, and review laws from it. Tūhaere also proposed the abolition of the Native Land Court and the creation of a system of tribal governance over Māori land. After the hui, he wrote to the Government with his proposals, and it took no action.

- The first Kotahitanga Paremata in 1892 resolved that it would make laws for Māori people and lands, and the colonial Legislature should no longer do so; and that native committees should replace the Native Land Court. A delegation then visited Wellington, where they placed their proposals before the Premier and Native Minister, neither of whom took any action.
- Other members of the House did respond. Sir George Grey promised to draft and introduce a Bill providing for local self-government and for a national Māori assembly that would propose laws for consideration by the colonial Parliament. Grey's Native Empowering Bill 1892 was weaker than promised, but did nonetheless make some provision for local self-government. It was introduced but never debated.
- In 1892, James Carroll and William Rees drafted the Native Committees Act 1883 Amendment Bill, which aimed to empower native committees to determine title and manage dealings in Māori lands – essentially the powers that Māori had expected of the original Act. This, too, was introduced but never debated.

Between 1893 and 1896, Kotahitanga provided several more opportunities for the Crown to engage with its leaders with a view to recognising Māori self-government:

- The Federated Maori Assembly Empowering Bill 1893 provided for district committees established under section 71 of the New Zealand Constitution Act, empowered to determine land ownership and manage landholdings.
- The 1893 Kotahitanga petition proposed to establish an autonomous Māori parliament, consisting of an upper and lower house, to govern all Māori (or at least all Māori who had signed the Kotahitanga pledge). It also proposed a system of district committees empowered to determine titles and manage lands.
- The Native Rights Bill 1894 provided for the establishment of a separate parliament for Māori, which would make laws dealing with the personal rights, lands, and property of all Māori people. The Bill was reintroduced in 1895 and again in 1896 but was not debated.

Ministers gave varying responses to these proposals. Some, such as Joseph Ward in 1892, were sympathetic, acknowledging that injustices had occurred and offering hope that initiatives for Māori autonomy and self-government might be considered. Others insisted that the treaty guaranteed Māori no more than citizenship rights and secure title to their lands; that the Crown, as a matter of law, was entitled to control Māori lands, fisheries, and other resources; that the colonial Parliament had never enacted laws that breached the treaty, except to abandon Crown pre-emption; and Māori must comply with settler laws and taxes. They held these views notwithstanding careful explanations made by Hōne Heke

Ngāpua and other Kotahitanga leaders about the basis for Māori self-government in he Whakaputanga, and the New Zealand Constitution Act.

To a significant degree, Kotahitanga leaders were seeking no more than the Crown's legal recognition for local komiti and national paremata that were already operating. With respect to local self-government, legal recognition of native committees was clearly possible for the Crown: rūnanga had been tried in the 1860s, and native committees in the 1880s. Hōne Mohi Tāwhai first proposed to establish native committees with legal authority over land disputes in 1880. This would have formalised the role already played by bodies such as Te Komiti o te Tiriti o Waitangi in the Bay of Islands. However, this proposal was not taken up, and the committees that were eventually established under Bryce's Native Committees Act 1883 lacked real power and foundered as a result. Te Raki rangatira, including Wiremu Pōmare and Maihi Parāone Kawiti at Kawakawa, and Wiremu Kātene, Hōne Peeti, and Hōne Heke at Waimate, argued again before the Native Land Laws Commission in 1891 for land titles to be determined by native komiti or rūnanga.[1004] Struck by the consistent calls for thorough reforms, the commissioners recommended that komiti and rūnanga be established to determine questions of land ownership and boundaries. But these, too, were ignored.[1005] Carroll's 1892 native committees legislation was a further, significant opportunity for the Crown to have delivered on its obligation to protect the tino rangatiratanga of Māori communities with respect to their lands. The Federated Maori Assembly Empowering Bill 1893 was another very significant opportunity. The Crown missed them both.

With respect to proposals for national self-government, the Crown's failure to seriously engage with the Native Rights Bill was a particularly significant missed opportunity to provide for an effective Māori voice in the making of the colony's laws. The Kotahitanga assembly had already been operating for several years and had shown itself capable of developing legislative proposals. In contrast, the colonial Parliament had been unresponsive to the persistent petitions of Te Raki Māori seeking greater representation in government, and relief from the effects of the Crown's Native Land legislation and the dog tax. In this context, it is not surprising that Te Raki Māori strongly supported the Kotahitanga Paremata and, as Armstrong and Subasic observed, that Kotahitanga became 'the primary vehicle both for the airing of their grievances, and just as importantly, for the realisation of their long-standing political aspirations for self-government and control over their land.'[1006] The independent voice of Te Raki Māori within Kotahitanga was best captured by Hōne Heke Ngāpua, whose Native Rights Bill became the centrepiece of the Kotahitanga strategy from 1893, the same time as he was also elected to represent the Northern Maori electorate in Parliament.

In the *He Maunga Rongo* report, the Tribunal concluded that 'the key point which prevented the Crown accepting a national Maori body to draft laws (or regulations) for Maori lands was not that it was inconceivable, impractical, or

1004. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1179–1184.
1005. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 1190–1191.
1006. Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 1304.

unreasonable by the standards of the time.'[1007] The Tribunal noted that over the late 1880s and 1890s, Balance and Seddon had submitted draft Bills to national Kotahitanga hui, indicating that 'the Crown could and did work with such meetings of representative Maori leaders'. In these exchanges, the will of Māori was made known to the Government, and it would have been no great leap of principle or practice to establish a more permanent provision for Māori input into legislation affecting them.[1008] What remained to be worked out was the relationship between Māori and colonial assemblies, including questions about their respective jurisdictions and how any conflicts would be resolved. We acknowledge that Heke's Bill went further than previous Te Raki Māori proposals towards the establishment of a separate system of government; in this, Heke's proposal appears to have reflected the depth of Ngāpuhi Māori frustration with the colonial Parliament. With good will on both sides, any differences could have been resolved. But the Crown did not attempt to negotiate over these matters; it rejected the Kotahitanga proposal out of hand. We agree with the conclusion of the Central North Island Tribunal in *He Maunga Rongo* that in the end,

> [I]t came down to economic self-interest. Settlers considered they had an equal or predominant interest in Maori lands, that those lands must in fact be transferred to them, and that ultimate power over them must be retained by the settler Government. (These points emerge very clearly in the parliamentary debates and other documentation of the time.) This was the reason why Home Rule was acceptable for the Irish but not for Maori.[1009]

More broadly, the Crown rejected a historically unique opportunity to make provision in New Zealand's constitutional arrangements for Māori tino rangatiratanga or autonomy at a national level, or for the Paremata Maori, in a manner that secured meaningful power for both treaty partners and allowed them to work constructively together. Māori had done the hard work by creating a representative assembly with very broad support. They had also met their obligations under te mātāpono o te whakaaronui tētahi ki tētahi/the treaty principle of mutual recognition and respect by sustained engagement with the Crown over a number of years in order to achieve mutual understanding and mutually acceptable oucomes. They could not perhaps accept some colonial institutions. Parliament was seen as overwhelmingly representative of settler interests, and along with the Native Land Court, both were viewed as hostile to Māori treaty rights and damaging to their communities. But they recognised that it was in their best interests to reach accommodation with the New Zealand Government and Parliament, and to secure their recognition of tino rangatiratanga. By the late 1890s, the Kīngitanga was also prepared to recognise the colonial Parliament, thus removing a key obstacle to agreement between the various parties. Yet, when Seddon did enter meaningful

1007. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, p 378.
1008. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, p 374.
1009. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 1, p 378.

negotiations at that time, he sought to divide Kotahitanga and pursued a model that significantly curtailed Māori influence at a national level, and provided for local self-government that was limited (particularly in respect of land) and operated under the Crown's control.

Accordingly, we find that:

- By rejecting Kotahitanga proposals for Māori autonomy and self-government in the early 1890s, and in particular by rejecting the Native Committees Act 1883 Amendment Bill 1892, the Federated Maori Assembly Bill 1893, the Kotahitanga petition 1893, and the Native Rights Bill 1894 (including when it was reintroduced in 1895 and 1896), the Crown acted inconsistently with its obligation to recognise and respect the tino rangatiratanga of Te Raki Māori, in breach of te mātāpono o te tino rangatiratanga and te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect. It also breached te mātāpono o te houruatanga/the principle of partnership.
- By failing to enter meaningful negotiations over the Kotahitanga proposals until the late 1890s, the Crown breached te mātāpono o te houruatanga/the principle of partnership.

11.5.3.2 *The 'Dog Tax War'*

As with its rejection of the Kotahitanga proposals and other proposals for Māori self-government, the Crown's imposition of the dog tax and encouragement for county councils to enforce the tax reflected its overarching aim to realise its substantive sovereignty in the north. It imposed the tax and supported enforcement without regard to its treaty obligations, despite Maihi Parāone Kawiti, Hōne Toia, and other rangatira invoking the treaty agreement both during the disputes and in the trials they were subjected to afterwards. The tax was imposed over communities that had not accepted the authority of the Crown's systems of national or local government; it amounted to taxation without adequate representation; and the imposed fines were punitive and impoverishing. The Crown's subsequent arrest of Te Huihui followers at gunpoint was an unnecessary and disproportionate use of force, which was intended to intimidate Māori in this district and elsewhere, serving as a warning that the Crown would not tolerate open defiance of its authority.

Accordingly, we find that:

- By supporting and encouraging this district's county councils to enforce the dog tax on communities that lived on customary Māori land and had not consented to the Crown's system of national or local government, the Crown breached te mātāpono o te tino rangatiratanga, and te mātāpono o te houruatanga/the principle of partnership.
- The Crown's arrest at gunpoint of Hōne Toia and other followers of Te Huihui was disproportionate, overly punitive, and calculated to intimidate Māori. This was in breach of te mātāpono o te mana taurite/the principles of equity and te mātāpono o te kāwanatanga. It was also in breach of te

mātāpono o te tino rangatiratanga, and te mātāpono o te houruatanga/the principle of partnership.

11.6 Whakarāpopototanga o ngā Whakataunga / Summary of Findings

In respect of parliamentary representation for Te Raki Māori, we find that:

- By providing for Māori representation in the House of Representatives through the Maori Representation Act 1867 without first engaging with Te Raki Māori, and in particular without seeking their input on the number and size of electorates, the Crown breached te mātāpono o te kāwanatanga me to mātāpono o te houruatanga/the principle of partnership.
- By effectively denying the great majority of Māori representation in the General Assembly, and then providing for the election of only four Māori members to the House, including only one for all northern Māori, when they were entitled to between 12 and 14 on a population basis in 1867, the Crown breached te mātāpono o te kāwanatanga me te mātāpono o te mana taurite/the principle of equity. The Crown also breached this principle by failing to ensure that Māori were represented in the Legislative Council and in provincial assemblies (the Auckland Provincial Council in the case of Te Raki Māori).
- By rejecting legislative proposals to increase Māori representation during 1871, 1872, 1875, and 1876, the Crown breached te mātāpono o te kāwanatanga, te mātāpono o te mana taurite me te mātāpono o te houruatanga/the principles of equity and partnership.

In respect of Te Raki Māori proposals for rūnanga and Native committees, we find that:

- By failing to take the opportunities offered by Wiremu Kātene's 1871 proposal for the establishment of rūnanga based on partnership in districts north of Auckland, and the Native Councils Bills of 1872 and 1873, the Crown breached te mātāpono o te houruatanga/the principle of partnership; it also acted inconsistently with its obligation to recognise and respect the tino rangatiratanga of Te Raki Māori and give effect to proposals for their self-government at a regional and local level in breach of te mātāpono o te tino rangatiratanga.
- The Native Committees Empowering Bill 1881 and the Native Committees Bill 1883 presented significant opportunities for the Crown to provide for Māori autonomy and self-government at a local level. By declining to pursue these opportunities, by instead establishing committees that lacked real power or authority, and by declining Te Raki Māori requests to increase the powers of committees established under the Native Committees Act 1883, the Crown acted inconsistently with its obligation to recognise and respect the tino rangatiratanga of Te Raki Māori, in breach of te mātāpono o te tino rangatiratanga and te mātāpono o te whakaaronui tētahi ki tētahi/the

principle of mutual recognition and respect. It also breached te mātāpono o te houruatanga/the principle of partnership.

In respect of proposals for a Māori Parliament, we find that:

- By declining to enter negotiations over the establishment of a Māori parliament despite repeated requests by Te Raki Māori (specifically, in Hirini Taiwhanga's 1878 petition, at the Waitangi parliament in 1881, in Hirini Taiwhanga's 1882 petition, in Hōne Mohi Tāwhai's 1883 petition, and on several other occasions during the 1880s), the Crown acted inconsistently with its obligation to recognise and respect the tino rangatiratanga of Te Raki Māori, in breach of te mātāpono o te tino rangatiratanga and te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect. This was also in breach of te mātāpono o te houruatanga/the principle of partnership.
- By impugning the credibility, integrity and status of Ngāpuhi leaders who petitioned the Queen in 1882 and 1883, in order to ensure that they would not meet the Queen and in order to prevent serious inquiry by the imperial government into the treaty issues they raised, the Crown committed a serious breach of its obligation to act in good faith towards its treaty partner, in breach of te mātāpono o te houruatanga/the principle of partnership.

In respect of Te Raki Māori appeals for redress and petitions, we find that:

- The Crown, by ignoring or rejecting petitions and other requests from Te Raki Māori for recognition of their tino rangatiratanga (in particular Hirini Taiwhanga's 1882 petition, the 1883 letter to the Aborigines' Protection Society, Wī Katene's 1884 petition, and further petitions and letters from 1886 to 1888), the Crown breached its duty of good faith, and te mātāpono whakatika/the principle of redress.

In respect of the Kotahitanga parliaments, we find that:

- By rejecting Kotahitanga proposals for Māori autonomy and self-government in the early 1890s, and in particular by rejecting the Native Committees Act 1883 Amendment Bill 1892, the Federated Maori Assembly Bill 1893, the Kotahitanga petition 1893, and the Native Rights Bill 1894 (including when it was reintroduced in 1895 and 1896), the Crown acted inconsistently with its obligation to recognise and respect the tino rangatiratanga of Te Raki Māori, in breach of te mātāpono o te tino rangatiratanga and te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect. It also breached te mātāpono o te houruatanga/the principle of partnership.
- By failing to enter meaningful negotiations over the Kotahitanga proposals until the late 1890s, the Crown breached te mātāpono o te houruatanga/the principle of partnership.

In respect of the 'Dog Tax War', we find that:

- By supporting and encouraging this district's county councils to enforce the dog tax on communities that lived on customary Māori land and had not consented to the Crown's system of national or local government, the

Crown breached te mātāpono o te tino rangatiratanga, and te mātāpono o te houruatanga/the principle of partnership.

- The Crown's arrest at gunpoint of Hōne Toia and other followers of Te Huihui was disproportionate, overly punitive, and calculated to intimidate Māori. This was in breach of te mātāpono o te mana taurite/the principles of equity and te mātāpono o te kāwanatanga. It was also in breach of te mātāpono o te tino rangatiratanga, and te mātāpono o te houruatanga/the principle of partnership.

11.7 Ngā Whakahāweatanga / Prejudice

On numerous occasions between 1865 and 1900, Te Raki Māori engaged with the Crown seeking recognition of institutions that would protect and provide for the ongoing exercise of tino rangatiratanga and self-government. Consistently, the Crown ignored, dismissed, rejected, or undermined these proposals. In 1883 and 1900, the Crown enacted legislation providing for very limited Māori authority over local affairs and lands, but neither was intended to provide for the fullest expression of Māori self-government.

From the mid-1860s, the relationship between the Crown and Te Raki Māori entered a new phase. With the Crown's side of the Crown–Māori relationship now in the hands of the colonial Government, the Crown abandoned its attempts to govern Māori through indirect rule and instead pursued a course aimed at breaking down traditional Māori systems of authority, hastening Māori submission to the colony's laws and institutions of government, and opening Māori lands for settlement on a massive scale. To most settler politicians during this period, the treaty did not guarantee Māori mana and tino rangatiratanga, encompassing full, independent authority over their territories and resources.[1010] Nor, in their view, did it provide for an enduring relationship between the Crown and Māori based on mutual peace and prosperity. Rather, to them, the treaty guaranteed only that Māori could own their customary lands and exercise citizenship rights, while authority was reserved for the colony's institutions of government.

Te Raki Māori responded to this new policy direction in two ways. First, they demonstrated their commitment to the treaty relationship by acknowledging their acceptance of the Queen's protection, seeking trade and settlement within their rohe, offering military and diplomatic assistance to the Crown, and working with the Crown's courts and other institutions to manage Māori–settler relationships. Secondly, they sought new means of expressing and protecting their tino rangatiratanga rights. They established new institutions at local, regional, and national levels, and sought Crown recognition of their enduring rights to self-government and their right to be protected from laws that encroached on their mana and tino rangatiratanga.

Notwithstanding these efforts, the Crown succeeded in its objectives. Having asserted its claim to sovereign authority through a series of North Island wars,

1010. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 512.

the Crown then progressively undermined Māori tribal authority. Over time, the Native Land Court and Crown purchasing severed traditional relationships with land and resources. State-sponsored immigration left Māori in a minority in their traditional territories. When Māori sought economic advancement, the Crown demanded that they first submit to the colony's laws, give up land for public works, and pay rates, taxes, and duties which further threatened land and community authority.

During the 1880s, the Crown also began to assert its authority by force: arresting and imprisoning members of Hokianga prophetic communities, and then sending soldiers against Te Huihui, an impoverished Hokianga community who rejected the Crown's authority and would not pay its taxes. By sending such a large force, the Premier clearly intended to overawe Te Huihui and all of Ngāpuhi, and indeed to set an example to all Māori who sought to maintain their independence. It took Māori mediation to ensure that bloodshed was averted, though it could not save Hokianga men from prison and from fines that they could not afford. The grief and bitterness left by the Government's response is still evident today.

The immediate effect was to pressure Te Huihui into submission, even though they were living on customary lands and had never accepted the colonial Government's right to tax them or enforce its laws over them. But there was a broader, chilling effect on Te Raki Māori autonomy. For many decades, both sides had avoided open conflict, knowing that the costs would be too high. Now, the Crown was prepared to embrace open conflict, believing that it had the stronger force. From that point, Māori knew that the Crown would back its presumed sovereignty with arms. Ngāpuhi leaders ensured that the conflict ended without bloodshed, and to this extent they exercised their tino rangatiratanga; but their efforts could not prevent Māori submission to an overarching Crown authority.

Even within the colonial system of government, the Crown was not prepared to share meaningful power. The Crown's few concessions to Māori autonomy during this period were tokenistic and manifestly inadequate, failing to provide for tino rangatiratanga even at a local level, or to protect Māori from systematic attacks on their authority and resource rights. At no point was it willing to give Māori effective power within the colony's system of government, in recognition of their tino rangatiratanga. Ngāpuhi and Kotahitanga leaders were urged to bring their proposals to the Government, and did so year after year, through every channel at their disposal; yet their representations appeared to be met with little interest, with patronising suggestions to redirect their efforts, or with complete rejection. By 1900, the Crown had extended its practical authority over much of the district, and the capacity of Te Raki Māori to exercise their tino rangatiratanga had been commensurately weakened.

By 1900, Māori in most parts of the district could no longer fully exercise the rights traditionally associated with tino rangatiratanga, including rights to possess, manage, and develop traditional lands and resources; resolve internal disputes; enter trade and economic alliances; and defend their rights and territories, independent of Crown interference. It is not clear that the Crown's reach was yet

complete into every part of the district, but the capacity of Te Raki Māori to resist the Crown's practical authority was much diminished.

Further, the Crown's actions took a severe toll on its relationship with Te Raki hapū, the effects of which were evident to us throughout our hearings. Te Raki Māori had seen this relationship in personal terms, as part of a sacred bond between rangatira and the Queen, in which she would protect them from the harms of colonisation. By 1900, the Crown had made clear that it did not see the relationship in these terms, and that any exercise of Māori authority, however limited, must occur under the control of colonists and their institutions, and on their terms.

CHAPTER 12

KŌRERO WHAKATEPE ME NGĀ TAUNAKITANGA / CONCLUSIONS AND RECOMMENDATIONS

Kua eke i runga i te waka Kotahi. Kia mahara tatou kei hoe whakatuara. Kia tika ano te tikanga o te hoe ki to te hunga o te ihu. Kei huri te hunga o te kei ki te hoe whakamuri.

Now that we have all embarked in one canoe, let us be careful that we do not pull backwards. Let all pull in the same direction, as those who sit in the bows; do not let the people in the stern paddle in the opposite direction.

—Wiremu Pohe of Te Parawhau, speaking at the Kohimarama Rūnanga on Tuesday, 7 August 1860[1]

12.1 Te Paparahi o Te Raki, 1840–1900: Summary and Conclusions

In 1840, Te Paparahi o Te Raki was a complex cultural and political landscape home to thriving hapū and iwi whose histories spanned many generations. Northern hapū and iwi trace their origins to the early explorers from Hawaiki, including Kupe, and Nukutawhiti and Ruanui who established settlements on the Hokianga harbour before exploring the forested interior of the district. Several other waves of settlers arrived over subsequent generations, carried by the many different waka which made landfall in the north, including *Uru-ao*, *Kurahaupō*, *Tākitimu*, *Tinana*, *Māmaru*, *Māhuhu-ki-te-rangi*, *Mātaatua*, *Moekākara*, *Tainui*, and *Te Arawa*. The claimants in our inquiry told us of how their tūpuna who arrived in Te Raki travelled throughout the district, settling in different places, and naming the landscape they found. Over many generations, Te Raki hapū intermarried, collaborated, and on occasion came into conflict forming a network of whakapapa connections, and diverse and intersecting rights in lands and resources that straddled different parts of the district.

In the decades before they signed te Tiriti o Waitangi, Te Raki rangatira had begun incorporating a small but growing population of settlers, as well as new technologies and trading relationships into their communities. The economic benefits of increased contact with the wider world, however, were unevenly

1. 'Proceedings of the Kohimarama Conference', 1 September 1860, *Te Karere Maori/Maori Messenger*, p 19; David Armstrong and Evald Subasic, 'Northern Land and Politics: 1860–1910' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2007) (doc A12), pp 111–112).

distributed among the district's population. While it remained modest, the Pākehā presence did not threaten longstanding forms of social and political organisation. Diverse and adaptable, Māori of the inquiry district held a deep connection with the natural environment and governed themselves — as they had for centuries – according to the tikanga guiding their tribal polities and daily lives.

This first part of our stage 2 report into Te Raki claims has primarily considered the interactions of Te Raki Māori with their treaty partner — the Crown — from the first signings of te Tiriti on 6 February 1840, until the close of the nineteenth century. As the preceding chapters have demonstrated, this engagement was diverse in nature: beneficial in certain times and places and destabilising in others. At various points during this period the Māori–Crown relationship involved negotiation and cooperation; but there was also armed conflict. Māori engaged with colonial land and settlement policies, accepting some but always determined to exercise their tino rangatiratanga, and resist the Crown's assimilationist policies and its asserted sovereignty when it infringed upon their autonomy.

Our purpose in traversing this relationship in the north over approximately six decades has been to address the core issues of grievance and alleged treaty breach the claimants in this inquiry raised. Following our stage 1 inquiry into the meaning and effect of He Whakaputanga o te Rangatiratanga o Nu Tireni/the Declaration of the Independence of New Zealand (1835) and te Tiriti, we have revisited ngā mātāpono o te Tiriti/the principles of the treaty to ensure that they reflect the expectations of both Te Raki Māori and the British signatories.

The Crown made a number of important concessions concerning Te Raki Māori claims of treaty breach which we have acknowledged and welcomed. Some of these concessions were general in nature and, the Crown argued, needed case-by-case demonstration. The Crown did not make a concession relating to its assumption of sovereignty, despite the agreement reached at Waitangi to share authority with Māori as the colony went forward that had been; nor did it conced any failure on the part of the Crown to engage in any meaningful way with the sustained efforts of Te Raki Māori to assert their tino rangatiratanga through their own paremata and tribal komiti.[2]

Overall, we were struck by the shared weight of injustice claimants and witnesses told us resulted from the imposition of the Crown's authority on the region and its people – whether by force or by resolute assertion of its legislative and administrative authority. In this concluding section, we briefly set out our earlier thematic conclusions and collate for quick reference the particular findings of breach and prejudice made in this report. We then present our recommendations, under section 6 of the Treaty of Waitangi Act 1975, of actions the Crown should take to compensate for or remove such prejudice.

2. Crown statement of position and response (#1.3.2); Crown closing submissions (#3.3.402).

12.1.1 Early interactions between the Crown and Te Raki Māori and the Northern War

Our stage 1 report concluded that the agreement in te Tiriti provided for the tino rangatiratanga, the full authority and independence of Te Raki Māori communities to coexist with the British Crown's kāwanatanga, or governance. The Crown would exercise authority over settlers, thereby keeping the peace and protecting Māori.[3] Where Crown and Māori populations mingled and their spheres of influence overlapped, the treaty partners would negotiate arrangements that served their mutual interests. Māori agreed to transact their lands with the Crown, but not exclusively; nor is it clear that the Crown would even have a right of first refusal. They understood also that the Crown had agreed to return any lands improperly acquired from them before te Tiriti was signed. Rangatira appear to have agreed further that the Crown's kāwanatanga responsibilities included protecting Māori from foreign threats.[4] Despite this agreement, the Crown proceeded to assert sovereignty almost immediately, claiming Māori consent, despite the fact that it had not explained its intention to do so and what this might entail during the treaty hui.

The Crown declared sovereignty over the North Island and then all the islands of New Zealand in two proclamations issued by the Queen's representative Captain Hobson in May 1840. The *London Gazette* published the proclamations that October. These steps are accepted in international law as marking the establishment of British sovereignty in this country.[5] As a result the rest of the world no longer recognised the independent authority of the rangatira and iwi of Aotearoa New Zealand. It was clear from the wording of the May proclamations that the British considered a 'cession' of sovereignty to have taken place. These steps, however, were entirely at odds with Te Raki Māori understanding of the treaty agreement reached only months before. The Crown made no effort to explain to rangatira the process by which it would assert sovereignty over the whole country, or that it intended to establish a government and a legal system entirely under its control.

The Crown's proclamation of sovereignty heralded the introduction of foreign legal concepts not explained to Te Raki rangatira before they signed te Tiriti. One was the doctrine of radical title, by which the Crown assumed paramount ownership over all the land of New Zealand, while Māori customary title survived the change in sovereignty as a 'burden' or qualification on it. The Crown thus became the sole source of title to land, and the legal authority to make unilateral decisions about Māori rights and interests in land and how far they would be recognised was

3. Waitangi Tribunal, *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry*, Wai 1040 (Wellington: Legislation Direct, 2014), pp 526, 529.

4. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 524–525, 529.

5. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 671, 690 (CA); Philip Joseph, *Joseph on Constitutional and Administrative Law*, 5th ed (Wellington: Thomson Reuters, 2021), pp 52–53.

vested in the Crown.[6] On the basis that only the Crown could extinguish 'native title', the Crown introduced its pre-emption policy, asserting the exclusive right to enter land transactions with Māori. British officials viewed the Crown's radical title and its exclusive right of pre-emption as fundamental to their ability to govern the new colony, to manage and encourage British settlement, and to introduce an orderly system of legal land titles. Yet these imported legal concepts also reflected British assumptions of cultural superiority. The Crown assumed it would control the colonial land market, and gave little thought to the role Te Raki Māori expected to play in the development and settlement of the colony.

Through the reports of parliamentary select committees on 'aboriginal tribes' in the Empire (1837) and British settlements, and 'the present state of the Islands of New Zealand' (1838), the Crown was relatively well informed on aspects of Māori land tenure.[7] The British government had also been influenced by humanitarian and missionary views on the importance of protecting Māori rights prior to the signing of te Tiriti.[8] However, the view that Māori only owned lands they physically occupied also became increasingly influential among Crown officials and colonists.[9] It was considered that all other lands were 'waste' or 'wild' lands, and following the Crown's assertion of its sovereignty, would become its demesne.[10] Thus, despite Lord Normanby's recognition of Māori ownership of all lands in New Zealand in 1839, and the treaty itself, some of his successors at the Colonial Office, notably including Lord Russell and Earl Grey, proposed that the Crown should claim ownership of lands it considered unoccupied or unused, by virtue of its radical title.[11]

Land and resources were vital to Te Raki hapū and their exercise of tino rangatiratanga. Rights in land were derived from ancestral relationships, and occupation and use, reflecting and sustaining intimate bonds between hapū and whenua. Under tikanga, hapū territories intersected and overlapped as resources were held in common and shared with other groups. As leaders, rangatira were responsible for the maintenance and distribution of these rights, as well as the protection of their people's shared mana.[12] Even as inter-hapū coordination increased from the

6. Philip Joseph, *Joseph on Constitutional and Administrative Law*, p 47.

7. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 299–300, 306.

8. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 299.

9. Donald M Loveridge, '"An Object of the First Importance"': Land Rights, Land Claims and Colonization in New Zealand, 1839–1852' (commissioned research report, Wellington: Crown Law Office, 2004) (Wai 863 ROI, doc A81), pp 24–26.

10. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 45–47.

11. Vincent O'Malley, 'Northland Crown Purchases, 1840–1865' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2006) (doc A6), p 30; Loveridge, '"An Object of the First Importance"' (Wai 863 ROI, doc A81), p 55.

12. Manuka Henare, Hazel Petrie, and Adrienne Puckey, 'He Whenua Rangatira': Northern Tribal Landscape Overview' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2009) (doc A37), pp 224–232, 365–366; Erima Henare (doc A30(c)), p 7; Hīrini Henare, transcript 4.1.1, Te Tii Marae, pp 77–78; Patu Hohepa, transcript 4.1.1, Te Tii Marae, pp 108, 114, 154, 165; Erima Henare, transcript 4.1.1, Te Tii Marae, p 310; Bruce Gregory (doc B22), p 8; Buck Korewha (doc C4), p 14; Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 30–31.

early 1800s, they remained independent and autonomous within their spheres of authority.[13] Prior to 1840, Māori had transacted land with settlers within the context of their own laws, and the tikanga of tuku whenua (see chapter 6, section 6.3) continued to underpin these arrangements. Rangatira consented to te Tiriti on the basis that the Crown would enforce the Māori understanding of pre-treaty land transactions, and therefore return land settlers had not properly acquired.[14] However, the Crown's assertion of pre-emption and paramount title to the land placed Māori rights within a British legal paradigm and made them vulnerable to alienation. Rather than acknowledging Māori authority over their land and resources, Crown officials and colonists instead engaged in debates about how their rights were to be defined and therefore, contained and then extinguished.

The legal principle of radical title would find application in an important early issue for both treaty partners: the first Land Claims Commission's investigation of pre-1840 land transactions. Rangatira expected the Crown to seek their agreement on the nature, shape, and processes for any investigation into pre-1840 land transactions. However, even before the signing of te Tiriti, the Crown quickly moved to establish the first Land Claims Commission based on Australian precedent where indigenous rights had not been recognised. Pākehā commissioners with little or no knowledge of customary law or local circumstances were appointed to investigate these claims. Where the transaction was made on equitable terms, grants would be issued to settlers, and the commissioners were to report on any surplus land which the Crown could claim for itself – that is, any land in excess of what the commission determined had been legitimately purchased but exceeded the area settler claimants could be granted under the law (though this limit was later relaxed in some cases). As we have discussed in chapter 6, despite adaptations in practice, pre-1840 transactions were not absolute alienations, but rather conditional allocations of rights to land and resources under tikanga. This was the law of New Zealand as it was understood and enforced by Māori at the time of transaction. That knowledge was available to the Crown through missionary writings and the inquiries of parliamentary select committees during the late 1830s.[15] However, the Crown's directions to commissioners (and their subsequent investigations) largely assumed that land arrangements were to be assessed in terms of purchase and sale, and failed to adequately consider the customs and standards of Māori society. Thus, through the first Land Claims Commission, the Crown seized the power to determine and dominate the process for identifying land rights, and Te Raki Māori tikanga was supplanted without their consent.

It is no surprise then, that where settler claims were numerous, such as the Bay of Islands and Hokianga, the work of the first Land Claims Commission could prompt indignation and suspicion. Mistrust of the new colonial Government's intentions grew as rangatira learned of the intention to claim 'surplus' lands,

13. Patu Hohepa, transcript 4.1.30, Te Renga Parāoa Marae, p [791].
14. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, p 523.
15. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 213, 300–31, 306.

and to acquire and profit from their lands more generally.[16] Steps the colonial Government took to control trade and the timber industry also stoked Māori fears. The June 1841 the New Zealand Customs Ordinance contributed to a significant economic downturn in the district (see section 4.4). The Crown introduced new requirements and duties on imported goods at the Bay of Islands, Hokianga, and Whāngārei harbours. The resulting decline in trade, together with the decision to move the capital to Auckland in 1841, prompted many settlers to depart from the district and a resulting collapse of food prices.[17] There was no evidence that colonial authorities informed Te Raki Māori of their intentions to take these steps or introduce controls over their long-established trading activities. Rangatira had been told during the Tiriti discussions that the capital would remain in the Bay of Islands, and that they would continue to benefit from trading opportunities. While external changes in the whaling and timber industries contributed to the economic decline in Te Raki, Crown officials at the time recognised that the customs duties and decision to move the capital were primary factors in the district's economic collapse. By 1844, Governor FitzRoy himself was convinced the Crown had caused the economic downturn, and wrote that the British flag had become a symbol of economic 'oppression'.[18]

Despite the steps the Crown took to assert authority over the lands and economy of the district during the early 1840s, its power and influence on the ground was far from clearly established. Te Raki leaders continued to enforce their own laws, and the Crown's rudimentary police force remained insufficient to exercise substantive control over Te Raki Māori communities. However, while the Crown had made only limited attempts to govern Te Raki Māori up to that time, those efforts posed a significant threat to the on-going exercise of Māori authority. The number of muru conducted against Pākehā increased during this period as settler transgressions against tikanga became more frequent and Māori anxieties about their political and economic circumstances grew.[19] Tensions escalated in July 1844, when Hōne Heke Pōkai led a taua muru to Kororāreka, and following a confrontation with a police magistrate, felled the flagstaff on Maiki Hill. In response, Governor Robert FitzRoy sent troops to the Bay of Islands.[20]

The frustration of many northern Māori with the trajectory of the treaty relationship lay behind Heke's flagstaff fellings of late 1844 and early 1845. We have

16. Rose Daamen, Paul Hamer, and Barry Rigby, *Auckland*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1996) (doc H2), p 74.

17. Manuka Henare, Hazel Petrie, and Adrienne Puckey, 'He Rangi Mauroa Ao te Pō: Melodies Eternally New' (commissioned research report, Kawakawa: Te Aho Claims Alliance, 2013) (doc E67), p 247.

18. Grant Phillipson, 'Bay of Islands Maori and the Crown, 1793–1853' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2005) (doc A1), p 311.

19. Ralph Johnson, 'The Northern War, 1844–1846' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2006) (doc A5), p 86.

20. Johnson, 'The Northern War' (doc A5), pp 90–92; Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 329.

described these fellings as a challenge to the Crown's encroachment on Ngāpuhi tino rangatiratanga and a signal that the Crown should meet with them and resolve issues of relative authority. The Crown nonetheless failed to consider the underlying concern of Heke, Kawiti, Pūmuka and others that te Tiriti was being ignored and that the Crown intended to impose its laws on and subordinate Maori. Governor FitzRoy attempted to bolster support for the Crown at an important hui held at Waimate in September 1844, making a number of key promises including the return of surplus lands. However, he also ignored opportunities for dialogue with Hōne Heke on more than one occasion, instead threatened military action against Heke and his allies, and chastised rangatira for not intervening in muru conducted against settlers.[21] In response to the second felling of the flagstaff in January 1845, FitzRoy had a warrant issued for Heke's arrest, and militarised Kororāreka. Following the third felling, the flagstaff was rebuilt again, and fortified, despite missionary warnings that Heke and Ngāpuhi would regard this as a provocative act.[22] War broke out following the fourth felling of the flagstaff in March 1845, when British officers evacuated Kororāreka and began to shell the town to prevent it from falling into Māori possession. Māori responded by looting and burning the town though they protected and assisted resident settlers.[23]

Throughout the Northern War, the Crown was the aggressor, using the threat of military force to impose the sovereignty it believed had been acquired in 1840. FitzRoy had issued instructions that permitted the arrest of 'rebel' leaders as 'hostages' for the good behaviour of their communities whether they had taken up arms or were merely deemed to be in support, The Crown initiated attacks on the pā and kāinga of Ngāti Manu, Ngāti Hine, Ngāti Rāhiri, Ngāti Kawa, Ngāti Tautahi, Te Uri o Hua, Te Kapotai and other hapū. Pōmare II who was suspected of assisting the 'rebellion' was arrested and taken with his daughter to Auckland where he had to give up land rights and acknowledge that their detention was justified. as a condition of release. The Crown was responsible for renewing hostilities when it attacked Ruapekapeka in December 1845 after a five-month hiatus where it had initially ignored Heke's first appeals for peace negotiations, and then made the surrender of land a condition for peace. By contrast, Heke, Te Ruki Kawiti, Hikitene, and their allies fought only when attacked, and sought to protect both Māori and settler communities as much as possible from the effects of conflict. Some Hokianga rangatira, including Tāmati Waka Nene, Rawiri Taonui and Hōne Mohi Tāwhai, fought against Heke, but had a range of reasons for doing so. Fearful

21. Johnson, 'The Northern War' (doc A5), pp 153–154; 'Shipping Intelligence', *Auckland Chronicle and New Zealand Colonist*, 16 January 1845, p 2. How long the journey took depended on the conditions and the size and speed of the vessel. Mr Johnson recorded one voyage in which the HMS *Victoria* completed the journey in less than a day, and numerous other occasions in which events in the Bay of Islands were discussed in Auckland two days later: Johnson, 'The Northern War' (doc A5), pp 156, 157, 160. The *Victoria* was larger and slower than some of the coastal trading schooners that regularly made the Bay of Islands run.

22. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 349.

23. Johnson, 'The Northern War' (doc A5), pp 196–200.

of the impact of a Crown invasion of their lands, they had made an agreement with the Governor at Waimate in September 1844 to keep Heke under control and were bound to that commitment as a matter of mana. However, in pressuring hapū to take sides, the Crown took advantage of divisions within Ngāpuhi, and caused lingering resentment among 'rebel' and 'neutral' hapū alike.

Ultimately, there is no greater indictment of the British policy for colonisation of New Zealand than that within a few years of signing te Tiriti with Te Raki Māori, they embarked on a war against them. Despite all the cautions Lord Normanby expressed about engagement with Māori and the importance of protecting their interests, the British failed to make sufficient efforts to form relationships of equality and mutual respect with rangatira as agreed under the treaty. Instead, the Crown's recourse to the use of force reflected an expectation of colonial officials that they would defend the Queen's authority, establish British power and make New Zealand safe for the incoming settlers. The impact of the Northern War on the district and its peoples is difficult to overstate. Te Raki Māori suffered loss of life, dislocation, destruction of property, taonga and food sources, hardship, and increased internal division during the conflict and its immediate aftermath. Longer-term consequences included loss of leadership, stigmatising of the families of both 'rebel' and 'loyal' leaders, economic decline, and a breakdown of the Māori–Crown relationship in the district for many years. Over the following decades, the Crown abandoned its treaty obligations and sought to assert its control over the district through assimilationist policies and the acquisition of Māori land. Te Raki Māori who had fought against the Crown sought reconciliation, re-erecting the flagstaff which they named Te Whakakotahitanga o Ngā Iwi', accepting the second Land Claims Commission, and attempting to establish shared townships (see chapter 7, section 7.4.2).

With Respect to this Early Period of Interaction between the Rangatiratanga and Kāwanatanga Spheres of Authority, and the Northern War, We Made the Following Findings

In respect of the proclamation of sovereignty and the establishment of a Crown Colony government, we find that the Crown acted inconsistently with the guarantees in the article 2 of the treaty and in breach of te mātāpono o te tino rangatiratanga and te mātāpono o te houruatanga/the principle of partnership by:

- Proclaiming sovereignty over the northern island of New Zealand and over all New Zealand in May 1840 by virtue of cession by the chiefs, and publishing and thereby confirming the proclamations in October 1840, despite the fact that this was not what Te Raki rangatira had agreed to or expected; nor did the proclamations reflect the treaty agreement reached between Te Raki

rangatira and the Crown's representative about their respective spheres of authority.

- Subsequently appointing Hobson as Governor and instructing him to establish Crown Colony government in New Zealand, on the basis of the incomplete and therefore misleading information he supplied about the extent of Māori consent, without having considered the terms and significance of the treaty, in particular the text in te reo, and its obligations to Te Raki Māori from the outset.
- Undermining Te Raki Māori tino rangatiratanga and authority over their land by asserting radical (paramount) title over all the land of New Zealand, without explaining, discussing, or securing the consent of Te Raki Māori to this aspect of British colonial law, despite the control it gave the Crown over Māori land, and more especially the ultimate disposal of lands transacted pre-treaty with settlers
- Further undermining Te Raki Māori authority over their land by asserting a sole right of pre-emption, which was clearly expressed in neither the te reo text of te Tiriti nor in the oral debate; the Crown was anxious to secure this right so it could fund and control British colonisation, and its failure to convey its intentions on a matter of great importance to hapū used to conducting their own transactions with settlers was not in good faith.
- Failing to acknowledge the significance of the treaty and of Te Raki Māori agreement to it in any of the Crown's acts of state asserting sovereignty over New Zealand.
- These actions, in the absence of informed Te Raki Māori consent to the Crown's plans for the governance of New Zealand, were also inconsistent with the Crown's duty of good faith conduct, and thus breached te mātāpono o te houruatanga me te mātāpono o te whakaaronui tetahi ki tetahi/the principles of partnership and of mutual recognition and respect.

In respect of the assertion of effective Crown authority over Te Raki Māori during this period, we find that:

- By asserting the authority of its police and courts to enforce criminal law over Māori communities, the Crown breached te mātāpono o te tino rangatiratanga, as well as te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect. By claiming this authority without first engaging with and seeking the consent of Te Raki Māori, the Crown breached te mātāpono o te houruatanga/the principle of partnership.
- By failing to engage with Māori to ensure appropriate recognition and respect for Māori customary law, including appropriate recognition of the law of tapu and for the mechanisms of rāhui and muru, and appropriate recognition of the role of rangatira in the exercise of tikanga, the Crown also breached te mātāpono o te houruatanga/the principle of partnership.

In respect of the Crown's impacts on the district's economy, we find that:

- By imposing customs duties without engaging with Te Raki Māori and without considering the impacts on Māori, the Crown breached te mātāpono o te tino rangatiratanga, and te mātāpono o te houruatanga/the principle of partnership.
- By moving the capital to Auckland without engaging with Te Raki Māori, in breach of prior assurances (from Busby to Te Kēmara, and from Hobson to Pōmare) that the capital would remain in the Bay of Islands, and without attempting to mitigate the impacts of its decision, the Crown fundamentally altered the course of its treaty relationship with Te Raki Māori, acting inconsistently with its duty of good faith, and breaching te mātāpono o te houruatanga/the principle of partnership.

In respect of the Crown's actions before the war, we find that:

- By threatening to use force against Heke in August 1844, when he had signed te Tiriti and had consented to the Crown's kāwanatanga but not the imposition and exercise of its sovereignty, the Crown did not adequately recognise, and respect, the tino rangatiratanga of Ngāpuhi hapū. This was in breach of te mātāpono o te tino rangatiratanga. It was also in breach of te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect.
- By failing to seek dialogue with Heke before making this threat, the Crown acted inconsistently with its obligation to act honourably, fairly, and in good faith, and therefore breached te mātāpono o te houruatanga/the principle of partnership.
- By negotiating with Waka Nene and other Ngāpuhi rangatira in September 1844 while also threatening military invasion should its demands not be met, the Crown acted inconsistently with its obligations of fairness and good faith, and therefore breached te mātāpono o te houruatanga/the principle of partnership.
- By negotiating in a manner that pressured Ngāpuhi to take sides, the Crown breached te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect. This was also inconsistent with its obligations to recognise, and respect the tino rangatiratanga of Ngāpuhi hapū, and thus breached te mātāpono o te tino rangatiratanga.
- By entering an agreement in September 1844 with the rangatira assembled at Waimate that they would be responsible for protecting the flagstaff and opposing Heke if he attacked it again, the Crown acted inconsistently with its obligations to recognise and respect tino rangatiratanga in accordance with tikanga, in breach of te mātāpono o te tino rangatiratanga. It was also in breach of te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect.
- By issuing warrants for the arrest of Heke and other rangatira in January 1845, and by condemning taua muru as lawless and rebellious despite the fact that

the Governor had been instructed to provide legal recognition for Māori custom, and that the operation of taua muru had previously been tolerated, the Governor acted inconsistently with the Crown's duty to recognise and respect the tino rangatiratanga of Te Raki hapū, in breach of te mātāpono o te tino rangatiratanga. The Governor also breached te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect.

- By taking these actions without entering dialogue with the rangatira concerned, the Crown acted inconsistently with its obligation of good faith conduct, and thus breached te mātāpono o te houruatanga/the principle of partnership.
- By requiring Te Parawhau to forfeit 1,000 acres of the Whāngārei headlands (known as Te Poupouwhenua) as payment for the January 1845 taua muru against the settlers Millon and Patten, the Governor acted inconsistently with the Crown's duty to recognise and respect tino rangatiratanga, in breach of te mātāpono o te tino rangatiratanga. He also breached te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect.
- By taking these actions when it was foreseeable that they would heighten tensions between the Crown and Te Raki Māori, and without first pursuing negotiation, the Crown breached te mātāpono o te houruatanga me te mātāpono o te matapopore moroki/the principles of partnership and active protection.
- By raising the flagstaff in January and February 1845, by fortifying the flagstaff and militarising Kororāreka when it knew these actions increased the risk of conflict, and by taking these actions without seeking opportunities for dialogue to resolve tensions, the Crown acted inconsistently with its obligation to act with the utmost good faith, in breach of te mātāpono o te houruatanga/the principle of partnership.
- By shelling Kororāreka on 11 and 12 March 1845 in breach of a ceasefire and while Māori were in the town, the Crown committed a flagrant breach of its duty to actively protect the lives, interests, and tino rangatiratanga of Te Raki Māori. This action thus breached te mātāpono o te matapopore moroki/the principle of active protection, and te mātāpono o te tino rangatiratanga.

In respect of the Crown's conduct of war, we find that:

- By launching a military campaign in order to assert the Crown's sovereignty, the Crown breached te mātāpono o te tino rangatiratanga, as well as te mātāpono o te matapopore moroki/the principle of active protection. It further acted inconsistently with its obligation to act honourably, fairly, and in good faith, in breach of te mātāpono o te houruatanga/the principle of partnership. This finding applies to actions taken to support the military campaign, including the imposition of martial law and the naval blockade.
- The orders issued to Colonel Hulme on 26 April 1845 instructing him to spare no 'rebel' and 'if possible' to capture principal chiefs as hostages – both those in arms and those in 'covert' support – was a breach of te mātāpono o te

tino rangatiratanga and of te mātāpono o te houruatanga/the principle of partnership.

- By renewing hostilities in June and December 1845 after periods without conflict, the Crown breached te mātāpono o te matapopore moroki me te mātāpono o te houruatanga/the principles of active protection and partnership.
- By labelling Māori leaders who took action against the flagstaff 'rebels', the Crown acted inconsistently with its obligation to act in good faith towards its treaty partner, and therefore breached te mātāpono o te houruatanga/the principle of partnership.
- By taking advantage of and encouraging divisions within Ngāpuhi, the Crown breached te mātāpono o te mana taurite me te mātāpono o te houruatanga/the principles of equity and partnership, by acting inconsistently with its obligation to act with utmost good faith towards its treaty partner.
- By pressuring non-combatant rangatira to declare their loyalty to the Crown or face military action, the Crown breached te mātāpono o te houruatanga/the principle of partnership.
- The arbitrary capture and detention of the rangatira Pōmare II and his daughter Iritana was in breach of te mātāpono o te tino rangatiratanga, article 3 rights, and te mātāpono o te matapopore moroki/the principle of active protection.
- By requiring Pōmare, as a condition of his release, to acknowledge that he had been justifiably detained when that was not the case, and guilty for failing to control the actions of Heke and Kawiti, the Crown breached te mātāpono o te matapopore moroki me te mātāpono o te mana taurite/the principles of active protection and equity. It also acted inconsistently with its duties of honour and good faith, in breach of te mātāpono o te houruatanga/the principle of partnership.
- By requiring land at Te Wahapū as a condition of Pōmare II's release, the Crown breached its duty to recognise, and respect the tino rangatiratanga of Ngāti Manu and their rights to their lands and resources, in breach of te mātāpono o te tino rangatiratanga.
- By failing to adequately consider and address the welfare of non-combatants affected by its military campaign, systematically destroying pā, kāinga, waka, and food stores, the Crown breached te mātāpono o te matapopore moroki me te mātāpono o te mana taurite/the principles of active protection and equity.
- By failing to respond to Heke's initial offer of peace, the Crown acted inconsistently with its obligation of good faith, breaching te mātāpono o te houruatanga/the principle of partnership.
- By initially insisting on submission and land confiscation as conditions of peace, the Crown breached te mātāpono o te tino rangatiratanga, as well as

te mātāpono o te matapopore moroki me te mātāpono o te houruatanga/the principles of active protection and partnership.

- By refusing to engage and negotiate in person despite Heke's repeated requests, the Crown breached te mātāpono o te houruatanga/the principle of partnership.
- By continuing its military campaign after sincere offers of peace had been made in May, July, August, and September of 1845, the Crown acted inconsistently with its duty of good faith conduct. It breached te mātāpono o te matapopore moroki me te mātāpono o te houruatanga/the principles of active protection and partnership.

12.1.2 The Crown's land fund model and early policies for colonial development

As the Tribunal has previously observed, the Crown accepted at an early stage that to ensure the success of its new colony in Aotearoa New Zealand, it had a responsibility 'to legitimise and assist orderly colonisation'.[24] Lord Normanby's 1839 instructions for Governor Hobson placed paramount importance on the Crown's sole right of purchase under pre-emption. In order to maintain a land-fund for the promotion of British settlement and colonial development, the Crown would need to acquire 'the unsettled lands' of New Zealand at low cost and sell them on at higher prices. Normanby observed that settlers already in New Zealand had obtained '[e]xtensive acquisitions of such lands'. To address this difficulty, Hobson was to appoint a commission which would report to the Governor on whether the land had been 'obtained on equitable terms', who would then make the final decision on the issue of a Crown grant.[25] These twin policies for Crown purchasing under pre-emption and investigation of pre-1840 transactions were directed at establishing the Crown's control over land and facilitating 'the introduction of capital and of settlers'. However, in carrying out these interventions, Hobson was to act in accordance with a further priority clearly stated in Normanby's instructions, the protection of Māori interests which the British government had already recognised.[26]

There was a clear tension in these instructions between the Crown's protective intent and imperative to acquire large areas of land from Māori at low prices. The

24. Waitangi Tribunal, *The Hauraki Report*, 3 vols, Wai 686 (Wellington: Legislation Direct, 2006), vol 3, pp 1208–1209.

25. Alan Ward, *National Overview*, 3 vols, Waitangi Tribunal Rangahaua Whanui Series (Wellington: GP Publications, 1997), vol 2, p 34; David Armstrong, 'The Land Claims Commission: Practice and Procedure, 1840–1845' (commissioned research report, Wellington: Crown Law Office, 1992) (Wai 45 ROI, doc I4), p 9; Duncan Moore, Barry Rigby, and Matthew Russell, *Old Land Claims*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997) (doc H1), pp 15–17, 20.

26. Normanby to Hobson, 14 August 1839, BPP, vol 3, pp 86–90.

challenge of meeting both goals through the Crown's policy for the investigation of pre-treaty transactions and its purchasing policy could have been overcome had its officials sought early engagement with Te Raki Māori, and acquired the consent of rangatira for institutional arrangements that would recognise and respect their tino rangatiratanga and faciliatate a treaty partnership. How to determine Māori ownership of land, and how settler rights in land could be accommodated without causing harm to their communities were matters of great concern for Te Raki Māori. Furthermore, Māori had a shared interest in the economic development of the district which could and should have formed the basis for these negotiations. However, following the signing of te Tiriti, Crown officials failed to involve Te Raki Māori in decisions about its land policies despite the clear room for accommodation and evidence of huge Te Raki Māori interest and involvement in the economic development of the district. Preoccupied with the concerns of settlers, and the need to acquire large tracts of land at low cost, the Crown consigned Māori to the role of providers of land for settlement.

In the early 1840s, there were very few Pākehā in New Zealand qualified to engage with Māori on the Crown's behalf, or to provide advice on customary rights and laws. For these services, the Crown was obliged to rely on the services of missionaries and their sons who had lived in Māori communities and were familiar with their language. Responsibility for protecting Māori interests was placed in the hands of the Chief Protector of the Aborigines, the missionary George Clarke (senior), and his small staff of 'sub-protectors'. During this period, the Chief Protector was tasked with identifying customary rights and protecting Māori interests before the first Land Claims Commission, although his major concern was to ensure that settlers' title would not be challenged in the future. He was also primarily responsible for overseeing the Crown's purchasing of land. However, Clarke was conflicted in both respects. He was a major land claimant both on his own behalf, and as a member of the Church Missionary Society, and quickly encountered difficulty navigating the conflicting imperatives of his dual duties of protection and land purchase which he acknowledged at the time.[27]

A further challenge facing the colonial Government was that in its haste to secure New Zealand as a colony during the latter part of 1839, the British government failed to make any adequate provision for funding it.[28] With its resources spread thin across the significant policy challenges of purchasing Māori land, and investigating pre-1840 transactions throughout the country, the Crown struggled to establish its land policies on an equitable footing. When the Land Claims Commission began its work in January 1841, the lack of provision for surveys on anything like the scale required for this undertaking caused delays in issuing grants

27. Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 20; Bruce Stirling and Richard Towers, '"Not with the Sword but with the Pen": The Taking of the Northland Old Land Claims: Part 1: Historical Overview' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2007) (doc A9), pp 268–269.

28. A H McLintock, *Crown Colony Government in New Zealand* (Wellington: Government Printer, 1958), pp 126–127, 153–155; Loveridge, '"An Object of the First Importance"' (Wai 863 R01, doc A81), pp 280–281.

and resulted in confusion over what lands had been awarded. By the time FitzRoy arrived as the new Governor at the end of 1843, the commissioners had only reported on about half of the claims before them, and very few grants had been awarded. The Crown also struggled to establish its land purchasing programme and only made one purchase in Te Raki during the 1840s in the Mahurangi and Omaha block, though this was a vast area of land estimated at approximately 220,000 acres.[29] Clarke, who conducted the purchase, carried out no investigation into customary rights in the area, and the deed was signed in Auckland in April 1841 by only 22 Hauraki rangatira.[30] This purchase failed to meet the Crown's own standards of the time. As the Crown conceded in our inquiry, it breached the treaty and the disadvantage caused to the Mahurangi Māori who did not take part in the original transaction was 'permanently locked in place'.[31]

Upon his arrival, FitzRoy inherited a colony with substantial debts and little finance available to stimulate the colonial economy through purchasing and opening land for settlement.[32] In order to quell growing dissatisfaction with the land fund model, and hasten the transfer of land to settlers, FitzRoy made a series of dramatic policy changes. He began intervening in the work of the Land Claims Commission to speed up the process, removing the requirement that grants be surveyed and that cases be decided by two commissioners. He also intervened in the process by making 12 grants for claims that had been previously disallowed and increasing the area that could be granted to settlers for many more of the unsurveyed grants.[33] These measures compounded the damage to Māori rights already caused by the commissioners' practice of validating transactions they knew to be incomplete and still in Māori occupation. FitzRoy promised Maori the return of 'surplus lands' from the old land claims but this did not happen.[34]

FitzRoy also implemented a pre-emption waiver system in 1844, which enabled settlers to directly purchase land from Māori provided that certain conditions were met. The implementation of this policy again offered Te Raki Māori little protection despite intended safeguards. These were regularly ignored or circumvented, and the Crown's scrutiny of pre-emption waiver claims was highly deficient. Notably no tenths reserves as promised in FitzRoy's waiver proclamations of 1844 were set aside. Even where claims were disallowed for failure to meet specified conditions, the Crown did not return those lands to the Māori owners, but deemed them to 'revert' to the Crown on the basis of its assumption of radical title.

29. See Barry Rigby, 'Pre-1865 Te Raki Crown Purchase Validation Report' (commissioned research report, Wellington: Waitangi Tribunal, 2015) (doc A53), appendix A; Barry Rigby, 'On Te Raki Old Land Claims, Pre-Emption Waiver Claims, and Pre-1865 Crown Purchases', corrections requested by Crown counsel, 2017 (doc A48(e)), p 7; O'Malley, 'Northland Crown Purchases' (doc A6), pp 185–186.

30. O'Malley, 'Northland Crown Purchases' (doc A6), p 187.

31. Crown statement of position and concessions (# 1.3.2), p 3; Crown closing submissions (#3.3.404), pp 2, 8.

32. O'Malley, 'Northland Crown Purchases' (doc A6), p 39.

33. Stirling and Towers, 'Not with the Sword but with the Pen' (doc A9), p 423.

34. Phillipson, 'Bay of Islands Maori and the Crown' (doc A1), p 346.

In the end, despite FitzRoy's attempt to address delays and confusion in the granting of titles, his policies only produced more of both.

Upon succeeding FitzRoy as Governor, in 1845, George Grey quickly took steps to end the waiver scheme, re-assert Crown pre-emption under the Native Land Purchase Ordinance 1846, and introduce new penalties for settlers entering into informal lease agreements. He also took steps to abolish the position of Chief Protector of Aborigines which he saw as ineffectual and expensive.[35] Under the Land Claims Ordinance 1846, he appointed a further commissioner, Henry Matson, to investigate and settle pre-emption waiver claims, and attempted to confirm the validity of FitzRoy's grants under the Quieting Titles Ordinance 1849. Despite Grey's acknowledgement that FitzRoy's policies and their application had done injustice to Māori, both his interventions essentially served the interests of settlers, and offered no protection to kāinga, cultivations, and wāhi tapu.

The problem of unsurveyed grants continued into the mid-1850s, and Grey's Quieting Titles Ordinance was a 'dead letter' by the time the Land Claims Settlement Act 1856 was enacted by the newly established colonial Legislature.[36] The procedures established by this and an Extension Act passed in 1858 favoured colonists and the Crown at the expense of Māori. Former New Zealand Company agent Francis Dillon Bell was appointed to head the second Land Claims Commission in 1857, and over the next five years, he confirmed or increased grants resulting in the transfer of some 175,000 acres of land to old land and pre-emption waiver claimants. His decisions also resulted in the defining of some 100,000 acres of land the Crown owned by reason of 'scrip' and its claim to the 'surplus' for both pre-treaty and pre-emption waiver 'purchases' (see chapter 6, section 6.1.3). In many cases, decades had passed since these pre-1840 transactions were first undertaken. However, the passage of time did not change the fact that they were not absolute sales but rather customary arrangements, conditional, ongoing, and with an unextinguished underlying Māori title. The Crown's imposition of English legal concepts, grant of absolute freehold title to the settlers concerned, and its own subsequent taking of the surplus were effectively a raupatu of Māori tino rangatiratanga over thousands of acres of land in Te Raki.

Decades of Māori petition and protest followed these awards, and prompted limited, cursory, and narrowly focused inquiries: including the Houston commission (1907), the Native Land Claims Commission (1920), and the Sim commission (1927). The culmination of this process was the more thorough Myers commission (1946), which acknowledged the outstanding grievances 'in equity and good conscience'.[37] However, the Myers commission proceedings were premised on the assumption that the first investigations by the land claims commissions had been conducted thoroughly and properly whereas the ratification process had been flawed from the outset. The commission also presumed that legal title to the

35. Loveridge, '"An Object of the First Importance"' (Wai 863 R01, doc A81), pp 279–280.
36. Moore, Rigby, and Russell, *Old Land Claims* (doc H1), p 40.
37. Myers commission, report, AJHR, 1948, G-8, p 3.

surplus lands was vested in the Crown, and offered flawed remedies and inadequate compensation.

During the 1850s, the Crown also implemented its land purchase policies in Te Raki. In 1848, Governor Grey set out a vision for the transformation of the colony that was shorn of the caution and concern for protecting Māori interests which had previously been expressed by Normanby and Clarke, and cynically dismissed Māori claims over large area of lands where multiple groups held interests.[38] Having faced armed resistance in Te Raki and other parts of the North Island, he envisaged the Crown asserting its control over extensive swathes of the country through large-scale purchases ahead of settlement, the payment of nominal prices, and restriction of Māori to small reserves required for their subsistence. To this end, Grey also rejected appeals from settlers and Māori for legal recognition for private leasing of Māori land, despite being aware that Te Raki Māori continued to lease their lands informally and some preferred this way of transacting their land. However, the Crown viewed leasing as an obstacle to its purchasing ambitions and the expansion of its authority through the extinguishment of native title.

Grey's framework for Crown purchasing would be applied to great effect by Donald McLean and the Native Land Purchase Commissioners employed by the Native Land Purchase Department, following its establishment in 1854. Over the following years, McLean exercised little oversight over his land purchase commissioners in Te Raki, who employed a range of tactics intended to secure purchases for the Crown and overcome or circumvent opposition. Officials held out material benefits to Te Raki Māori as incentives for transacting their land with the Crown, and accepting the low prices it set. They were promised townships, roads and economic opportunities which were slow to follow or never eventuated at all. Ten per cent clauses were included in the deeds of two Whāngārei purchase blocks promising to provide owners of a block with a share in the rising value of their land when it was on-sold (see chapter 8, section 8.5). However, this commitment was never fully carried out, and the scheme was abandoned after only a handful of payments were made to owners many years after the land was purchased.

Under McLean, the Native Land Purchase Department made a minimal effort to ensure Te Raki Māori retained sufficient lands for their present and future sustenance, development, and to fulfil their cultural obligations. Rather than monitoring the effect of its purchases on hapū, McLean sought to implement a policy whereby Māori would repurchase the lands they required for their kāinga and cultivations from the Crown (at greatly increased prices) thus securing individual Crown grants, the benefits of which he proclaimed at every opportunity. Unsurprisingly, repurchase was largely rejected by Te Raki Māori, despite McLean's hope that it would bring their communities under the control of the colonial Government. In the absence of any systematic policy on land retention, the granting of reserves was left entirely to the discretion of the land purchase commissioners who reserved only 13,940 acres of land between 1840 and 1865 – a small

38. Grey to Grey, 15 May 1848, BPP, vol 6, pp 24–25.

fraction of the some 482,000 acres it purchased during that period.[39] Overall, the Crown's purchasing policies and practices sought to confine Te Raki Māori to an essentially marginal position in the colonial economy.

With Respect to the Crown's Land Fund Model and Policies for Colonial Development, We Made the Following Findings

In respect of the first Land Claims Commission, we find that:

- The Land Claims Ordinance 1841 was inconsistent with the guarantees in article 2 of te Tiriti, in breach of te mātāpono o te tino rangatiratanga, te mātāpono o te houruatanga/the principle of partnership, and te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect.
- The Crown failed to provide a parallel role for Māori alongside the British commissioners in determining whether pre-treaty transactions were valid and ensuring that Māori intentions were understood, respected, and safeguarded; give effect to the promises made by the Crown's representative to Māori at Waitangi and Māngungu, both verbally and within te Tiriti; acknowledge and incorporate reference to tikanga (customary law) in a meaningful way, and give weight to tikanga in assessing the purpose and nature of the transactions alongside British law; ensure that all customary owners of land involved in each transaction had been identified and had consented to transactions involving lands in which they had interests (only two witnesses were required to confirm a 'sale'); and require the commissioners to ascertain the nature of those transactions as Māori understood them, thus limiting the nature and effectiveness of their inquiry, and impeding determination of the real character of the transactions as undertaken under tikanga at the time. These failures facilitated the conversion of conditional occupation rights into absolute conveyances under British law.
- The Land Claims Ordinance 1841 also failed to give guidance as to fairness of price, specify the measures needed to give effect to joint Māori and Pākehā occupancy arrangements and underlying trusts, or require commissioners to protect kāinga and other sites in active Māori occupation, investigate equity of outcome, advise on the sufficiency of land remaining in possession of hapū, and ensure that reserves were specified and protected in grants.
- These shortcomings were not offset by the involvement of protectors, who were concerned more with securing the titles granted to settlers and the progress of the colony than with ensuring justice for Māori. The Crown was thus

39. Rigby, 'On Te Raki Old Land Claims' (doc A48(e)).

also in breach of te mātāpono o te matapopore moroki/the principle of active protection and te mātāpono o mana taurite/the principle of equity.

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

In respect of the Crown's development of its purchasing policy, we find that:

- The Crown failed to engage with Te Raki Māori in developing its purchasing and settlement policy during the 1840s, and prioritised its political and economic objectives at the expense of Māori interests and treaty-protected rights in breach of te mātāpono o te tino rangatiratanga, and te mātāpono o te houruatanga/the principle of partnership.
- By denigrating the validity of Te Raki Māori rights in land and accepting the principle that those rights could be extinguished over large tracts of land at low cost, while hapū and iwi could be confined to small reserves for cultivation and occupation, Crown policy breached te mātāpono o te houruatanga/the principle of partnership, te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development, and te mātāpono o te matapopore moroki/the principle of active protection.

In respect of the FitzRoy and Grey's policies towards the validation of old land claims, we find that that:

- The Crown through Governor FitzRoy's actions in expanding grants beyond commissioners' initial recommendations, issuing grants where the commissioners had recommended none, and issuing unsurveyed grants for the benefit of settlers breached te mātāpono o te tino rangatiratanga and te mātāpono o mana taurite me te mātāpono o te matapopore moroki/the principles of equity and of active protection.
- Despite acknowledging the injustice to Māori on the one hand and the Crown's duty to support their rights on the other, Governor Grey failed to do anything effective to ensure that those rights were protected. The Crown Titles Quieting Ordinance 1849 aimed to remove uncertainty about settlers' title in Crown granted lands, but provided inadequate protections for enduring Māori customary interests. By enacting the ordinance, the Crown was therefore in breach of te mātāpono o mana taurite me te mātāpono o te matapopore moroki/the principles of equity and of active protection.
- Grey offered little more to Māori in terms of ensuring occupied sites and wāhi tapu were reserved in grants to settlers despite his clear acknowledgement of the Crown's duty in this regard. That failure was in breach of te mātāpono o te matapopore moroki/the principle of active protection.

In respect of the Crown's pre-emption waiver policy, we find that:

- The administration of the waiver policy was deeply flawed from the outset, Crown scrutiny was deficient to the point of negligence with the result that intended protections set out in FitzRoy's proclamations were able to be evaded, and expected benefits failed to materialise in breach of te mātāpono o te matapopore moroki the principle of active protection.
- Governor Grey's Land Claims Ordinance 1846 and his options of August 1847 for the settlement of waiver claims favoured settler and Crown interests over those of Māori in breach of te mātāpono o mana taurite/the principle of equity and te mātāpono o te matapopore moroki/the principle of active protection.

In respect of the Bell commission and the Crown's policies on scrip and surplus lands, we find that:

- The taking of the 'surplus' from old land claims can only be seen as an effective confiscation of some 51,980 acres from pre-treaty land arrangements undertaken under tikanga, and breached te mātāpono o te tino rangatiratanga, as well as te mātāpono o te houruatanga me te mātāpono o whakaaronui tētahi ki tētahi; and by failing to honour promises that such land would return to Māori, the Crown disregarded its duty to act in the utmost good faith, and breached te mātāpono o te houruatanga/the principle of partnership.
- The Crown's surplus land policy applied in respect of both old land claims and pre-emption waiver purchases breached te mātāpono o te tino rangatiratanga; the principle of partnership/te mātāpono o te houruatanga; the principle of mutual recognition and respect/te mātāpono o te whakaaronui tētahi ki tētahi; the principle of mutual benefit and the right to development/te mātāpono o te whai hua kotahi me te matatika mana whakahaere; and te mātāpono o te matapopore moroki/the principle of active protection.
- The Land Claims Settlement Act 1856 and Extension Act 1858 breached the principle of te mātāpono o te tino rangatiratanga, as well as te mātāpono o te mana taurite me te mātāpono o te matapopore moroki/the principles of equity and of active protection.
- By failing to require that adequate reserves were set aside out of the areas deemed sold and awarded to settlers or taken by the Crown as surplus under The Land Claims Settlement Act 1856 and Extension Act 1858 the Crown breached te mātāpono o te matapopore moroki/the principle of active protection.
- By passing the Land Claims Settlement Act 1856 and Extension Act 1858 without any opportunity for Māori to express their views on either how settler grants were to be resolved or the Crown's right to take the surplus, the Crown breached breach of te mātāpono o te whakaaronui tētahi ki tētahi me te mātāpono o te mana taurite/the principle of mutual recognition and respect, and the principle of equity.
- The Crown failed to institute an impartial and fair process whereby Māori who

had been adversely affected by the defects in the first ratification procedures could gain redress. Instead, the second Land Claims Commission, under a single Pākehā commissioner, Francis Dillon Bell, exceeded its function of defining European grants and Māori reserves. Bell acted to obtain as much land from Māori as he could for the Crown and suggested legislative amendments and gazetted rules for that purpose in breach of te mātāpono o te tino rangatiratanga, te mātāpono o te mana taurite/the principle of equity; te mātāpono o te matapopore moroki/the principle of active protection; and te mātāpono o te whakatika/the principle of redress.

- The Crown asserted a right to lands subject to claims for which scrip had been awarded or that had been disallowed, and its officials took deliberate and sometimes questionable steps to gain as much land for the Crown as possible. In the case of Motukaraka and Waitapu, the Crown claimed land (by falsification of boundaries) to which it clearly was not entitled. These actions were in breach of article 2 guarantees of tino rangatiratanga over lands and resources, and in breach of te mātāpono o te tino rangatiratanga.
- The Crown sought to maximise the return on its earlier issue of scrip on extremely generous terms to the settlers concerned in breach of te mātāpono o te matapopore moroki me te mātāpono o te mana taurite/the principles of active protection and equity, resulting in prejudice to Māori throughout the inquiry region but, in particular, to hapū based in Hokianga, who lost 14,029 acres by this means.
- The disparity between how Pākehā and Māori were treated within the later stages of the Crown's validation procedures was in breach of te mātāpono o te matapopore moroki me te mātāpono o te mana taurite/the principles of active protection and equity.
- The disposal of the claims of children of marriages between Māori women and settlers (the 'half-caste claims') also contrasted with the treatment of settler claims. The potential to have provision made for the mothers and their children under the Land Claims Settlement Act 1856 proved illusory, they were among the last claims to be examined, and few grants were issued despite promises to the contrary. This too breached in te mātāpono o te matapopore moroki me te mātāpono o te mana taurite/the principles of active protection and equity.
- By privileging settler and its own interests over those of Māori and failing to ensure that problems arising from the first commission were dealt with and rectified in a fair and timely manner; and to ensure that hapū were left with sufficient lands; and by reason of its scrip and surplus land policies, the Crown breached te mātāpono o te tino rangatiratanga, te mātāpono o te mana taurite/the principle of equity; and te mātāpono o te whakatika/the principle of redress.

In respect of the Crown's implementation of its purchasing policy we found that:

- By limiting the ability of Māori to exercise all the rights of ownership through failing to provide legal recognition for existing lease arrangements in an attempt to induce Māori to part with their land, the Crown breached te mātāpono o te tino rangatiratanga and te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development.
- By not adequately considering Te Raki Māori views and interests and by implementing a land purchase policy after 1848 that favoured the interests of settlers, and sought to bring Te Raki Māori communities under the control of British institutions and laws through assimilationist policies, the Crown breached te mātāpono o te houruatanga/the principle of partnership, te mātāpono o te tino rangatiratanga, and te mātāpono o te mana taurite/the principle of equity.

In respect of the Crown's purchasing practices on the ground we found that:

- By employing land purchasing tactics that prioritised the interests of settlers and colonial development above the interests of Te Raki hapū and iwi, the Crown acted inconsistently with its duty to act in good faith towards its treaty partner, in breach of te mātāpono o te houruatanga/the principle of partnership and te mātāpono o te mana taurite/the principle of equity.
- By not dealing with Te Raki Māori in good faith with regard to price setting for their land, and utilising its monopoly advantage to insist on the low maximum prices it would pay, the Crown breached te mātāpono o te houruatanga/the principle of partnership.
- By paying nominal prices which reduced the ability of hapū to develop their remaining land if they so wished and enter the economy on an equal footing with settlers, the Crown breached te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development, te mātāpono o te mana taurite/the principle of equity, and te mātāpono o te tino rangatiratanga.
- By failing to adequately implement its 10 per cent commitment to Te Raki Māori as recorded in certain purchase deeds, the Crown breached te mātāpono o te houruatanga/the principle of partnership, and te mātāpono o te kāwanatanga.
- By failing to take timely steps to meet its commitment to ensure that Te Raki Māori would receive collateral benefits they were promised, the Crown breached te mātāpono o te whaihua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development.
- By failing to ensure that hapū communities each retained a land and resource base to meet their present and future requirements for sustenance and fulfilment of cultural obligations, to provide opportunities for development, and to enable them to participate in the national economy, the Crown breached te mātāpono o te whaihua kotahi me te matatika mana whakahaere/the

principle of mutual benefit and the right to development and te mātāpono o te matapopore moroki/the principle of active protection. It also breached te mātāpono o te tino rangatiratanga.

- By failing to make adequate statutory provision for the creation of secure titles for native reserves for hapū, and by failing to ensure that reserves were surveyed and their boundaries clearly marked, the Crown breached te mātāpono o te houruatanga/the principle of partnership, te mātāpono o te kāwanatanga, and te mātāpono o te tino rangatiratanga.
- By failing to act reasonably, honourably, and in good faith, to engage with its treaty partner, and involve Te Raki Maori in decision-making about the alienation and settlement of their lands, the design and implementation of its land purchasing programme and its policy for colonial development in the inquiry district in the period 1840 to 1865, the Crown breached te mātāpono o te houruatanga/the principle of partnership, te mātāpono o te tino rangatiratanga, as well as te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect.
- By failing to uphold its own standards clearly articulated at the time and prioritising the purchase of large areas of land at low cost in order to serve the interests of settlers over respect for and recognition of Te Raki Māori interests, the Crown breached te mātāpono o te tino rangatiratanga, te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development, te mātāpono o te mana taurite/the principle of equity and te mātāpono o te matapopore moroki/the principle of active protection.

12.1.3 Constitutional change, the extinguishment of Māori title, and land alienation

The Crown's purchasing programme proceeded against the backdrop of significant constitutional change. During the first years after the treaty, the Crown's kāwanatanga powers were vested in the Governor, who retained ultimate decision-making power within the colony.[40] However, in 1852 the British Parliament passed the New Zealand Constitution Act, establishing a bicameral national legislature comprising an elected lower house (the House of Representatives) and an appointed upper house (the Legislative Council).[41] The Act also created six provincial governments, each with its own elected assemblies and superintendents.[42] The franchise was only

40. Raewyn Dalziel, 'The Politics of Settlement', in *The Oxford History of New Zealand*, ed Geoffrey W Rice, 2nd ed (Auckland: Oxford University Press, 1992), p 88.

41. New Zealand Constitution Act 1852, ss 32–33, 40–42.

42. New Zealand Constitution Act 1852, ss 2–3. The provinces were Auckland, New Plymouth, Wellington, Nelson, Canterbury, and Otago.

extended to men who met a property test that excluded most Māori men from voting in the first general elections. No provision was made for Māori representation in Parliament until four Māori seats were introduced in 1867. At the time, the Māori electorates provided Māori with far fewer representatives than they were entitled to on a population basis and were viewed as a temporary measure only. This arrangement also denied Māori women the franchise. Throughout the nineteenth century, Māori were consistently denied a proper place within colonial democratic institutions. As they became increasingly outnumbered by the growing settler population, Māori throughout New Zealand increasingly sought their own Paremata that would be recognised and respected by settler Government.

The first act of the New Zealand General Assembly was to pass a resolution calling for responsible government, that is, settler self-government, with the Governor being advised by Ministers who were elected members of the new Parliament. Over the following years, the settler Government gradually assumed responsibility for Māori affairs, as Governor Gore Browne began to accept advice from Ministers. Governor Grey (appointed for a second time) subsequently accepted the principle of ministerial responsibility for Māori affairs in 1861, and the imperial government confirmed the principle of ministerial responsibility in 1864. In chapter 7, we found that the transfer of authority from imperial to colonial Government fundamentally undermined the treaty relationship. The Crown had promised to protect Māori in possession of their lands, the exercise of their chiefly authority, and in their independence. Yet the Crown failed to build any of these protections into the new constitution. Instead, the Crown progressively transferred authority to the very settler population from which it was supposed to protect Māori.

During this period of contest over responsibility for Māori affairs, the Crown had a number of options available to make some legal provision for Te Raki Māori rangatiratanga and tikanga. Most obvious was section 71 of the Constitution Act, which provided that the Queen, by letters patent, could establish native districts in which Māori would continue to govern themselves according to their own 'laws, customs and usages'.[43] However, the provision was not adopted by successive Governors, each of whom adopted a different approach to introducing colonial law and authority into the parts of New Zealand that remained largely outside of the Crown's substantive control. In 1860, in the climate of crisis created by the outbreak of the Taranaki war and growing support for the Kīngitanga among many iwi, Governor Gore Browne called a national rūnanga of Māori leaders, thought to be well-disposed to the Crown, including many Te Raki rangatira. The purpose of the Kohimarama gathering was to defuse Māori opposition and concerns about the war and shore up support for the Crown's authority. However, the rūnanga provided Te Raki rangatira with a forum to directly express their wishes and grievances to the Crown, and thereby influence government policy. The Government published English translations of the proceedings in *The Maori Messenger/Te Karere Maori* which emphasised rangatira expressions of loyalty to the Queen, but the official translations did not fully reflect what was said in te reo Māori.

43. New Zealand Constitution Act 1852, s 71.

While Te Raki rangatira acknowledged the Queen's mana and maru, they were not expressing submission to but partnership with the Crown. Te Raki rangatira also expressed no opinion on proposals to convert customary tenure into an English form of title. Despite Gore Browne's promises that Māori would be provided a means by which to consider and give input into Crown policy the following year, the Kohimarama rūnanga was never reconvened.

In 1861, George Grey who had succeeded Gore Browne made the unilateral decision to abandon all future national rūnanga. In their place, he swiftly established 'new institutions', or district rūnanga, that would provide Māori with significant powers of local self-government, but no influence on Crown policy at a national level. The district rūnanga were to have a wide range of powers which local hapū rūnanga already exercised, including as a forum for resolving land disputes. Grey's policy did little more than add a layer of British legal authority to existing structures, and he viewed the rūnanga as a means of introducing 'law and order' in Māori communities, and eventually amalgamating them into the colonial system of law and government.[44] However, despite their limitations, Te Raki rangatira embraced these 'new institutions', and likely saw them as a means of advancing their partnership with the Crown and attracting settlers. Grey visited the north in late 1861 seeking support for his policy, promising Māori that the rūnanga would endure forever and would bring benefits for their communities including townships, schools, and hospitals in the Bay of Islands and Hokianga.[45] The rūnanga were also sold as a way to provide rangatira greater access to the Governor, allowing him to better protect their interests.[46] For Te Raki Māori, these were important undertakings and it would have seemed that the Crown was taking a novel interest in their concerns. As we discussed in chapter 7, the district rūnanga had the potential to operate as an effective form of self-government, and to give Māori greater control over the pace of settlement, though they only met once a year (see chapter 7). However, only four years later this commitment was abandoned when the Crown withdrew its funding and support for the rūnanga in late 1864 in favour of a more directly assimilationist institution: the Native Land Court.

As in other parts of the country, the Crown's imposition of a new system of land tenure initially through its Native Land legislation was particularly devastating – not just to Te Raki Māori land ownership, but to the structures and practices underpinning the cultural, political, and economic organisation of hapū. In 1861, Native Minister Frederick Weld claimed that without individual title, Māori would lack the incentive to improve their land and 'unless they could have property and be afforded the means of progression by means of that property, all their efforts to rise would fail'.[47] Behind Weld's argument was the belief that the most efficient and

44. Sir George Grey, October 1861, AJHR, 1862, E–2, p 10.

45. Sir George Grey, 6 November 1861 (cited in Armstrong and Subasic, 'Northern Land and Politics' (doc A12), p 174).

46. 'Memorandum of conversation between Sir Geo[rge] Grey and Natives assembled at Keri-keri', 7 November 1861 (cited in Vincent O'Malley, supporting documents (doc A6(a)), vol 6, pp 1890–1891); Armstrong and Subasic, 'Northern Land and Politics' (doc A12), pp 174–175.

47. 'Native Title', 16 August 1861, *New Zealand Parliamentary Debates*, vol D, p 311.

economically productive form of land tenure essential to a civilised society was individual ownership. Settler politicians were also highly critical of what they considered to be the slow pace of land acquisition under Crown pre-emption as conducted by McLean's Native Land Purchase Department. It was acknowledged too that there had to be a fair means of investigating title and that the Crown taking that role when purchasing land was inequitable and had resulted in the outbreak of conflict.

The problem with the laws that were then imposed, member of the House of Representatives for Northern Māori Hōne Heke Ngāpua later observed, was that the individual, divisible rights to land they had created were antithetical to the relationship of Māori with their whenua. Indeed, he said, 'the Government . . . had made a big blunder in passing laws disregarding the true Native tenure and Native customs.'[48]

From 1862, the Crown began to abandon its policy of pre-emption which it previously set so much store by, in favour of a title conversion policy that would enable settlers to directly purchase land from Māori. The Native Lands Act 1862 allowed Māori a degree of control over the title conversion process and demonstrated some potential for a Crown–Māori partnership that might have provided for greater recognition of tikanga. However, a restructuring of the Native Land Court system as a national Pākehā-led court of record, codified by the Native Lands Act 1865, became an essential element of the Crown's policy of assimilation, as it sought to promote the economic development of the colony through the large-scale transfer of land ownership. Through the 1865 Act and subsequent legislation, the Crown sought to foster alienation by concentrating ownership in the form of individually tradeable shares in the hands of small groups of up to 10 selected owners recorded on a certificate of title by the Native Land Court. The intention had been to force Māori into subdividing their lands, but these owners represented many others. These unexpressed trust arrangements risked dispossession for those owners not included on titles, and the Crown's effort to amend the legislation in 1867 and 1869 offered little in the way of effective protections (see chapter 9, section 9.5). In response to growing criticism of the ten-owner rule, the Crown introduced a new system of memorials of ownership in 1873 which were to record the names of all owners, each of whom was awarded individually tradeable shares. Neither the titles offered under the either of these schemes offered Te Raki Māori the security and flexibility they sought. Certificates of titles had the effect of legally dispossessing hapū, while memorials of ownership were good for selling and little else. In the absence of any consultation with Māori, the Crown imposed upon them a series of Native Land laws that left both individuals and collectives unable to manage their lands in a way that promoted the stability of their communities or their economic interests. As the Crown conceded in our inquiry:

> the operation and impact of the native land laws, in particular the award of land to individuals and enabling individuals to deal with land without reference to iwi or hapū,

48. Hone Heke Ngāpua, 5 September 1894, *New Zealand Parliamentary Debates*, vol 85, p 461.

made those lands more susceptible to partition, fragmentation and alienation. This undermined traditional tribal structures which were based on collective tribal and hapū custodianship of the land. The Crown failed to protect those collective tribal structures which had a prejudicial effect on the iwi and hapū of Northland and was a breach of the treaty and its principles.[49]

The damage inflicted upon Māori of our inquiry district was deep and enduring. In the first 10 years of the Native Land Court's operation in Te Raki over 300,000 acres of land, comprising 469 blocks, were titled.[50] At the outset of this period, the Crown withdrew from purchasing in Te Raki, having opened Māori land to direct purchase from settlers. However, in the early 1870s the Fox ministry returned to the practice of funding colonial infrastructure through the purchase and resale of cheap Māori land in response to economic pressures and in pursuit of colonisation goals. Crown purchasers would now compete in a land market with private purchasers. The significant amount of land that had passed through the Native Land Court by the mid-1870s drove down prices. This trend would only continue over the remainder of the decade as a further 255,860 acres, comprising 202 blocks, would be titled between 1875 and 1880. It was during these years, that the Native Land Court 'cemented its dominance in Te Raki and emerged as a key element and ally in the Crown's land purchasing programme in the region.'[51]

The Crown further strengthened its purchasing position by assuming monopoly powers over lands declared under the Native Land Purchase Act 1877. This power allowed the Crown to further limit the ability of Māori to deal collectively with their lands and realise the best possible price, locking out competition as purchase officers gradually acquired individual shares. In this market for land, Māori land owners had access to few protections. The conduct of Crown purchase agents was calculated to prevent collective decision making, and practices such as tāmana, or advance payments ahead of title determination by the Native Land Court, were consciously employed to undermine Te Raki Māori capacity to retain land. The opaque and incremental nature of these payments left Māori landowners without a way of knowing what parts of their land might later be carved out by the Court for the Crown on the basis of its purchase of individual interests, or the extent of the loss to the hapū. Despite the fact that the Crown was aware of the effect that tāmana payments had on Māori, and apparently frowned on its use, it failed to stop the practice until 1894 when the Crown reasserted its right of pre-emption. Further, the Crown subverted its monitoring obligations by declining to adopt or make appropriate use of effective protective mechanisms that included independent valuations, restrictions on alienability, and creation of hapū reserves.

49. Crown closing submissions (#3.3.406), pp 5–6.

50. Excludes blocks for which the date of titling is not known: Paul Thomas, 'The Native Land Court in Te Paparahi o Te Raki: 1865–1900' (commissioned research report, Wellington: Waitangi Tribunal, 2016) (doc A68), pp 17–19.

51. Excludes blocks for which the date of titling is not known: Thomas, 'The Native Land Court' (doc A68), pp 17–19.

In our view, a treaty-consistent standard of Crown behaviour would have provided mechanisms for community control over whenua. Furthermore, it is evident that the Crown was able, even within a nineteenth century European paradigm, to provide for customary rights in land. We note the provision made for tribal titles in the Native Lands Acts of 1862 and 1865; and a tentative step towards providing a collective management of lands through incorporations and the election of committees in 1894. It appears, however, that only one tribal title was issued in the district, while the 1894 provision was regarded with suspicion and besides came too late to be of much use. By this stage, only a small percentage of land remained under customary title in the Te Raki district. Throughout the nineteenth century, the Crown remained convinced, at least with respect to the ownership and utilisation of land, that Māori would have to abandon their communal ways in order to participate in the developing economy and advance in civilisation. By design, the Crown's Native Land legislation and the advantages in purchasing Māori land the Crown legislated for itself gravely undermined the capacity of Te Raki hapū to retain and manage their lands. We therefore share the view of the Tribunal in *He Maunga Rongo* that the legislative regime for land introduced from 1862 was fundamentally inconsistent with the treaty, and that 'every purchase conducted under it was necessarily in breach of the Treaty'.[52]

The extent of land that transferred out of Māori hands during the nineteenth century reflects the overall effect of the Crown's native land policies in our inquiry district. From 1865 to 1900, the Crown purchased some 231 Māori land blocks in the district with a combined area of 588,707 acres.[53] Private purchasing occurred on a smaller scale during this time and resulted in the loss of at least a further 174,000 acres.[54] The Crown's purchase of such an extensive territory disrupted relationships within and between Te Raki hapū and their connections with whenua, awa, and ngahere, as well as minerals, and other resources. Instead, by the end of the nineteenth century, many Te Raki Māori lacked sufficient land for sustenance, let alone future development. Certain hapū, as has been established, were virtually landless. As claimant Hone Pikari told us, the Crown's insistence on buying

52. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, Wai 1200, 4 vols (Wellington: Legislation Direct, 2008), vol 2, p 625.

53. Barry Rigby, 'Validation Review of the Crown's Tabulated Data on Land Titling and Alienation for the Te Paparahi o Te Raki Inquiry Region: Crown Purchases 1866–1900' (commissioned research report, Wellington: Waitangi Tribunal, 2016) (doc A56), p 3; Crown closing submissions (#3.3.407), p 13; claimant closing submissions (#3.3.213), p 35.

54. This figure was reached as the sum of the private purchase data provided by the Crown for the period from 1865 and 1905. The figure includes purchases where the date of purchase is unknown, but excludes all blocks that had their title determined by the Native Land Court after 1905. The figure also accounts for an error in the Tokawhero block, where the Crown data recorded the purchase of the whole block (2,777 acres), whereas the purchase only amounted to 694 acres: Crown data (#1.3.2(c)). In his evidence in this inquiry, Paul Thomas observed that the Crown's data on private purchasing may not be complete as it has relied on the block narratives produced by researcher Paula Berghan, and 'it is unclear how extensive and systematic Berghan's search for private purchase was'. As a result, our figure is most likely lower than the acreage actually purchased privately during this period: Thomas, 'The Native Land Court' (doc A68), p 257.

from individuals, without knowledge of the hapū, undermined Te Raki rangatira; '[they] lost substantial authority and control over the whenua, and once this authority was diminished, so was the mana of the rangatira'.[55] And we would add the mana and rangatiratanga of hapū, as the strength of community and collective control was undermined. The result was nothing less than economic, and in many respects cultural, destruction; in Mr Pikari's words, quite simply, 'the Crown has devastated us land-wise'.[56]

By the mid-1870s, the impact of the Crown's Native Land legislation and purchasing policies began to be felt across the district. From this point, Te Raki leaders gradually lost faith in the partnership that had seemed to be promised at Waitangi, and became increasingly vocal about their rights under the treaty and the clear harm they perceived the Crown's policies were doing to their communities. They petitioned the House of Representatives, and sent deputations to the Queen raising concerns about the colonial Government's actions and seeking recognition of their rights under the treaty. During these years, Te Raki rangatira offered the Crown alternatives to the assimilationist policies it had imposed on Māori. Rangatira from Te Raki, and outside the district, gathered at Ōrākei and Waitangi paremata during the 1870s and 1880s, where they adopted resolutions condemning the Crown's Native Land laws, and proposing local Māori systems of self-government. From the late 1880s, the national Kotahitanga movement developed numerous proposals for Māori autonomy and self-government at local and national levels, all of which the Crown declined.

Kotahitanga leaders were seeking no more than the Crown's legal recognition of local komiti and national paremata that were already operating. With respect to local self-government, statutory recognition of native committees was clearly possible for the Crown – rūnanga had been given official recognition in the 1860s and native committees in the 1880s although their powers had remained limited. Māori had already demonstrated their capacity to sustain a representative assembly with very broad support. Furthermore, during the 1890s, Seddon and Ballance had submitted draft Bills to national Kotahitanga hui, indicating that the Crown was already able to work with Māori leaders. Yet, when Seddon finally entered meaningful negotiations in 1899, he sought to divide Kotahitanga and curtail Māori influence at a national level. The Māori Councils and Māori Land Councils established in 1900 (which we discuss further in a forthcoming volume) provided for limited local self-government and operated under the Crown's control. From the evidence considered in this part of the report, it is clear why the Crown was unwilling to adequately provide for self-government in these years and address Te Raki Māori concerns and priorities regarding their lands, and why it failed to rein in purchasing officers' activities. Taking either course would have impeded purchasing and hindered the Crown's plans for the development of a colonial economy that favoured settlers while marginalising Māori.[57]

55. Hone Pikare (doc w11), p 15.
56. Hone Pikare (doc w11), p 17.
57. Waitangi Tribunal, *He Maunga Rongo*, Wai 1200, vol 2, p 625.

Throughout the nineteenth century, the Crown engaged minimally with Māori while imposing its vision over the colony's economic future. By the close of the century, having refused to recognise Te Raki Māori tino rangatiratanga, or provide statutory support for their institutions of self-government, the Crown once again attempted to impose authority on the district by force. The 'Dog Tax War' of 1898 was the first occasion since the Northern War in which the Government had sent armed forces with hostile intent into Ngāpuhi territories. The dog tax was imposed on communities that had not accepted the authority of the Crown's systems of national or local government, amounting to taxation without adequate representation. The fines imposed on those who refused to pay the tax were punitive and impoverishing. The arrival of soldiers in Hokianga in May 1898 to arrest members of Te Huihui was defused by Māori leaders, who prevented what could have been a violent confrontation. This action was disproportionate, and represented the Crown's near complete failure by the end of the nineteenth century to uphold the agreement it had entered with Te Raki rangatira under te Tiriti.

With Respect to the Constitutional Changes Implemented by the Crown and its Policies for Extinguishing Māori Title and Further Purchasing, We Make the Following Findings

In respect to the provision the Crown made for Te Raki Māori tino rangatiratanga as it took steps to establish institutions for settler self-government, we find that:

- The Crown failed to recognise, respect, and give effect to Māori political rights when it enacted a constitution that provided for provincial and national representative assemblies in 1852 without negotiating with Te Raki Māori, without ensuring that Te Raki Māori were able to exercise a right to vote alongside settlers, and without providing safeguards that would secure ongoing Te Raki Māori autonomy and tino rangatiratanga. These Crown actions and omissions, which came at a crucial juncture in New Zealand history, breached te mātāpono o te tino rangatiratanga. These actions also breached te mātāpono o te houruatanga me te mātāpono o te whakaaronui tētahi ki tētahi/the principles of partnership and of mutual recognition and respect.
- By providing for responsible government by colonial ministries from 1856, and ultimately allowing those ministries to assume responsibility for the Crown–Māori relationship, the Crown fundamentally undermined the treaty relationship. The Crown did not negotiate with Te Raki Māori, or provide safeguards to ensure that Māori could continue to exercise autonomy and tino rangatiratanga. This breached te mātāpono o te tino rangatiratanga. It also breached te mātāpono o te houruatanga me te mātāpono o te whakaaronui tētahi ki tētahi/the principles of partnership and of mutual recognition and respect.

- By failing to declare self-governing Māori districts under section 71 of the Constitution Act 1852, and thus to ensure provision was made for Māori autonomy within its own kāwanatanga framework, the Crown breached te mātāpono o te houruatanga/the principle of partnership.
- By effectively denying the great majority of Māori representation in the General Assembly prior to 1867, the Crown breached te mātāpono o te mana taurite/the principle of equity. The Crown also breached this principle by failing to ensure that Māori were represented in the Legislative Council and in provincial assemblies (the Auckland Provincial Council in the case of Te Raki Māori).

With respect to the significance of the Kohimarama Rūnanga, we find that:

- By calling the Kohimarama Rūnanga only after war had already broken out, the Crown ensured the rūnanga focused primarily on its own agenda, that is on seeking Māori approval for the war and on its own proposals for administration of Māori affairs rather than responding to the priorities of Māori leaders. This was inconsistent with the Crown's duty of good faith, in breach of te mātāpono o te houruatanga/the principle of partnership.
- Governor Grey's decision to cancel the planned 1861 national rūnanga and all future national rūnanga was inconsistent with the Crown's obligation of good faith. The decision was a critical missed opportunity to build a forum for regular dialogue between the rangatiratanga and kāwanatanga spheres. It denied Māori (including Te Raki Māori) opportunities for ongoing input into government policy on matters of fundamental importance to them, including questions of land titling and administration, local government, and justice. By denying this opportunity, the Crown was in breach of te mātāpono o te houruatanga/the principle of partnership.

With respect to Governor Grey's rūnanga, the 'new institutions', we find that:

- By promising Māori that rūnanga would exercise substantial powers to make and enforce local regulations, determine land ownership, and guide development in their districts, and then failing to give effect to rūnanga decisions, the Crown acted inconsistently with its obligation of good faith, and breached te mātāpono o te houruatanga me te mātāpono o te whakaaronui tētahi ki tētahi/the principles of partnership and of mutual recognition and respect.
- By first reducing the powers that rūnanga could exercise and then unilaterally withdrawing support for them after promising Māori that the scheme would endure forever, allow Māori to make law for their districts, determine land ownership and boundaries, control the pace of settlement and bring benefits, including the development of services and infrastructure leading to greater prosperity, the Crown acted inconsistently with its obligation of good faith, and therefore breached te mātāpono o te houruatanga/the principle of partnership.

- By failing to deliver on its 1858 promise that a township would be established at Kerikeri, and its 1861 promise that a township would naturally follow the establishment of district rūnanga, the Crown acted inconsistently with its obligation of good-faith conduct, and therefore breached te mātāpono o te houruatanga/the principle of partnership.

In respect of the establishment of the Native Land Court, we find that:

- By developing and implementing a system for title determination based on its own agenda to acquire more land, rather than the protection of Māori rights as guaranteed under article 2, the Crown breached te mātāpono o te tino rangatiratanga and te mātāpono o te matapopore moroki/the principle of active protection.
- The Crown's failure to seek Māori engagement on the provisions of the Native Lands Act 1862 was inconsistent with its duty to consult and gain the consent of Te Raki Māori on matters central to their guaranteed treaty rights, in breach of te mātāpono o te houruatanga/the principle of partnership and te mātāpono o te tino rangatiratanga.

In respect of the restructure of the Native Land Court and the Native Lands Act 1865, we find that:

- By failing to make a good-faith effort to engage with and secure Māori consent in advance of the changes to the Native Land Court system, as set down in the Native Lands Act 1865, the Crown breached te mātāpono o te houruatanga/the principle of partnership, te mātāpono o te matapopore moroki/the principle of active protection, and te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect.
- By legislating unilaterally in 1865 to codify changes to the composition and decision-making powers of the Native Land Court, the Crown effectively removed Māori control of the title investigation and determination process, breaching te mātāpono o te tino rangatiratanga and te mātāpono o te houruatanga/the principle of partnership.
- By abolishing, without consultation, the flexible and tikanga-informed process the Court had originally employed to determine ownership in favour of a British system prioritising individual over collective rights, the Crown breached te mātāpono o te houruatanga/the principle of partnership and mātāpono o te tino rangatiratanga.

In respect of the appropriateness of titles awarded by the Native Land Court, we find that:

- The Crown introduced laws offering a title that failed to give legal expression to collective tenure and to accord with Te Raki Māori preferences. Such failures breached te mātāpono o te houruatanga/the principle of partnership and te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect and the guarantee of te tino rangatiratanga.

- The titles awarded to Te Raki Māori under nineteenth-century Native Land legislation and through the Native Land Court failed to provide the same certainty, stability, and protection as titles awarded in respect of general land and duly registered under the Land Transfer Act. The failure of the Crown to provide an equivalently robust titling regime for Māori as that applying to the settler population (and which failed to equip whānau and hapū to participate in the colonial economy to the same degree) breached te mātāpono o te mana taurite/the principle of equity.

In respect of the Native Land Court's operation in Te Raki, we find that:

- The failure of the Crown to create a body in which Māori (in Te Raki and elsewhere) had the determining role when deciding questions pertaining to their own lands was a breach of te mātāpono o te houruatanga/the principle of partnership; and in respect of the Court it created, its failure to ensure that assessors had equal status and authority to judges throughout the period under consideration was a breach of te mātāpono o te mana taurite/the principle of equity.
- The failure to ensure adequate notification of hearings and that the costs involved in the conversion of customary title were shared appropriately and fairly among the parties who benefited, Crown as well as Māori, breached te mātāpono o te houruatanga/the principle of partnership and te mātāpono o te mana taurite/the principle of equity.
- The Crown failed to monitor court processes to assure itself that the institution it had created was functioning in an appropriate manner and to ensure that statutes were appropriately rigorous, fully implemented, and effective. Those failures breached te mātāpono o te matapopore moroki/the principle of active protection.

In respect of the Te Raki Māori engagement with the Native Land Court and the consequences of that engagement, we find that:

- By rejecting all requests by Te Raki Māori for the right, opportunity, and authority to conduct title investigations through their own institutions, by empowering individual Māori to act independently of co-owners, and by employing questionable purchasing tactics, the Crown rendered engagement with the Native Land Court and its processes practically obligatory, thereby breaching te mātāpono o te tino rangatiratanga.
- The process of tenure conversion meant many Te Raki Māori incurred substantial debt, notably in the form of survey costs. Although the extinguishment of customary ownership principally served the interests of the Crown, Māori were forced to meet the costs, often through the loss of land. By failing to ensure that the costs of extinguishing customary Māori title in the Native Land Court were allocated according to the distribution of benefits arising from the process, the Crown breached te mātāpono o te mana taurite/the principle of equity, in breach of te mātāpono o te houruatanga/the principle

of partnership and te mātāpono o te matapopore moroki/the principle of active protection.

In respect of the forms of remedy and redress provided for Māori by the Crown's Native Land regime, we find that:

- The legislative provisions relating to Native Land Court re-hearings did not, at least until 1894, furnish a sufficiently robust appeal mechanism or process, while the Native Affairs Committee possessed only a power of recommendation, and was not intended to act (and did not act) as a de facto court of appeal. The failure of the Crown to provide a robust appeal mechanism was in breach of article 3 of the treaty and te mātāpono o te mana taurite/the principle of equity.
- The Crown, in being responsible for and failing to remedy these systemic deficiencies over a period of nearly 30 years, breached te mātāpono o te matapopore moroki/the principle of active protection and te mātāpono o te whakatika/the principle of redress.

In respect of the political and economic objects of the Crown's purchasing programme, we find that:

- By returning to land purchasing in the 1870s for the purpose of expediting Pākehā settlement, and doing so at the expense of Te Raki Māori rights to retain and develop large parts of their land within a mutually beneficial relationship, the Crown breached te mātāpono o te houruatanga/the principle of partnership, and te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development, as well as te mātāpono o te tino rangatiratanga.
- By assuming and imposing land purchase monopoly powers under the Government Native Land Purchase Act 1877 without the consent of Te Raki Māori and in the face of opposition, the Crown acted inconsistently with its duty to engage with Māori in good faith, in breach of te mātāpono o te houruatanga/the principle of partnership.
- By unilaterally reimposing Crown pre-emption through the Native Land Court Act 1894 in the face of express Te Raki Māori opposition and without adequate engagement with Te Raki hapū, the Crown breached te mātāpono o te houruatanga/the principle of partnership.
- By reimposing Crown pre-emption, the Crown denied Te Raki Māori potential benefits associated with a market in land. Its reimposition restricted the ability of Māori to develop and transfer their land in a way that other landowners were not subject to. This breached te mātāpono o te mana taurite/the principle of equity. Moreover, re-asserting its right to pre-emption actually heightened the Crown's obligations to protect the rights and interests of Māori landowners. Its failure to do so was thus a breach of te mātāpono o te matapopore moroki/the principle of active protection and te mātāpono o te kāwanatanga.

- By failing, through its legislation and policy, to promote land settlement opportunities and collateral benefits for Te Raki Māori equivalent to those afforded to Pākehā settlers, as promised, breached te mātāpono o te mana taurite me te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of equity and the principle of mutual benefit and the right to development.

In respect of the Crown's on the ground purchasing practices, we find that:

- By employing tāmana, or advance payments, the Crown deliberately undermined the capacity of Te Raki Māori to retain their lands and resources in breach of te mātāpono o te tino rangatiratanga.
- By conducting its purchasing in a manner calculated to undermine the capacity of hapū to reach and maintain decisions about land, the Crown also undermined established Te Raki Māori authority structures and social cohesion, breaching te mātāpono o te tino rangatiratanga.
- In addition, despite the objections of Te Raki Māori and the conclusions reached by several official investigations into this practice, the Crown failed to respond in a timely and effective manner with appropriate remedies. This failure was in breach of te mātāpono o te whakatika/the principle of redress.
- By failing to monitor and exercise effective control over the practices and activities of its purchasing agents the capacity of Te Raki Māori to retain and develop their lands was undermined, in breach of te mātāpono o te tino rangatiratanga, te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development, and te mātāpono o te matapore moroki/the principle of active protection.
- By deliberately designing purchasing processes and using tactics intended to lower the prices of Te Raki Māori land for its own benefit, the Crown acted inconsistently with its duty of good-faith conduct, and in breach of te mātāpono o te houruatanga/the principle of partnership. In this respect, the Crown was also in breach of te mātāpono o te mana taurite/the principle of equity.
- By intentionally acquiring vast tracts of Te Raki Māori land at much lower prices than it was worth, the Crown was in breach of te mātāpono o te mana taurite me te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principles of equity and of mutual benefit and the right to development.
- The Crown purchased land by acquiring individual interests, bypassing and thereby undermining community decision-making processes which had traditionally protected whānau and hapū lands. In doing so, the Crown acted inconsistently with its duty of good-faith conduct, in breach of te mātāpono o te houruatanga/the principle of partnership. It also breached te mātāpono o te tino rangatiratanga.

In respect of the steps the Crown took to protect Te Raki hapū interests, we find that:

- In failing to develop and implement a system to ensure Te Raki whānau and hapū retained land of appropriate quality and quantity for the well-being of present and future generations and their economic development, the Crown fell short of the protective duties inherent in the treaty partnership, breaching te mātāpono o te matapopore moroki/the principle of active protection, and te mātāpono o te houruatanga/the principle of partnership.
- The Crown failed to implement or enforce an effective policy for restricting the alienation of Māori land, and instead prioritised the needs of settlers, taking steps to reduce the effectiveness of existing restrictions, in breach of te mātāpono o te tino rangatiratanga, te mātāpono o te mana taurite/the principle of equity, mātāpono o te matapopore moroki/the principle of active protection, and te mātāpono o te whai hua kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development.
- The Crown failed to develop and institute a clear policy for creating reserves on a basis agreed with Te Raki hapū leaders, in breach of te mātāpono o te houruatanga/the principle of partnership. The policies the Crown did introduce failed to balance its purchase goals with the creation of hapū reserves and to legally protect and respect such reserves as were established, in breach of te mātāpono o te matapopore moroki/the principle of active protection.
- The Crown failed to ensure that Te Raki whānau and hapū retained enough land and resources to meet their obligations under tikanga, to develop their lands, and to contribute to the colonial economy in successive generations, which breached te mātāpono o te tino rangatiratanga and te mātāpono o te matatika mana whakahaere/right of development.
- The Crown failed to ensure the implementation of effective protective legislation including legislation specifically addressing fraud prevention, and then circumscribed the exercise of those legislative protections that did exist or simply ignored them. This breached te mātāpono o te houruatanga/the principle of partnership and te mātāpono o te matapopore moroki/the principle of active protection.

In respect of parliamentary representation for Te Raki Māori, we find that:

- By providing for Māori representation in the House of Representatives through the Maori Representation Act 1867 without first engaging with Te Raki Māori, and in particular without seeking their input on the number and size of electorates, the Crown breached te mātāpono o te kāwanatanga me to mātāpono o te houruatanga/the principle of partnership.
- By effectively denying the great majority of Māori representation in the General Assembly, and then providing for the election of only four Māori members to the House, including only one for all northern Māori, when they were entitled to between 12 and 14 on a population basis in 1867, the Crown breached te mātāpono o te kāwanatanga me te mātāpono o te mana taurite/

the principle of equity. The Crown also breached this principle by failing to ensure that Māori were represented in the Legislative Council and in provincial assemblies (the Auckland Provincial Council in the case of Te Raki Māori).

- By rejecting legislative proposals to increase Māori representation during 1871, 1872, 1875, and 1876, the Crown breached te mātāpono o te kāwanatanga, te mātāpono o te mana taurite me te mātāpono o te houruatanga/the principles of equity and partnership.

In respect of Te Raki Māori proposals for rūnanga and native committees, we find that:

- By failing to take the opportunities offered by Wiremu Kātene's 1871 proposal for the establishment of rūnanga based on partnership in districts north of Auckland, and the Native Councils Bills of 1872 and 1873, the Crown breached te mātāpono o te houruatanga/the principle of partnership; it also acted inconsistently with its obligation to recognise and respect the tino rangatiratanga of Te Raki Māori and give effect to proposals for their self-government at a regional and local level in breach of te mātāpono o te tino rangatiratanga.
- The Native Committees Empowering Bill 1881 and the Native Committees Bill 1883 presented significant opportunities for the Crown to provide for Māori autonomy and self-government at a local level. By declining to pursue these opportunities, by instead establishing committees that lacked real power or authority, and by declining Te Raki Māori requests to increase the powers of committees established under the Native Committees Act 1883, the Crown acted inconsistently with its obligation to recognise and respect the tino rangatiratanga of Te Raki Māori, in breach of te mātāpono o te tino rangatiratanga and te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect. It also breached te mātāpono o te houruatanga/the principle of partnership.

In respect of proposals for a Māori Parliament, we find that:

- By declining to enter negotiations over the establishment of a Māori parliament despite repeated requests by Te Raki Māori (specifically, in Hirini Taiwhanga's 1878 petition, at the Waitangi parliament in 1881, in Hirini Taiwhanga's 1882 petition, in Hōne Mohi Tāwhai's 1883 petition, and on several other occasions during the 1880s), the Crown acted inconsistently with its obligation to recognise and respect the tino rangatiratanga of Te Raki Māori, in breach of te mātāpono o te tino rangatiratanga and te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect. This was also in breach of te mātāpono o te houruatanga/the principle of partnership.
- By impugning the credibility, integrity and status of Ngāpuhi leaders who petitioned the Queen in 1882 and 1883, in order to ensure that they would not meet the Queen and in order to prevent serious inquiry by the imperial government into the treaty issues they raised, the Crown committed a serious

breach of its obligation to act in good faith towards its treaty partner, in breach of te mātāpono o te houruatanga/the principle of partnership.

In respect of Te Raki Māori appeals and petitions, we find that:

- The Crown, by ignoring or rejecting petitions and other requests from Te Raki Māori for recognition of their tino rangatiratanga (in particular Hirini Taiwhanga's 1882 petition, the 1883 letter to the Aborigines' Protection Society, Wī Katene's 1884 petition, and further petitions and letters from 1886 to 1888), the Crown breached its duty of good faith, and te mātāpono whakatika/the principle of redress.

In respect of the Kotahitanga parliaments, we find that:

- By rejecting Kotahitanga proposals for Māori autonomy and self-government in the early 1890s, and in particular by rejecting the Native Committees Act 1883 Amendment Bill 1892, the Federated Maori Assembly Bill 1893, the Kotahitanga petition 1893, and the Native Rights Bill 1894 (including when it was reintroduced in 1895 and 1896), the Crown acted inconsistently with its obligation to recognise and respect the tino rangatiratanga of Te Raki Māori, in breach of te mātāpono o te tino rangatiratanga and te mātāpono o te whakaaronui tētahi ki tētahi/the principle of mutual recognition and respect. It also breached te mātāpono o te houruatanga/the principle of partnership.
- By failing to enter meaningful negotiations over the Kotahitanga proposals until the late 1890s, the Crown breached te mātāpono o te houruatanga/the principle of partnership.

In respect of the 'Dog Tax War', we find that:

- By supporting and encouraging this district's county councils to enforce the dog tax on communities that lived on customary Māori land and had not consented to the Crown's system of national or local government, the Crown breached te mātāpono o te tino rangatiratanga, and te mātāpono o te houruatanga/the principle of partnership.
- The Crown's arrest at gunpoint of Hōne Toia and other followers of Te Huihui was disproportionate, overly punitive, and calculated to intimidate Māori. This was in breach of te mātāpono o te mana taurite/the principle of equity and te mātāpono o te kāwanatanga. It was also in breach of te mātāpono o te tino rangatiratanga, and te mātāpono o te houruatanga/the principle of partnership.

12.2 Recommendations

By 1900, the Crown had extended its substantive authority over much of Te Paparahi o Te Raki in breach of treaty principles, despite the objections, protests, and aspirations of many rangatira. In our view, from the very outset of the treaty relationship there were clear signs that the Crown's intentions for the colonisation of New Zealand were inconsistent with the undertakings it had made to Te Raki

Māori prior to the signing of te Tiriti, and in the agreement itself. Hobson's proclamations of sovereignty were the first step to setting the treaty on a different course, whereby the Crown would assert itself as the superior authority. Only five years later, the Crown conducted a war to bring Ngāpuhi under its substantive sovereignty. In the following years, the Crown neglected Ngāpuhi concerns until it was assured of their 'loyalty'. From the 1850s, the Crown also began to make sweeping constitutional changes that further departed from te Tiriti and transferred responsibility for its treaty obligations to the colonial Government and settler-led Parliament without specific safeguards for Māori. As settler influence grew, the Crown sought to extend its authority into Māori communities as quickly as possible, and continued to prioritise settler demands for Māori lands and resources. The primary vehicle for the Crown's assimilationist policies was the Native Land Court, which undermined the rangatiratanga of hapū communities and disrupted their ability to exercise tikanga. As tribal structures were progressively eroded during this period, the Te Raki Māori economy was simultaneously dismantled, resulting in material poverty for many.

The prejudicial impacts of the Crown's nineteenth century acts and omissions were clearly apparent by 1900. They have been severe and lasting. Te Raki Māori now hold only a small proportion of the land in the district, and their tikanga has been marginalised. Instead of the equal authority they had been promised, their lives and resources are now governed by a range of local councils and Crown agencies in which they have only a limited place and role.

To settle these grievances and restore its honour, the Crown should now enter into discussions with Te Raki Māori about how full restoration of their tino rangatiratanga can be effected in a contemporary context. We are cautious not to preempt work that is likely ongoing to establish which groups should carry out these negotiations on behalf of the claimants. However, the negotiations will need to be sensitive to the different structures of tribal authority that exist in Te Raki, and within Ngāpuhi, and seek to provide for the exercise of both hapū and iwi rangatiratanga. In our view, a crucial first step will be for the Crown to recognise the agreement in te Tiriti as described in our stage 1 report, and our conclusion that the Crown did not acquire sovereignty through an informed cession by the rangatira who signed te Tiriti at Waitangi, Waimate, and Māngungu.[58] Only then can the parties move forward with a shared understanding, and begin to take steps towards giving practical effect to the agreement that they entered into in 1840, today.

Any new institutional arrangements agreed upon should provide for Te Raki hapū and iwi to exercise the tino rangatiratanga they were guaranteed in te Tiriti, alongside other Crown agencies and local authorities within their rohe. There are optimistic signs that this is not out of reach for the parties. We note that Te Raki Māori have remained committed to te Tiriti as the foundation for their relationship with the Crown, despite the fact that its guarantees and obligations have been neglected for so many years, and little redress for past breaches has been

58. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, Wai 1040, pp 526–527.

forthcoming. Furthermore, we are conscious that in recent years government organisations have begun taking a greater interest in treaty rights of Māori at a national and local level, and steps undertaken to provide some Te Raki hapū with a greater say in aspects of governance within their rohe. We have no doubt that this will be a complex task requiring perseverance and good will from both parties. For that reason, we think this work should begin as soon as possible to establish the basis upon which parties can together move forward towards a settlement.

In order to assist the parties with this work, we recommend that:

- the Crown acknowledge the treaty agreement which it entered with Te Raki rangatira in 1840, as explained in our stage 1 report;
- the Crown make a formal apology to Te Raki hapū and iwi for its breaches of te Tiriti/the Treaty and its mātāpono/principles for:
  - Its overarching failure to recognise and respect the tino rangatiratanga of Te Raki hapū and iwi.
  - The imposition of an introduced legal system that overrode the tikanga of Te Raki Māori.
  - The Crown's failure to address the legitimate concerns of Ngāpuhi leaders following the signing of te Tiriti, instead asserting its authority without adequate regard for their tino rangatiratanga which resulted in the outbreak of the Northern War.
  - The Crown's egregious conduct during the Northern War.
  - The Crown's imposition of policies and institutions that were designed to wrest control and ownership of land and resources from Te Raki Māori hapū and iwi, and which effected a rapid transfer of land into Crown and settler hands.
  - The Crown's refusal to give effect to the Tiriti/Treaty rights of Te Raki Māori within the political institutions and constitution of New Zealand, or to recognise and support their paremata and komiti despite their sustained efforts in the second half of the nineteenth century to achieve recognition of and respect for those institutions in accordance with their tino rangatiratanga.
- That all land owned by the Crown within the inquiry district be returned to Te Raki Māori ownership as redress for the Crown's breaches of te Tiriti/the Treaty and ngā mātāpono o te Tiriti/the principles of the Treaty.
- That the Crown provide substantial further compensation to Te Raki Māori to restore the economic base of the hapū, and as redress for the substantial economic losses they suffered as a result of the Crown's breaches of te Tiriti/the Treaty and ngā mātāpono o te Tiriti/the principles of the Treaty.
- That the Crown enter discussions with Te Raki Māori to determine appropriate constitutional processes, and institutions at national, iwi, and hapū levels to recognise, respect, and give effect to their Tiriti/Treaty rights. Legislation, including settlement legislation, may be required if the claimants so wish.

The Tribunal reserves the right to make further recommendations on the matters addressed in this part of our report in subsequent volumes.

Dated at Wellington this 22nd day of December 2022

Judge Craig T Coxhead, presiding officer

Dr Robyn Anderson, member

Dr Ann R Parsonson, member

THE SEAL OF THE WAITANGI TRIBUNAL

APPENDIX I

HIRINI TAIWHANGA'S 1882 PETITION TO THE QUEEN

Petition from the Maoris to the Queen

8 August 1882

To Her Majesty Victoria, the Good Queen of England, and the Empress of India,

Greeting:

Go forth, O our messenger, on the soft airs of affection, to remote lands, across the ocean that was trodden by Tawhaki,[1] to Victoria, the Queen of England, whose fame for graciousness has extended to all the kingdoms of the world, including New Zealand. O mother, the receiver of the sentiments of the great peoples and the small peoples under the shade of your authority, Salutations! May the Almighty preserve you on your Throne, and may men applaud you for your goodness to your peoples living in these Islands, who are continually directing their eyes toward you, the mother who is venerated by them.

O mother, the Queen! on account of the desire to protect these Islands, your father sent hither, in 1840, Captain Hobson. At that time the enlightened administration of England was discovered by us, and the Maori Chiefs came to the conclusion that England, in preference to other countries, should be the protector of New Zealand—to protect and cherish the Maori tribes of New Zealand. The conclusion brought about the Treaty of Waitangi, and the appointment of the first Governor, Captain Hobson.

In consequence of the ignorance of some tribes, including Hone Heke, the flagstaff was cut down at Maiki, Bay of Islands, for the tribes in question imagined that the flag was the symbol of land confiscation. Nevertheless, there was no blood in the flagstaff which had been cut down, making it needful to raise armies to fight the Maoris. If the Native Chiefs had been summoned to a conference at that time, and matters had been explained to them, there would have been no war; but the Europeans flew as birds to make war against Heke, which brought about the blood-shedding of both Europeans and Maoris.

1. A translator's note explained: 'Tawhaki, the God-man, whose name frequently occurs in all the ancient mythology of the Maori race'.

In the year 1860 another evil was brought upon the Maori tribes by the Governor himself, who, without any grounds, drove Wiremu Kingi from his own lands at Waitara, and this war about land renewed the shedding of both European and Maori blood. On this occasion, O mother, the Queen! the grievous lamentation of this Island was raised, and you recalled, in consequence, Governor Gore Browne, whose administration closed here. It was said by the Europeans that William King did wrong in opposing the Governor; that if William King and party had appealed to the Supreme Court, the Government act in that case would have been condemned. Hence the knowledge of the Taranaki tribes taking up that opinion, and retaining it up to the capture of Te Whiti and others, who did not oppose in fight the Government when it went with an army to Parihaka to enkindle Maori strife, thereby endeavouring to find a basis to make the Maoris do wrong, and then confiscate their lands.

In the year 1862, you, O Queen, sent hither Governor Grey to calm down the rain and the wind,[2] so that the sea of both races should be still. Governor Grey possessed much wisdom: he understands the Maori language, also the Maori customs. Notwithstanding, when he came the second time as Governor of these Islands, he rushed hastily away to Taranaki, and gave instructions for road-making on Maori territory, thereby bringing about a war and the slaying of many of both races. In the year 1863, the war was carried into Waikato, and the Maoris throughout the Island were unaware as to the reason why war had been made on the Waikato. Now, O Queen, the Waikatos had formed a land league, in accordance with the Treaty of Waitangi, to preserve their native authority over the land, which principle is embodied in the treaty.

O, the Queen! you do not consider that act of retaining their land to be unjust: but the Government of New Zealand held it to be wrong, inasmuch as war was declared against the Waikatos, and the confiscation of their land followed, although the Waikatos had no desire to fight—the desire came from the Governor and his Council. When the Waikatos were over-powered, armies of soldiers went forth to engender strife against the Maoris at Tauranga, at Te Awa-o-te Atua, at Whakatane, at Ohiwa, at Opotiki, at Turanganui, at Ahuriri, at Whanganui, at Waimate, and various other places. The motive impelling the projectors of these deeds to execute this work was a desire to confiscate the Maori lands, and to trample under the soles of their feet the Treaty of Waitangi. While these proceedings were being carried out, the weeping people wept, the lamenting people lamented, the agonized people were in agony, the saddened people were in sadness, while they held the Treaty of Waitangi as a basis on which the voice of the Maoris could be made known to you, O Queen.

But the people of New Zealand declared that the fighting and the confiscation of land which brought calamity, and made your Maori children orphans, were sanctioned by you, O Queen. We did not believe the utterances of the Europeans as to the wrongs we suffered, that they were brought upon us by your queenly authority;

2. A translator's note explained: 'Rain and wind – figurative expressions denoting wars and tumults'.

but our decision was that such acts were not sanctioned by you, O Queen, whose benevolence towards the Maori people is well known. The disorderly work referred to has been carried into practice, so that a path might be opened up to Europeans to seize Maori lands.

In the year 1881, a new plan was devised by the Government to enkindle strife in respect to the Maoris. Armies were sent to Parihaka to capture innocent men that they might be lodged in prison; to seize their property and their money, to destroy their growing crops, to break down their houses, and commit other deeds of injustice. We pored over the Treaty of Waitangi to find the grounds on which these evil proceedings of the Government of New Zealand rested, but we could find none. Some of the European inhabitants of this Island disapproved of these injurious doings to Maori men; and it was vaguely rumoured that Sir Arthur Gordon, the Governor, refused to approve of these acts. Many other evils have been discovered by our hearts, therefore have we considered right, O mother, the Queen, to pray that you will not permit increased evils to come upon your Maori children in New Zealand, but to graciously sanction the appointment of a Royal English Commission to abrogate the evil laws affecting the Maori people, and to establish a Maori Parliament, which shall hold in check the European authorities who are endeavouring to set aside the Treaty of Waitangi; to put a bridle also in the mouth of Ministers for Native Affairs who may act as Ministers have done at Parihaka, so that all may be brought back to obey your laws; and to prevent the continued wrongs of land matters which are troubling the Maori people through days and years; and to restore to the Maoris those lands which have been wrongfully confiscated according to the provisions of the Treaty of Waitangi; and to draw forth from beneath the many unauthorized acts of the New Zealand Parliament the concealed treaty, that it may now assert its own dignity.

In this year, 1881, we, O the Queen, built a House of Assembly at the Bay of Islands, and the great symbol therein is a stone memorial, on which has been engraved the articles of the Treaty of Waitangi, so that eyes may look thereon from year to year. Two invitations were sent to the Governor, requesting him to unveil the Stone Treaty Memorial. He did not accede to the request. Perhaps his disinclination arose from the fact that the Europeans had disregarded the principles embodied in the treaty, because in you, O Queen, is vested the sole authority affecting the Waitangi Treaty. Should you authorize, O mother, the Queen, the appointment in England of a Royal English Commission, under your queenly seal, to investigate the wrong-doings of both races, then will you rightly be informed, O mother, as to what is just and what is false.

It is believed by us, O Queen, that you have no knowledge as to the deeds of wrong that gave us so much pain, and which create lamentation among the tribes; but if, in your graciousness, a Maori Parliament is set up, you will, O Queen, be enabled clearly to determine what is right and what is wrong, what is evil and what is good, in the administrations of the two races in these Islands.

O mother, the Queen, there are no expressions of disaffection towards you by the Maori tribes, including the tribes of the King; but they revere, only revere your Majesty; and the search after you, O Queen, has induced us to send this petition

to England by the hands of the persons appointed by our Committee, who will see your very countenance and hear your words.

O mother, the Queen, do not suppose that the sufferings under which we labour are light. Many wrongs are felt by various tribes, but the following are some which have come under our own notice:—(1.) The fighting between the Maoris and the New Zealand Company in the year 1841–42, was brought about by land disputes, and Mr Wakefield fell in the strife. (2.) The war against Te Rangihaeata in the year 1842–43: a land dispute also was the origin; and some of Rangihaeata's people were wrongly executed, their deaths being opposed to the English law, and contrary to the principles of the Treaty of Waitangi. (3.) The war against Heke and Kawiti in 1844–45, caused by land sales and the withholding of the anchorage money at Bay of Islands,[3] was contrary to the second article of the Treaty of Waitangi. (4.) The fighting between the chiefs Te Hapuku and Te Moananui in 1848–49, brought about by land-purchasing on behalf of the Government. (5.) The war against Wiremu Kingi on account of the block of land named Waitara, at Taranaki. (6.) The war against the Waikatos in 1863, extending to the year 1870. (7.) The fight among the Ngatitautahi tribe in 1879, four Natives killed, the strife being occasioned by the land purchases of Government, a portion of £700,000 having been scattered over our lands by Government agents in 1875. (8.) The capture of two hundred innocent men of Te Whiti in 1879–81. (9.) The incarceration of Te Whiti and his people in 1881–82, who were guiltless of any crime.

The following, O Queen, are references to New Zealand Ordinances put forth and said to be against the principles contained in the Treaty of Waitangi:—(1.) The making of unauthorized laws relating to Maori lands—namely, the Land Acts of 1862, 1865, 1873, 1880—which Acts were not assented to by the Native Chiefs in all parts of the Island. Nor is there any basis in the Treaty of Waitangi for these laws, which continuously bring upon our lands and upon our persons great wrongs. (2.) The Immigration and Public Works Act, and the borrowing of £700,000, expended here and there to confuse the Maoris and their titles to land.

O mother, the Queen, these other things, and many of the laws that are being carried into effect, are, according to Maori ideas, very unjust, creating disorder amongst us, giving us heart-pangs and sadness of spirit to your Maori children, who are ever looking towards you, most gracious Queen; and it is averred by men of wisdom that these matters which weigh so heavily upon us are in opposition to the great and excellent principles of the Treaty of Waitangi.

May you be in health, O mother, the Queen! May the Almighty bring down upon you, upon your family, and upon the whole of your people, the exalted goodness of Heaven, even up to the termination of your sojourn in this world, and in your inheritance in the home of sacred rest.

3. The official translation contained a note, apparently from a parliamentary official: 'The anchorage money referred to here was paid by Government officials to Hone Heke and party for two successive years, but when an application was made for payment by Heke the officials failed to recognize the Maoris, and stated that the moneys ever afterwards would be paid to the Custom-house authorities, although it had been arranged, it is averred, at the signing of the Treaty of Waitangi, that Heke's party should be the recipients of the money in question.'

May you live, is the prayer of your children in the Island of New Zealand.

Parore te Awha.	Mangonui Rewa.
Hare Hongi Hika.	Hirini Taiwhanga.
Maihi Paraone Kawiti.	Wiremu Puhi te Hihi.
Kingi Hori Kira.	Hakena Parore.

For the Native people of New Zealand.

APPENDIX II

MĀORI AND SETTLER POPULATIONS NORTH OF AUCKLAND, 1871–96

The following table shows the census results for counties or electoral districts (whichever are available) north of Auckland. The results encompass this inquiry district, as well as the Muriwhenua, Te Roroa, and Kaipara districts, and Auckland as far as the Waitematā and Manukau Harbours. North of Whāngārei, Māori continued to outnumber settlers until the 1890s – and for longer in Hokianga.

	1878	1881	1886	1891	1896	1901
Mongonui						
Māori	–	–	2,101	1,461	1,616	2,093
Settlers	1,204	1,471	1,833	1,389	1,889	2,274
Whangaroa						
Māori	–	–	–	656	656	743
Settlers	–	–	–	878	969	927
Bay of Islands						
Māori	–	–	1,766	2,205	2,507	2,235
Settlers	1,489	2,184	2,158	2,562	2,723	2,587
Hokianga						
Māori	–	–	2,364	2,355	1,839	2,330
Settlers	419	587	767	1,494	1,909	1,767
Hobson						
Māori	–	–	683	592	1,011	984
Settlers	2,171	4,602	3,542	3,298	3,750	4,813
Whangarei						
Māori	–	–	627	853	606	739
Settlers	2,906	6,198	4,724	6,120	6,847	6,380
Otamatea						
Māori	–	–	–	239	264	186
Settlers	–	–	–	2,054	2,483	2,721

	1878	1881	1886	1891	1896	1901
Rodney						
Māori	–	–	320	129	193	173
Settlers	3,122	3,287	3,243	3,170	3,464	3,678
Waitemata						
Māori	–	–	203	246	260	171
Settlers	3,424	7,130	7,936	6,184	6,762	7,035
Te Rarawa	2,270	2,775				
Ngāpuhi	5,667	5,564				
Ngāti Whātua	753	487				
Totals						
Māori	8,690	8,826	8,064	8,736	8,952	9,654
Settlers	14,735	25,469	24,203	27,149	30,796	32,182

Māori and non-Māori populations north of Auckland, by county, 1878–1901.
Source: New Zealand Census.

In 1871, the settler population north of Auckland was 8,529.[1] The census did not count Māori. In 1874, the settler population was 9,210 and the Māori population 5,427.[2] The settler population was concentrated between Auckland and Whāngārei. North of Whāngārei, Māori outnumbered settlers until at least the late 1880s.

Very broadly, Hobson county encompassed the area from southern Mangakāhia to the northern Kaipara Harbour. Hobson broadly encompassed the territories between the Kaipara Harbour and the east coast, and was split in 1886 into northern (Otamatea) and southern (Hobson) counties. Waitemata encompassed territories from the southern Kaipara Harbour to the northern shores of the Waitematā and Manukau Harbours.[3]

1. This comprised 2,331 in the Mangonui and Bay of Islands electoral district; 3,691 in Marsden; and 2,504 in Rodney.
2. The settler population comprised 2,515 in the Mangonui and Bay of Islands electoral district; 4,032 in Marsden; and 2663 in Rodney. The Māori population comprised 1,560 Te Rarawa, 3,235 Ngāpuhi (though this seems to be a significant underestimate), and 632 Ngāti Whātua.
3. Counties Act 1867, First Schedule; Counties Act 1886, s 6.

APPENDIX III

MĀORI ELECTORATE ENTITLEMENTS BASED ON TOTAL POPULATION

	Establishment		Census year						
	1867 (lower estimate)	1867 (upper estimate)	1874	1878	1881	1886	1891	1896	1901
Māori									
Population	40,000	47,000	45,470	43,595	44,097	41,969	41,953	39,834	43,112
Representatives	4	4	4	4	4	4	4	4	4
Population per representative	10,000	11,750	11,368	10,899	11,024	10,492	10,488	9,959	10,778
Settlers									
Population	204,114	204,114	299,513	414,412	489,933	578,482	626,658	703,360	772,719
Representatives	70	70	74	84	91	91	70	70	76
Population per representative	2,916	2,916	4,047	4,933	5,384	6,357	8,952	10,048	10,167
Electorate entitlement (based on total population)									
Total population	244,114	251,114	344,983	458,007	534,030	620,451	668,611	743,194	815,831
Māori as a percentage of total population	16.39	18.71	13.18	9.52	8.26	6.76	6.27	5.30	5.28
Total seats	74	74	78	88	95	95	74	74	80
Māori entitlement	12	14	10	8	8	6	5	4	4

Table 2: Māori and non-Māori representation in the House of Representatives 1867–1901 (nationwide).

Sources: New Zealand Census Maori and non-Maori populations. For 1867 population estimates see Donald McLean, NZPD, 1867, pp 457–458, and 1867 result from NZPD, 1867, vol 2, p 705; see also Sorrenson, apps 1–2 (pp 865–866). Sorrenson used different population estimates from New Zealand Yearbooks and reported results for election years. We have used census years to provide a more accurate reflection of the relative populations. However, the results broadly align. The results are for total populations, not restricted by voting age, gender, or property ownership.

Category	Census year					
	1878	1881	1886	1891	1896	1901
Māori						
Population	8,690	8,826	8,064	8,736	8,952	9,654
Representatives	1	1	1	1	1	1
Settlers						
Population	14,735	25,469	24,203	27,149	30,796	32,182
Representatives (at most recent election)	3	4	4	3	3	3
Population per representative	4,911	6,367	6,051	9,049	10,265	10,727

Māori and non-Māori representation in the House of Representatives, 1874–1901 (north of Auckland).

Sources: New Zealand Census Maori and non-Maori populations. At the 1866 general election, settlers north of Auckland had five representatives, one each for Mongonui, the Bay of Islands, and Marsden, and two for the Northern Division. Subsequently, the electorates were: 1871–79 – Mongonui–Bay of Islands, Marsden, Rodney; 1881–87 – Bay of Islands, Marsden, Rodney, Waitemata; 1890 – Bay of Islands, Marsden, Waitemata.